Washburn Law Journal

Spring, 1998

37 Washburn L.J. 497

LENGTH: 23283 words

ARTICLE: A Kansas Approach to Custodial Parent Move-Away Cases

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The authors express their appreciation to Darryl Bertsch, Peggy Chen, Julie Kunce Field, Gary Kretchmer, Dr. Jeff Montolio and Dr. John Spiridigliozzi for their helpful comments during our prePtion of this article.

LEXISNEXIS SUMMARY:
... Among these cases, ones in which a custodial parent seeks to move to a distant location with the children are especially troubling. ... Third, some states have placed the burden on the custodial parent to prove that the move is in the best interest of the child. ... However, it added that just because "the move is in the best interests of the custodial parent does not mean that it is automatically in the best interests of the child." ... As in *D'Onofrio*, the relocating parent must first demonstrate that an actual advantage will be realized by both the children and the custodial parent. ... Finally, Illinois, which statutorily places the burden on the custodial parent to prove that removal is in the child's best interest, has used the language of *D'Onofrio* to determine the best interests of the child. ... Washington places a heavy burden on the non-custodial parent that is essentially equal to a presumption in favor of the relocating parent. ... If the custodial parent was able to show exceptional circumstances, then the court would apply the third step to the analysis considering the overall best interests of the child. ...

TEXT:
[*497] I. INTRODUCTION

Child custody cases are readily conceded by judges to be among the most difficult cases they must decide. Among these cases, ones in which a custodial parent seeks to move to a distant location with the children are especially troubling. In some cases, the justification for moving away may be unassailable, yet the ability to maintain contact between the non-custodial parent and the child may be substantially eroded.

In this article, we examine the approach that Kansas courts should take in these cases. We begin by reviewing the varying approaches taken at present in other states. Next, we review the pertinent social science literature for studies by psychologists and others that may bear on consideration of these types of cases. We then discuss how such information can and should be considered by trial and appellate courts. We next review the law presently applied in Kansas to these cases, as well as a set of factors tailored to move-away cases that we believe should be applied in Kansas courts. Last,

we respond to other published articles that seek to decide these cases based on a presumption in favor of the relocating parent rather than on a careful review of the facts of each case.

II. THE APPROACH IN OTHER STATES

How to deal with a custodial parent who wants to move to a location distant from the other parent is a relatively new issue. Historically, children of divorce were considered chattel of the father and it was never considered that they would go with their mother over **[*498]** the objection of the father. n1 Early in this century, most states implemented the tender-years doctrine, a presumption that children, especially young ones, were better cared for by the mother. As a corollary principle, she was free to decide where to live with the child, even if that meant relocation. n2 With the advent of the era of joint custody and father's rights, the issue of relocation has become more complicated. Both parents have equal, competing interests and the costs are very high.

In response to this new context for the resolution of relocation cases, state courts around the country have developed a wide array of various formulas, burdens, presumptions, factors and standards. Four major categories of cases have developed. First, several states have followed New Jersey in its "real advantage" approach, an approach that, in most cases, favors the relocating parent. Second, some states have adopted a presumption in favor of letting the custodial parent move, placing a heavy burden on the non-custodial parent. Third, some states have placed the burden on the custodial parent to prove that the move is in the best interest of the child. Last, some states have concluded that burdens and presumptions do not work in the fact-sensitive area of child custody, choosing instead simply to apply an overall best interests of the child standard.

A. States Following the "Real Advantage" Approach

In 1976, the New Jersey Superior Court decided *D'Onofrio v. D'Onofrio*, n3 a case that has since then been termed "a trend setter in the area of relocation law," n4 and "the most widely cited case across the nation in this area of law." n5 The "real advantage" n6 standard to relocation cases adopted by New Jersey n7 has had a wide sweeping **[*499]** effect across the country and many states' high courts have followed the superior court's burdens, reasoning and factors point by point. n8

The plight of Mrs. D'Onofrio was a very sympathetic one. She was a single mother raising two young children, struggling to make ends meet on the $ 63 she received each week from her former husband and the $ 90 she brought home as a home service aid for the county's welfare board. Although trained as a bookkeeper, she had been unable to find work of this type in the New Jersey area and was finding it difficult to make ends meet. Her apartment, which was located on a busy and heavily trafficked street, had no suitable and convenient play area for the children, but cost $ 235 each month in rent. n9

Mr. D'Onofrio had been seeing the children on every Friday, birthdays and holidays. After Mrs. D'Onofrio would drop the children off at their paternal grandparent's house, he would visit with them but then would often leave them with his mother. He never had the children spend the night with him, claiming his work as a police officer and his lack of room for them at his home with his new wife prevented it. The court found that he made in excess of $ 8,000 each year after taxes, alimony and support, but there was some question about his additional income from moonlighting. n10

Mrs. D'Onofrio was born in South Carolina and still had a large family there. Her father was planning to move back to South Carolina within the next year and her mother was already there, nursing Mrs. D'Onofrio's grandmother in a terminal illness. Mrs. D'Onofrio also was able to find employment as a bookkeeper in South Carolina at a starting salary of $ 147 per week and "had located a desirable apartment in a garden-type complex bordering a wooded area and providing superior recreational facilities for the children at a monthly rental of $ 155." n11

The court had to decide the case in light of the state's "anti-removal" n12 statute, which provided that children of a divorced parent could not be removed from the state without the consent of the non-custodial parent "'unless the court, upon cause shown, shall otherwise order.'" n13 Because the statute called for the "exercise of judicial **[*500]** discretion," n14 the court set forth the standards under which cause to allow the move would be shown.

The court stated that first the custodial parent must "demonstrate that a real advantage to herself and the children will result from their removing their residence to a place so geographically distant as to render weekly visitation impossible." n15 If the custodial parent can satisfy this burden, then the court would consider the following factors:

> [The court] should consider the prospective advantages of the move in terms of its likely capacity for improving the general quality of life for both the custodial parent and the children. It must evaluate the integrity of the motives of the custodial parent in seeking the move in order to determine whether the removal is inspired primarily by the desire to defeat or frustrate visitation by the non-custodial parent, and whether the custodial parent is likely to comply with substitute visitation orders when she is no longer subject to the jurisdiction of the courts of this State. It must likewise take into account the integrity of the non-custodial parent's motives in resisting the removal and consider the extent to which, if at all, the opposition is intended to secure a financial advantage in respect of continuing support obligations. n16 Finally, the court must be satisfied that there will be a realistic opportunity for visitation in lieu of the weekly pattern which can provide an adequate basis for preserving and fostering the parental relationship with the non-custodial parent if removal is allowed. n17

Though it may seem that as long as the custodial parent shows an advantage to the move, the court will apply an equal balancing of all of the interests involved, the tone of the court shows a preference for the custodial parent:

> The children, after the parents' divorce or sePtion, belong to a different family unit than they did when the parents lived together. The new family unit consists *only* of the children and the custodial parent, and what is advantageous to that unit as a whole, to each of its members individually and to the way they relate to each other and function together is obviously in the best interests of the children. It is in the context of what is best for *that* family unit that the precise nature and terms of visitation by the non-custodial parent must be considered. n18

[*501] The court opined that less frequent visits of longer duration might actually be better for the non-custodial parent and that it did not seem fair that the non-custodial parent could feel free to leave the state whenever he saw fit, while the custodial parent may not do the same to seek a better lifestyle for herself and the children. n19 Needless to say, Mrs. D'Onofrio was allowed to move to South Carolina.

Not every case presented to the courts has facts, like *D'Onofrio*, in which the competing interests of the parties weigh so heavily in allowing the custodial parent to move. Some of the courts that have chosen to follow *D'Onofrio* have done so in cases involving non-custodial parents who have pursued frequent contact and good relationships with their children. For example, in *Staab v. Hurst*, n20 the father was visiting his fifteen-month-old daughter every Wednesday evening, every other weekend, alternating holidays and two weeks in the summer. The mother filed for a request for relocation to move to Texas so that she could attend nursing school. She claimed that she could not get into a local program, but that a Texas school had told her she could probably be admitted to its program upon completion of an exam. She had also obtained employment in Texas at the same rate of pay as her current employment in Arkansas. The father's income would not make it possible for him to keep the same frequent visitation schedule if she did move to Texas. The trial court denied her request because it decided that the mother's reasons for moving did not outweigh the disruptive effect of losing the frequent contact that the child had with not only the father, but the grandparents as well. Following *D'Onofrio*, the appellate court reversed, finding that the trial judge did not consider the interests and well being of the mother and gave no alternatives of the visitation schedule. A dissenting opinion argued that it was the trial judge who was in the best position to hear the testimony and look into the peculiar circumstances of each case to act in the best interest of the child. n21

Michigan also adopted the *D'Onofrio* standard in *Mills v. Mills* n22 and *Anderson v. Anderson*. n23 In *Mills*, the mother was allowed to remove the child to New York because she planned on marrying an **[*502]** IBM executive who lived there. n24 In *Anderson*, the mother wanted to move to Arizona because her new husband *hoped* to get employment there. The court allowed the moves because the step-fathers' "career opportunities" would benefit the new family units. n25

Pennsylvania decisions have held that if the custodial parent satisfies her initial burden of showing that the move is likely to significantly improve the quality of life for both herself and the child, then the court will determine custody based on the other factors of *D'Onofrio*. n26 The court applies a low burden on the custodial parent to show that the move will result in a better quality of life. In *Zalenko v. White*, n27 the trial court, although finding that this test had been satisfied, denied the mother relocation because it could find absolutely no benefit to the child individually to move with the mother. However, though the trial judge was in the best position to determine the best interests of all parties

involved, the appellate court reversed finding that the mother had satisfied her burden by showing that the move would benefit *her* life.

In practice, *D'Onofrio* courts appear to give more deference to the reasons for the move than to the loss of contact between the child and the other parent, even when that non-custodial parent has gone to great lengths to foster a good, parent-child relationship with frequent visits that, because of the move, cannot be retained at the same level. In *Shaw v. Shaw*, n28 the father had visitation with his child every weekend and summer vacation. The court, although it did not specifically cite *D'Onofrio*, used the same factors to allow the mother to take the eight-year-old daughter to Florida. n29 The mother's reason for relocating in this case was a good one (she and her new husband's income would rise from $ 8,000 per year to $ 40,000 per year), but the court seemed to totally disregard the loss of the frequent contact between the father and the child. The court stated that "interference with the non-custodial parent's visitation privileges is not an 'insuperable obstacle'." n30 The court reasoned that the father's relationship with his daughter "can be **[*503]** preserved to a significant extent by a provision for frequent telephone calls and generous visitation schedule during school breaks and summer vacation." n31

Other states, such as Massachusetts, n32 North Dakota, n33 and Nevada, n34 have statutes that closely resemble the anti-removal statute of New Jersey. The Supreme Court of North Dakota has followed *D'Onofrio* because of this, n35 and the case law there favors the relocating custodial parent by making reference to the "'new family unit.'" n36 Massachusetts, on the other hand, although it follows *D'Onofrio*, seems to put less emphasis on this new family unit and determines the best interest of the child.

In *Yannas v. Frondistou-Yannas*, n37 the Massachusetts court held that the "upon cause shown" language in its state's anti-removal statute n38 meant that the move must be in the child's best interest. To determine these best interests, the court used the *D'Onofrio* factors. However, it added that just because "the move is in the best interests of the custodial parent does not mean that it is automatically in the best interests of the child." n39 The court stated that if the custodial parent can show a good reason for the move, then all of the relevant factors are considered collectively without any one being controlling. n40

Nevada, although following *D'Onofrio*, n41 also seems to interpret its "anti-removal" statute in a way that does not favor allowing the move and considers the best interests of the child: "Determination of the best interests of a child in the removal context necessarily involves a fact-specific inquiry and cannot be reduced to a rigid 'bright-line' test." n42 As in *D'Onofrio*, the relocating parent must first demonstrate that an actual advantage will be realized by both the children and the custodial **[*504]** parent. If this is satisfied, then the court weighs the other factors. The court also made a non-exhaustive list of "sub-factors" that may be used to determine whether the move likely will improve the quality of life for the children and the custodial parent. n43

Finally, Illinois, which statutorily places the burden on the custodial parent to prove that removal is in the child's best interest, n44 has used the language of *D'Onofrio* to determine the best interests of the child. n45 Illinois also seems more ready to recognize the harm that may result from a distant move on the non-custodial parent-child relationship. The trial court is required to consider the harm that may result to the relationship between the child and the non-custodial parent. n46

B. States Allowing a Presumption in Favor of the Relocating Parent

Although the *D'Onofrio* standard, at least in practice, appears to favor allowing the custodial parent to move with the child, other states have gone even further in allowing for an outright presumption in favor of such move. For example, in *Silbaugh v. Silbaugh* n47 the Minnesota Supreme Court stated:

> In *Auge v. Auge*, n48 this court determined that *Minn. Stat. § 518.18* (1994), governing modification of custody orders, created an implicit presumption that removal would be permitted. Since then, we have extended this principle to instances in which parents have joint legal custody. To defeat this presumption, the party opposing removal must offer evidence which would establish that the removal is not in the best interests of the child *and* would endanger the child's heath and well-being or that removal is intended to interfere with visitation. n49

[*505] Without such a showing, Minnesota will allow the custodial parent to remove the child without a hearing. n50

In *Silbaugh*, the mother wanted to take the children with her to Arizona, stating that her reasons were "a career opportunity" and "the potential for a better lifestyle." n51 As to the loss of the frequent contact the children had with their father, the court stated that it was

> mindful of the sense of loss and the worry experienced by non-custodial parents who face the prospect that their children may move to another state and that their visitation arrangement may be significantly altered. However, our concern must be for the Silbaugh children and their need for a sense of stability in their familial arrangements. n52

States that follow a presumption for moving can lead to illogical results, hindering a non-custodial parent's right to maintain a continuing and close relationship with his child for what sometimes may be a non-compelling reason for the custodial parent to move. For instance, in *Kerkvliet v. Kerkvliet*, n53 the mother gave notice to her former husband that she wished to move with their four children to Florida. Both the mother and the father were teachers of the same school district in Wisconsin, and the father had exercised his visitation rights almost daily through their school and extracurricular activities and had the children every other weekend. The mother's reasons for wanting to move to Florida included: "a different situation for [her] teaching . . . they do not have bussing in Florida . . . the people in Florida are very open and welcome . . . Florida is very similar to Wisconsin because of the trees and the landscape . . . and the weather." n54 The mother further testified that:

> She had lived in Wisconsin all her life, that neither she nor the children have relatives or friends in Florida, that she would likely have to take a cut in pay in a new teaching job, and that Florida schools would not be without their problems. She stated that she had considered teaching in the nearby Burlington, Wisconsin, school district and in private schools, but that while such action "would take care of half the problems . . . it would not also provide for the climate change." n55

Although the trial court termed the mother's decision as "inappropriate," "wrong," "disruptive," and "selfish," the Wisconsin Court of Appeals upheld its decision to allow the move because of the statutory rebuttable presumption of continuing custody with the **[*506]** custodial parent in a relocation case. n56 It is cases such as this one that show how presumptions favoring relocation may conflict with a best interests standard. The father had been a frequent, continuous contact in his children's lives. The children and the father would lose this daily contact because of the mother's whim to live someplace new.

Although the Wyoming Supreme Court has said that it determines relocation cases in the best interests of the child and does not establish a bright line test, n57 it clearly supported a presumption when it stated its standard:

> "It would be incongruous for a court, when presented with a custodial order originally based upon the best interests of the child, to refuse to support the efforts of the custodial parent to maintain and enhance *their* standard of living, albeit in another jurisdiction. So long as the court is satisfied with the motives of the custodial parent in seeking the move and reasonable visitation is available to the remaining parent, removal should be granted." n58

The court exemplified how far it would go to become satisfied with the custodial parent's motives when it allowed a mother to take her children to South Dakota. n59 Her reason for moving from Sheridan, Wyoming, where the father had "significant involvement with the children, including exercising his weekend and summer visitation rights, providing music lessons, attending teacher conferences, athletic events and concerts that the children participate in, and monitoring grades," n60 was that "she saw her opportunities as a 41-year-old woman in Sheridan to be limited." n61 She stated that she wanted to attend a technical school in South Dakota, yet she had not enrolled herself or the children in school there and had not even found housing or a job. Also, she could obtain this same degree over a number of summers in **[*507]** Denver, but chose not to. She mentioned that she felt the schools in South Dakota were much better than the schools in Sheridan, which she claimed placed too much emphasis on athletics, n62 but was unable to back up this testimony. Because of the move, the father testified that he would lose his very important weekend visitations, and summer vacations were becoming more difficult because of the children's summer activities, such as camps and jobs.

California has recently adopted a strong presumption in favor of allowing the custodial parent to relocate in *In re Marriage of Burgess*. n63 The California Supreme Court stated that "a custodial parent seeking to relocate bears no

burden of establishing that it is 'necessary' to do so. Instead, he or she 'has the right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child.'" n64

In Colorado, as long as the custodial parent shows that the move is not for the sole reason of interfering with the other parent's relationship with the child, then there is a presumption in favor of moving and the non-custodial parent can only prevent the move by showing that the child would be endangered by the move. n65 Florida and Tennessee also will allow the custodial parent to move once they have been able to show a good-faith reason for the move. n66

Washington places a heavy burden on the non-custodial parent that is essentially equal to a presumption in favor of the relocating parent. The non-custodial parent must show that not allowing the move would be in the child's best interest *and* that the proposed relocation would be detrimental to the child in some specific way that is not inherent in the geographical distance between the parents if the move is approved. n67 **[*508]** The Supreme Court of Washington has gone a step further by holding that a trial court does not have the authority to order the primary residential parent of a child to live in a particular geographical area in order to facilitate frequent contact between the child and other parent in the *initial* parenting plan. n68

C. States Placing the Burden on the Relocating Parent

While a trend has emerged allowing a presumption in favor of a custodial parent who seeks to relocate (sometimes requiring a showing of at least a minimal reason for the move, sometimes not), a handful of states have held just the opposite. These states place the burden on the relocating parent to show not only that there is a true reason for the move, but also that the relocation will be in the child's best interest. n69 One state has even stated that it has a presumption *against* allowing the child to move, n70 and Louisiana has recently passed a relocation statute that placed the burden on the custodial parent. n71

For instance, Arizona places the burden of showing that the relocation is in the child's best interest on the parent who is choosing to take the child away. n72 An appellate court has provided a non-inclusive list of factors that the trial court should take into consideration in deciding what is in the best interest of the child. These are: (1) "whether the request to move is in good faith and not simply to frustrate the other parent's right to maintain contact with the child," (2) "the prospective advantage of the move for improving the general quality of life for the custodial parent and the child," (3) "the likelihood the custodial parent will comply with modified visitation orders when that parent is beyond the jurisdiction of the court," (4) "whether the move will allow a realistic opportunity for visitation for the noncustodial parent . . . and, if not, the possible adverse effect of the elimination or curtailment of the child's association with the noncustodial parent," (5) "the extent to which moving or not moving **[*509]** will effect the emotional, physical, or developmental needs of the child," and (6) the "integrity of the noncustodial parent's motives in resisting and the extent to which, if at all, the opposition is intended to secure a financial advantage in respect to continuing support obligations." n73

D. States Following No Presumption: The Best Interest Standard

Several states have held that a standard that has no presumptions or burdens will best serve the interests of the child in these often difficult, fact-specific cases. In *Jaramillo v. Jaramillo*, n74 the Supreme Court of New Mexico sounded a clarion call against presumptions in relocation cases:

> We believe that allocating the burdens and presumptions in this context does violence to *both* parents' rights, jeopardizes the true goal of determining what in fact *is* in the child's best interests, and substitutes procedural formalism of the admittedly difficult task of determining, on the *facts*, how best to accommodate the interests of all parties before the court, both parents and children. n75

In *Jaramillo*, the court had to decide between a father who had visited his four-year-old child on alternate weekends, Wednesday of each week, holidays and several weeks during the summer, and a mother who wished to move to New Hampshire, where her parents lived. The court was satisfied that the mother's reasons were legitimate, finding real economic advantages and potential educational advantages. The alternative visitation schedule for the father, should the mother be allowed to move, was ten weeks in the summer and alternating Christmas vacations.

Unlike the states mentioned above, New Mexico recognizes *all* of the competing interests that affect a child in a post-divorce family. The court stated that placing a burden on the relocating parent would impair her constitutional right to travel. n76 On the other hand, the court felt that a presumption in favor of moving would place an undue burden on the non-custodial parent whose right to a close relationship with his child was an equally important right. n77 Pursuant

to this reasoning, the court established the procedural guidelines for relocation cases as one in which *both* parents bear the burden to show that the child's interests **[*510]** would best be served by their proposed custody arrangement. n78 The court then affirmed the trial court's decision to allow the mother to relocate to New Hampshire based on the trial court's conclusion that this was in the child's best interests. n79

Other states that decide relocation cases under the overall best interests standard include Alaska, n80 Maine, n81 North Carolina, n82 and Montana. n83 Recently, Maryland decided to join the ranks of these **[*511]** states, n84 abandoning its prior holding of placing a heavy burden on the non-custodial parent. n85 Because of this, the court was able to give deference to such facts as the step-father's interference with the father's relationships with his children, the mother doing nothing to further the father-children relationships, the mother and step-father doing everything to establish a new family to the exclusion of the father and the mother's refusing to communicate with the father. n86

Recently, New York has turned away from a presumption favoring the non-custodial parent to a best interests standard. n87 In *Tropea v. Tropea*, n88 the New York Court of Appeals heard on consolidated appeals two relocation cases, both concerning mothers who wished to relocate out of the area.

New York previously had developed a three-step process in determining relocation cases that favored not allowing the child to move. n89 First, the non-custodial parent had to show that the proposed relocation would deprive them of "meaningful access" to the child. If this was not shown, then the analysis would stop and the custodial parent was free to relocate. However, as the court noted, the lower courts had been unable to uniformly determine what "meaningful access" meant. n90

Second, if it was shown that the move would deprive the non-custodial parent of meaningful access, then the court applied a presumption that the relocation would not be in the child's best interest and the custodial parent would have to prove "exceptional circumstances" justifying the move. n91 Some lower courts interpreted this to mean that an economic necessity or health-related compulsion was required to satisfy this burden and that a new marriage would never meet the requisite burden. n92 If the custodial parent was able to show exceptional circumstances, then the court would apply the third step to the analysis considering the overall best interests of the child.

The court of appeals found the three-step analysis unsatisfactory, not only because it was difficult to apply, but also because it set up **[*512]** artificial barriers to the consideration of relevant factors. n93 The court noted there usually were a variety of possible permutations, so that it was "counterproductive to rely on presumptions whose only real value is to simplify what are necessarily extremely complicated inquiries." n94 The court held that a general, best interest standard should be applied. n95 The court listed many factors that the trial court should consider when determining the best interest of the child, but made the broad statement that the court was free to consider any relevant factor. n96 Using this reasoning, the court of appeals affirmed the lower courts' rulings allowing both mothers to relocate. n97

III. LESSONS LEARNED FROM SOCIAL SCIENCE RESEARCH

A. Why We Should Look at Social Science Research Results

Any analysis of the best interests of children is approached based on assumptions about the needs of children emotionally and psychologically. Judges may rely upon a variety of sources for their assumptions. Some may be based on life experiences -- as parents, as sons or daughters, as people who have come into contact with perhaps hundreds of divorced families in court. The judicial system assumes that judges (as with jurors in jury cases) are able to rely upon their common sense and experience, developed through many years of daily living and general education, in deciding the issues involved in a lawsuit. However, those experiences may just as easily be atypical as typical. What the judge may learn from the divorcing families who have contested cases may not be applicable to other divorcing families. Yet, we want to have good information about how the individual cases we deal with may fit into the larger picture, along with any information that might suggest ways to assist the families involved in individual cases.

It seems appropriate, then, to review the social science literature regarding the importance of the relationship between children and the **[*513]** non-custodial parent. This subset of the literature must be viewed in light of broader research regarding the developmental needs of children at various ages. That topic is much too broad to review here, although some comments will be necessary to note problems that may arise when long distance visitation is encountered with younger children. n98

B. An Introduction to the Limits Inherent in Family Interrelationship Studies

For many reasons, there are limitations inherent in psychological studies, especially those of family interrelationships, that caution against sweeping application of the findings. In the vast majority of cases in which families of divorce have been studied, the non-custodial parent has been the father. Accordingly, virtually all of the studies of non-custodial parents have focused on the relationships of non-custodial fathers. n99

There is some variation in the results of these studies, as might be expected in research about so intricate a set of relationships as the interactions of a human family over time. Significantly, though, some of the studies clearly have superior methodology to others. The best ones obtain information from both parents, children and others, such as teachers; obtain participants by review of court records or other sources, rather than relying solely on self-selected volunteers who respond to newspaper ads or those who happened into a particular counselor's office; and compare similarly situated divorced families with intact families. n100 Many others are conducted with less scientific rigor, n101 **[*514]** including the compromise of obtaining all of the data about the amount of visitation exercised by the non-custodial father from the custodial mother. n102 That compromise is a highly significant one. A survey of 220 divorcing couples found that non-custodial parents reported significantly more visits with their children, as well as significantly more denials of visitation by their ex-spouses, than did the custodial parents. n103 In addition, some studies have found that between twenty-two and forty percent of custodial parents admitted to interfering with visitation by the non-custodial parent on at least one occasion for the purpose of punishing the ex-spouse. In another study, twenty percent of the custodial parents interviewed said they saw no value in the non-custodial parent's visits and admitted attempting to sabotage them. n104 Thus, reliance on the custodial parent for the key data needed to analyze the importance of visitation with the non-custodial parent is a significant methodological weakness in some of the studies.

Other factors also militate in favor of an exercise of caution in broadly applying the results of most of the research. Even if the study is well designed, it is not equivalent to a clinical trial of a new drug, in which "double-blind" study methodologies can be used. Children simply are not assigned to one parent over the other at random. n105 The studies can measure correlations between variables. For example, they may find a statistically significant correlation between the quality of contact with the non-custodial parent and some measure of adjustment in the child. The existence of a correlation does not show causation, however. There may be some third, unmeasured factor that is causing each of the two measured ones that appear to be occurring together, or the correlation may be simply due to coincidence. n106

[*515] In addition, many of the studies involve fairly small numbers of participants. In these studies, the absence of a statistically significant correlation may be due to the small number in the sample rather than the true absence of a relationship. n107 Or it may be that the human relationships involved are so complex that it is difficult to isolate the effects of various factors so that they can be accurately measured at all. n108

An additional caveat, perhaps the most important of all, must also be made. Social science research can only quantitatively assess *measurable* things. Many aspects of a child's relationship with a parent are wholly *unmeasurable*. No one can quantify the value of having a parent in attendance at a preschool Christmas pageant or at a fourth grader's basketball game. No one can quantify the value of having a parent drop by for lunch at the elementary school (or the harm, depending upon the embarrassment threshold of the child). Even after reviewing the literature with respect to what is measurable and quantifiable, we still must make policy judgments about the importance of what is unmeasurable in the relationship between a child and his or her parents.

[*516] *C. The Evidence of the Importance of the Father-Child Relationship After Divorce*

Reviewing the literature with these caveats in mind, there is clear evidence of the importance of maintaining a good relationship between the child and the non-custodial parent in most cases. What is not clear -- but very important to move-away cases -- is the extent to which *frequent* visitation and geographical proximity are integral to the goal of maintaining that relationship.

Two studies have been conducted in a near-ideal manner: families were chosen either at random from within a larger population group or from court records, rather than self-selection; divorced families were compared to similar, intact families; and multiple information sources were used. n109 In each, significant benefits were associated with either the amount or quality of the contact with the non-custodial parent.

In one study, professors Robert Hess and Kathleen Camara compared sixteen divorced families, chosen from court records, with sixteen intact families in the same school classrooms as the divorced children. n110 The children in the study ranged from nine to eleven years old and the families had been sePted for two to three years. n111 All of the fathers had remained within close geographical proximity of the mothers, who had custody. n112 The children, both parents and teachers were interviewed. n113

The Hess and Camara study confirmed some general effects observed in children of divorce, who showed significantly greater stress, less productive work styles and greater aggressiveness. n114 However, whether the family was divorced or intact was not the best predictor of child outcomes. For example, the level of aggressive behavior was more accurately predicted by information about the level **[*517]** of harmony between the parents, the quality of the mother-child relationship and the quality of the father-child relationship than it was by whether the family was divorced or intact. n115 The most important factor in the child's social and school adjustment after the divorce was the quality of his or her relationship with the parents. Those who maintained positive relationships with both parents did the best; those who maintained positive relationships with at least one parent did next best; and where the relationship with both parents was unsatisfactory, the negative effects of divorce were the most severe. n116

These researchers concluded that "the child's relationship with the father without custody is of equal importance to his or her well-being and sePte from the relationship with the custodial mother," n117 so that policies that impede rather than facilitate the relationships between the child and either parent will tend to aggravate the negative effects of divorce. n118 They noted that having a close relationship with both parents increases a child's confidence that the conflict does not involve him or her, reducing preoccupation with divorce and freeing the child's energy to attend to school-related and social activities. n119 Because the quality of the child's relationship with the father was found to be of significance to the child's adjustment, the researchers also tried to determine what factors correlated with higher quality father-child relationships. They found a statistically significant correlation between the duration of the visits with the father and the quality of the relationship, but not between frequency of visitation and quality of the relationship. n120 Therefore, they concluded that relationships between children and fathers could be maintained even with some variation in distance and opportunity to visit, so long as the quality of interaction during meetings could be maintained. n121

The second study in which random selection methods were combined with multiple information sources was conducted by psychologist Linda Kurtz. n122 Study subjects were obtained through elementary schools. Children of both divorced and intact families were included in a total group of about 500. n123 Within that group, twenty-eight boys and thirty-three girls in divorced families were identified, **[*518]** and a randomly selected group of children from intact families of the same age and from the same school were also included. n124 The average age of the divorced family children was ten, although they ranged from third to sixth grade and from eight to twelve years old. n125 Again, the study confirmed other research suggesting that divorced children experience lower self-esteem and cognitive functioning than children from intact families. n126 Accordingly, Kurtz sought to study what factors might help children cope with the difficulties of divorce, so that clinicians could encourage actions that would assist children's coping mechanisms. n127

One of the instruments administered by Kurtz to the divorced children was the Children's Beliefs About Parental Divorce Scale (CBADS), a thirty-six-item objective scale examining children's beliefs about their parent's divorce. n128 She found that more frequent visitation with the non-custodial father was associated with lower scores on the CBADS test for paternal blame and for fear of abandonment. n129 Kurtz concluded that this "supported the contention that frequent and consistent visitation by the non-custodial parent represents an important coping resource for children in the aftermath of family disruption." n130 She suggested that counselors treat the rebuilding or preserving of a child's relationship with the non-custodial parent as important to the child's welfare in enhancing their feelings about themselves and in preventing the formation of mental distortions about the divorce. n131

Neither the Hess/Camara nor the Kurtz studies were long-term in nature. However, two studies of randomly selected college students suggest that the effects observed in these studies do remain over time. While only one information source -- the children, now in college -- was used, these studies retain the methodological benefit of a randomly selected population, as opposed to a self-selected or clinical one. In one study, fifty-two women from divorced families were compared to fifty-two women from intact families. n132 In the divorced family group, the divorce had occurred when the women were between nine and sixteen **[*519]** years old; in all cases, the mother was the custodial parent. n133 The researchers found that the frequency of reported post-divorce contact with the father was strongly correlated to the daughter's perception of the father's love for her. n134 Specifically, among these children of divorce, those women who had experienced a low frequency of contact n135 with their fathers currently perceived their non-custodial fathers as significantly less accepting and more inconsistent in love than did daughters from intact families. n136 The researchers concluded that a low frequency of contact with the father contributed to a perception of him by the daughter as rejecting and inconsistent in his love. n137 These feelings about the father, formed in childhood, appeared to affect the daughter's attitudes toward relations with men as young adults. Study participants filled out a survey known as the Heterosexual Trust Scale. n138 Among the daughters of divorced families, there was a significant relationship between the heterosexual trust score and the father's acceptance and consistency: the greater the perceived acceptance and con-

sistency of the father, the higher the heterosexual trust; the lower the father's perceived acceptance and consistency, the lower the trust. n139 For daughters of intact families, the perceived acceptance and consistency of the father were not related to the daughter's trust of men. n140 Thus, this study would suggest that a lack of contact by daughters with their fathers may tend to lead them to an increased distrust of men in later life.

The second study of college students compared men and women, aged eighteen to twenty-three, from divorced and intact families. n141 It found that children of divorce had a less favorable attitude toward their non-custodial parent than toward the custodial parent. n142 When the **[*520]** father was the non-custodial parent, children of divorced parents rated their fathers less favorably than did children of intact families. n143 However, the ratings of mothers were not significantly different between divorced and intact families. n144 The significant finding to the researcher in this study was that there was a greater disparity between the ratings of mother and father in divorced families than in intact ones. n145 This was thought to be significant because children, regardless of whether their parents had divorced, had a greater tendency to suffer from depression when their attitudes toward each of the parents was divergent than when they viewed the parents equally. n146 The researcher theorized that the perception of loss of the non-custodial parent was a factor in the increased incidence of depression, and concluded that "the continued involvement of the non-custodial parent in the child's life appears crucial in preventing an intense sense of loss in the child." n147

Several studies have shown general benefits from contact with fathers for children in divorced families. Academic performance, particularly in boys, has been better with greater contact with non-custodial fathers. n148 Greater contact with non-custodial parents, usually fathers, has also been associated with higher self-esteem, n149 better adjustment to divorce, n150 fewer disturbances at school, n151 and better **[*521]** general behavior. n152 When a parent is absent from a child's life for prolonged periods, intense longing for and fantasizing about the absent parent is often noted. n153 Visitation on alternate weekends, once the norm of court orders, was almost universally criticized as insufficient by children of divorce in one study. n154 In addition to potential benefits directly to the child, researchers have also found that increased visitation by non-custodial fathers was associated with better functioning in both the mothers n155 and the fathers. n156 Much of the research has suggested that maintaining contact with the father is particularly important for boys. n157

[*522] Unresolved in the research is the extent to which the frequency of visitation with the father is critical to the maintenance of a healthy relationship between father and child. The studies already cited in which greater contact with the father was found to be beneficial inferentially support the notion that at least some threshold level of frequency of contact is usually beneficial. One study of 212 families chosen randomly from court records found that the quality of the father's visitation was closely associated with the frequency of visitation; n158 however, that study is weak in its methodological approach because all of its information came from the fathers. n159 At least one other study has concluded that more frequent visitation by the father was associated with more positive adjustment to divorce in the child. n160 However, several other studies have failed to find a statistically significant correlation between the frequency of visitation by the father with the child and various measures of child behavior or adjustment. n161 Another study found no relationship between overall frequency of the father's visitation, but did find that the child's adjustment was better when there was a greater amount of time spent alone with the father. n162

Three special situations are worthy of an additional note: cases in which there is a high level of conflict between the parents; cases in which the non-custodial parent is emotionally disturbed; and cases in which the father has committed acts of abuse against the mother or the children. n163 In these cases, little or no visitation, or perhaps supervised **[*523]** visitation, may be in the best interest of the child, depending on the facts of the specific case. n164 In a study limited to high-conflict families engaged in court-ordered counseling or mediation, the children who were the most clinically disturbed had more frequent access to both parents and made more frequent transitions between parents. n165 Domestic violence, whether involving acts of physical abuse against the spouse or also against the children, can have profoundly negative impacts on children exposed to the abuse. n166 Recognition of that fact, combined with the concern that safety in some such cases may require moving to a secret location, has led the Kansas Legislature to exempt custodial parents from notice requirements of out-of-state moves if the other parent has been convicted of a person crime in which the child was a victim. n167 Similarly, a Model State Code on Domestic Violence, prepared by the National Council of Juvenile and Family Court Judges, suggests that there should be a rebuttable presumption that joint legal or physical custody being given to the perpetrator of domestic violence would be detrimental to the child and not in his or her best interest. n168 **[*524]** Shawnee County, Kansas, has similar provisions by guideline. n169

D. How the Courts May Consider Social Science Research

Now that we know the outline of what information is currently available in social science research about the role of non-custodial parents, we must consider how -- and whether -- lawyers and judges may use that information in actual cases. It is at least theoretically possible, of course, to hire an expert witness in every case and for that witness to be thoroughly familiar with both the background research and the facts of the individual case. But, to be sure, that doesn't always happen. n170

Consider this hypothetical situation, which is based on real experiences. n171 A child custody dispute involving a nine-month-old child is heard in court. The judge, new to the bench, is single and has no children. The attorneys for both parties are new and have never handled a contested hearing before this dispute. The argument is over visitation. The mother, who is still breast-feeding the child, wants visitation limited to four hours on Saturday afternoon in her presence. The father, who has had only limited contact with the child to date, wants to have the child every other weekend plus overnight on Tuesdays and Thursdays. No expert testimony is presented, and no information about child development needs is presented. The judge knows that his role is to act in the best interests of the child, but he has no information upon which to make an informed decision. The statutes provide no affirmative guidance: they tell us that neither parent has a **[*525]** vested interest in custody and that no presumption of custody in the mother is allowed even for infants. n172 After telling us what may not be considered, though, the statutes provide no other information particularly applicable to the present dispute.

In some counties, the judge would resolve the dispute through a back-door reference to social science research. For example, family law bench-bar committees in Johnson and Shawnee counties in Kansas have developed guidelines for infant and toddler visitation that are specifically based on social science research about the developmental needs of young children. n173 In Shawnee County, the guidelines explicitly note that they are based on "child development research" and state a general rule for children under eighteen months: "Generally, overnight visits for infants and toddlers are not recommended unless the nonresidential parent is closely attached to the child and able to provide primary care." n174 That may provide useful guidance, and it is helpful to litigants and attorneys to have some information about the general rules likely to be applied by the court. Still, the guidelines are not formally adopted court rules; they generally do not disclose the source of the social science research that serves as the basis for the rules announced; and the rules they adopt may, in some cases, be contrary to the best information available from social science research. Litigants, trial courts and appellate courts alike need a common understanding of the ways in which courts may rely upon social science research, and how discretionary decisions based on such research should be reviewed on appeal.

A readable, practical and useful approach has been developed by professor Michael J. Saks, n175 relying in part upon articles by professors **[*526]** Laurens Walker and John Monahan n176 and, before them, Professor Kenneth Culp Davis. It was Professor Davis who first developed the distinction between adjudicative facts, determined from evidence presented in the case at hand, and legislative facts, determined at times from sources outside the record of that case. n177 Today, it is generally accepted that when judges are formulating rules of general application they may act either from knowledge already possessed or upon investigation of pertinent social, economic, political or scientific general facts. n178

Saks, Monahan and Walker have provided a restructured analysis of the legislative/adjudicative fact distinction, accompanied by guidance for the role of the court in each situation. They designate legislative facts as "social authority," which, like legal authority, is used to establish a general rule and has application beyond the case at issue. n179 An example of the use of social authority information in child custody cases would be the adoption of a preference for custody being awarded to the "primary care giver" based upon social science research involving the "psychological parent" theory. n180 In some cases, such information is not used to establish a general rule, but only to establish the framework for considering other testimony. In those cases, the information is used as a "social framework." n181 A judge who used the psychological parent theory to help decide a specific case, without announcing a general rule, would be using it to establish a social framework for reviewing the evidence. n182 Similarly, use of research **[*527]** suggesting that abused children typically show several behavioral traits would be used as a social framework for viewing specific evidence about the children in that case as to whether abuse had occurred. n183 Last, research studies may be conducted specifically related to the case being tried, including psychological testing of the parties and children. In these cases, the information is truly factual in nature and is described as "social fact" data. n184 Even in those cases, though, courts may in actual practice use all three types of social information. The expert may combine case-specific findings (social facts) along with background professional views about child development and custody research (social frameworks), while ultimately forming a conclusion about custody by applying a legal standard (social authority) that may or may not be identical to the one the court is supposed to apply. n185 Saks, Monahan and Walker suggest that the uses

of these three different types of information should be clearly distinguished, with resulting differences in the way such information may be presented and challenged.

Social authority information, their redesignation for legislative facts, is used exclusively for creating general rules and is, therefore, treated like legal authority. As with legal authority, judges may listen to lawyers' arguments, receive briefs or conduct their own research. n186 As with legal authority, the appellate court reviews the trial court's findings de novo, reversing or revising the general rules based on its own research and conclusions. n187 Because extra-record material has long been used in determining so-called legislative facts, the Saks/Monahan/Walker suggestions for the treatment of social authority are largely descriptive of present practices.

[*528] Social framework information is not used to establish a general rule to be applied to other cases, such as a presumptive child custody rule. Rather, as in cases in which background studies about characteristics shared by abused children or battered women are presented to help determine the meaning of certain behaviors observed in the children or women involved in that specific case, n188 social framework information allows the use of general conclusions of social science research in determining factual issues in a specific case. n189

Monahan and Walker argue that limiting social framework consideration solely to information presented through expert witnesses is inefficient for the court, which must hear the same evidence over and over again in similar cases, and expensive for the parties, who must hire expert witnesses, which cannot be cost-justified in many cases. n190 They argue that social framework data in many cases has both a social authority/general rule component and a more fact-specific component. n191 When provided as general background, as in the use of framework information in child abuse and battered women cases mentioned above, general scientific knowledge is being established. Accordingly, they would suggest that such materials be treated as social authority is treated: the trial court may conduct its own research and its conclusions are subject to challenge and de novo review by the appellate courts. n192 When such materials are being applied to the specific facts of the case, the case-specific application is equivalent to a finding of fact and is treated as fact-finding traditionally has been: the trial court relies only upon the evidence presented as to case-specific facts and its conclusions are reviewed on appeal as are other findings of fact. n193

Monahan, Walker and Saks also suggest that social facts information is often comprised both of a general component, when methodology is being established, and a case-specific component, when case-specific research findings are at issue. n194 They suggest that the **[*529]** case-specific findings be treated as findings of fact, while the methodology of the studies would be subject to review as if it were a legal question. n195

The work of Monahan, Walker and Saks seems particularly well suited to the family law area. Courts necessarily make use of social science research data on a regular basis. For example, the Kansas Supreme Court has cited to the primary book that has advocated the psychological parent concept in deciding what rules should apply in paternity cases when a legally presumed father may not be the biological father of a child. n196 The complex questions that may arise when the ultimate fact finder is a jury are not present. The trial judge in almost all cases hears custody and family law cases on an ongoing basis; n197 he or she will naturally develop some expertise in the area, which need not be abandoned so that each case starts with a "clean slate." In fact, educational programs at conferences that Kansas judges are required to attend often cover background social science facts that could be applied in domestic cases. n198 If judges were not supposed to use this background information in their daily work, there would be no purpose in requiring their attendance at such programs.

One area in which such background information is particularly helpful is in handling domestic violence cases, whether in the context of child custody cases, Protection from Abuse Act cases or criminal domestic battery cases. Having basic information about the causes of domestic violence helps judges in determining when an individual case **[*530]** may be amenable to counseling or batterer's abuse intervention programs; what options may be available for continuing child visitation on an interim or permanent basis; and when continuation of child visitation may be appropriate. For example, Johnson County, Kansas, has assigned all of its criminal domestic violence cases to one division so that an educated response to these cases from the judiciary could be initiated. n199 These are specialized, highly discretionary, areas in which background knowledge can assist the court in reaching better, more rational results. n200 And, as Professor Saks has urged, "When venturing outside of familiar territory, judges ought to work harder, not grow careless." n201

In considering the use a judge may make of social science research data, one must consider whether there are any statutory rules of evidence that apply. Under the Federal Rules of Evidence, which are discussed in the Monahan, Walker and Saks articles, a comment to Rule 201 makes clear that the rule governing judicial notice has no application whatsoever to legislative facts. n202 However, Kansas has its own evidence rules, adopted prior to adoption of the Federal

Rules of Evidence. n203 Judicial notice is governed by *section 60-409 of the Kansas Statutes Annotated*, which, like the federal rule, appears not to **[*531]** have been intended to apply to a court's finding of legislative facts. n204 There are certainly cases, like *In re Marriage of Ross*, n205 in which the courts have taken legislative facts into account in forming policy pronouncements. It appears then that, as in the federal system, there is no statutory prohibition against the use of social science research in determining legislative facts. The broader proposals of Monahan, Walker and Saks similarly do not appear to be precluded by an existing statute or case law in Kansas.

We return, then, to the hypothetical raised at the beginning of this section. In addition to any guidelines that may have been adopted in the jurisdiction, the judge may look for and rely upon social science research regarding the developmental needs of a nine-month-old child. The judge may cite directly to such materials in establishing either a social authority rule generally applicable in such cases (similar to the Shawnee or Johnson County guidelines) or in establishing a social framework within which testimony about the particular child's relationship with his or her parents can be viewed. We referred previously to the guidelines as a "back-door" approach to the use of social science materials, since they were based on (uncited) research studies. Such guidelines are used routinely in Shawnee and Johnson counties, among other places. Direct use of social science research, a "front-door" approach, should be equally viable. Generally, the relevant literature suggests that overnight visits should be avoided altogether before a child is six months old n206 and only hesitantly granted for infants between six months and eighteen months of age when there are other considerations, such as a need to promote bonding with a long-distance non-custodial parent. n207 Whether citing directly to the literature or merely stating the applicable general rule, the trial judge should explicitly state the underlying social science basis for his or her decision or approach. Whether the judge relies upon family law guidelines, themselves premised upon social science research, or **[*532]** directly upon the research to establish a social authority rule generally precluding overnight visitation for children of this age, that conclusion should be reviewable de novo by an appellate court. If the judge uses the social science information to provide a social framework within which the testimony about this child's functioning and relationship with each parent can be evaluated, that background information should also be subject to de novo review by the appellate court. Only the judge's specific application of the general rules or background framework to the facts of this case should be subject to review under the standard tests for review of fact findings.

Family law cases are ones in which a trial judge is given a great deal of discretion. There is a danger in such cases that the basis of the judge's decision may become less visible and, therefore, less subject to scrutiny. n208 Any decision that the judge might make in the hypothetical visitation dispute involving the nine-month-old child will be based upon some implicit, perhaps idiosyncratic, theory of child development. n209 Explicitly allowing the use of social science information encourages judges to place the assumptions underlying their decisions into the record where they become appropriately subject to challenge by the parties and review by the appellate courts. n210 In Kansas, if a judge does not provide detailed findings of fact, a motion can be filed to obtain additional findings. n211 Social authority and social framework information should be explicitly mentioned, and its significance to the ultimate fact findings should be stated.

IV. A SUGGESTED APPROACH FOR KANSAS

A. Established Kansas Case Law

Following the trend throughout the country, the Kansas Legislature has determined that child custody and residency is to be determined "in accordance with the best interests of the child." n212 The Kansas Court of Appeals has explicitly applied this principle to cases involving a post-divorce relocation of the custodial parent. n213 The court has already **[*533]** determined that there is a legitimate state interest in restricting the residence of a custodial parent, which may, in a given case, override the parent's constitutional right to travel. n214 What is still at issue is how to give greater definition to this abstract principle of "best interests" in relocation cases.

The Kansas Supreme Court had the opportunity to explore relocation of a custodial parent recently in *In re Marriage of Bradley*. n215 The court made a rather broad reading of the statutes that apply to relocation without laying down a useful set of guildlines for trial courts to consider. n216 The court did state that the presumption of *section 60-1610(a)(3)(A) of the Kansas Statutes Annotated* -- that a custody arrangement contained in a settlement agreement is in the best interests of the child -- is no longer given effect after a parent decides to relocate; n217 that section 60-1610(a)(2)(A) permits a court to change a prior custody order "when a material change of circumstances is shown;" n218 and that the relocation of the custodial parent out of state may be such a material change of circumstances. n219 The court gave no useful guidance for trial courts in other cases, limiting its holding to an affirmance -- under the abuse of discretion standard -- that there was sufficient evidence in the record to support the trial court's ruling that switching custody to the father rather than allowing the mother to move with the children to Washington, D.C., was in the child-

ren's best interests. n220 Although the *Bradley* court appropriately decided the pending case, it gave trial courts little help in considering how to approach relocation cases generally.

What is clear from the Kansas case law and statutes is that, unlike some of the other states discussed above, there is no presumption in favor of either parent. The legislature has stated that neither parent has a vested right to custody and there should be no presumption in favor of either parent, regardless of the age of the child. n221 Further, when, as is **[*534]** generally the case, the original decree was based on a settlement agreement, there is no presumptive right of either parent to custody when a dispute later arises: the court may hear a full presentation of the facts and enter any order that could have been made at the initial hearing regardless of whether a change of circumstances has occurred. n222

The statutory provisions in Kansas strongly suggest that no presumption in favor of relocation may be granted and that a hearing to determine the best interests of the child must be held. *Section 60-1620 of the Kansas Statutes Annotated* specifically provides that a move out of state may be found to be a change of circumstances. n223 This legislative directive that a move out of state may, *by itself*, constitute a change of circumstances justifying a change of custody is inherently inconsistent with a presumption in favor of the relocating parent's right to move with the child. Two other statutory factors that the court is required to consider in all contested custody cases also suggest that a presumption in favor of the relocating parent would be incompatible with the Kansas statutory scheme. The court is required to consider the child's "adjustment to the child's home, school and community." n224 Thus, contrary to the argument of some proponents of a presumption in favor of the relocating parent, n225 any possible harm to the child from disruption with home, school and community contacts should at least be considered. The court is also required to consider "the willingness and ability of each parent to respect and appreciate the bond between the child and the other parent and to allow for a continuing relationship between the child and the other parent." n226 Again, contrary to the argument of some proponents of a presumption in favor of the relocating parent, n227 the motives of the relocating parent are directly at issue under Kansas law. If the custodial parent seeks to move for the purpose of limiting contact between the child and the other parent -- or simply without regard to the importance of that relationship -- that is a relevant consideration in the court's review. Thus, instead of a presumption in favor of relocation, the Kansas statutes clearly contemplate that a hearing will be held and that a considered judgment will be made from all of the evidence presented.

[*535] *B. Approaching Move-Away Cases*

Without a presumption assisting in the difficult task of determining the child's best interests, the trial court is left to determine the "best interests" of the child after considering "all relevant factors." n228 The statute contains a *non-exclusive* list of factors that the trial court may use. n229 Thus, the trial judge may, and in the authors' opinions, should consider other factors that may be more tailored to the specific situations of custodial-parent relocation cases.

These more-tailored factors which the trial judge should weigh in her decision can be borrowed from other states that have had the opportunity to make an in-depth review of the unique situations and problems that relocation cases bring. A consideration of these factors -- in addition to the generic factors listed in the statute -- will bring the trial court that much closer to a true determination of what really is the best interests of the child. These factors include:

(1) The extent to which moving or not moving will affect the emotional, physical or developmental needs of the child. n230 In assessing the potential benefits of moving, the trial court should consider any improvements that may flow from an improvement in the custodial parent's life. n231

(2) The soundness of the motive of the custodial parent's decision to relocate. In considering the motive, the trial court should balance the expected benefits of moving against the benefits of staying. The trial court should also consider the presence or absence of the custodial parent's desire to interfere with the non-custodial parent's relationship with the child. n232

[*536] (3) The availability of a reasonable alternative visitation schedule, n233 and whether the custodial parent will comply with this schedule once he or she is outside the jurisdiction of the court. n234

(4) What possible detrimental effect the relocation might have on the relationship between the child and the non-custodial parent. n235 In the determination of this factor, the trial court should also consider whether the non-custodial parent has previously exercised his or her visitation rights. n236 The trial court should also consider the possible motives of the non-custodial parent in resisting the relocation. n237

(5) "The attributes and characteristics of the parents and children and how the children have fared under the original custody and visitation agreement." n238

Trial judges should be required to state clearly the rationale for their decision and any assumptions underlying their approach. If social science or child development research is relied upon, at least the concept relied upon should be stated so that it can be reviewed on appeal. A great deal of discretion has been given to trial judges in these cases. Fairly reviewing the exercise of that discretion depends upon trial judges to provide a full and honest statement of the factual basis and rationale of their ruling.

V. A RESPONSE TO THE OTHER SIDE

We believe that the approach we have outlined for Kansas faithfully adheres to the Kansas statutes, Kansas case law and a fair reading of the social science research. However, we recognize that some other authors have suggested adoption of a presumption favoring relocation by custodial parents and that some recent decisions in other states have agreed with that view. In this section, we respond to some of the major arguments made in favor of such a presumption.

The most prolific author in this area has been Professor Janet M. Bowermaster, author of three articles. n239 We will review the primary **[*537]** arguments n240 put forward by Professor Bowermaster in favor of a presumption that a custodial parent should be allowed to move wherever she chooses free of interference from the other parent.

First, she argues that allowing men to object to a woman's choice of residence reflects the court's continued willingness to acknowledge "the husband's ancient prerogative to control where his wife would live." n241 This conclusion is itself premised upon her conclusion that there are no valid reasons for giving serious consideration to a non-custodial father's views when the custodial mother seeks to move away. Given the lack of support for the father's position, she concludes, traditional deference to male prerogatives must be at work. n242 Her conclusion is faulty from at least two perspectives. It is premised upon her finding that there are no valid reasons for giving serious consideration to the father's views; we hope we have demonstrated the falsity of that premise. In any event, it is the court that has control over the post-divorce custody and visitation issues, which may include restrictions on movement, not the ex-spouse.

Next, she argues that the notion that stability for the children is advanced by restricting custodial parents from moving away is undercut because statutes in most states allow them to move a limited distance, say 50, 100 or 150 miles. Such a move also would force changes in school, home and neighborhood, so, she argues, if the system will allow those changes, then courts and custodial parents should not be able to use stability for the children as an argument against allowing a longer distance move sought by the custodial parent. n243 Kansas does not have a statute specifically allowing a custodial parent to move within a fixed distance; it does have a statute requiring advance notice if a child will be moved out of state. n244 Even in a state that has the approach she describes -- specifically authorizing custodial parent moves under a **[*538]** certain distance -- that does not justify the conclusion that courts should not be allowed to consider emotional stability interests when a longer move is at issue. The question at that point is not what other moves the custodial parent *might* have made; the question is whether the specific move she *is* making is in the best interests of the child. The court is involved because the parents have a dispute on that issue which the parties cannot resolve by themselves. In Kansas, a court is statutorily required to consider "the child's adjustment to the child's home, school and community." n245 Similar factors are considered in most other states. It is not the only factor to be considered, but it must be considered in Kansas and is appropriately considered elsewhere if one wants to look at the full picture presented in an individual case. Indeed, it is only if you adopt the approach that a predetermined presumption is preferable to a case-by-case analysis that careful review of each potential effect on the child is not worthy of examination.

In perhaps her major point, she argues that the claim that children's best interests are served by ensuring frequent and continuing contact with both parents is unpersuasive. n246 Her case on this point is multi-faceted. First, she claims that equal sacrifices to those that may be endured by a custodial parent not allowed to move are not placed on non-custodial parents. n247 She notes that while custodial parents are required to make the child available for visitation, non-custodial parents are not required to exercise it. Second, she argues that there would be restrictions forbidding non-custodial parents from moving away from their children if this (ensuring frequent contact with both parents after divorce) were truly an important goal. n248 The response to these first two points is related: the state has little, if any, power over the non-custodial parent. Even Bowermaster has noted in a prior article that the state has leverage only over the custodial parent. n249 There is a constitutional right to travel. Thus, although the court can condition custody or visitation rights on a person's residence, it cannot prevent the move. There is, **[*539]** then, no effective way to keep a non-custodial parent from moving. n250 That the state does not do something (restrict the non-custodial parent's right to move) it has no power to do proves nothing. There is court authority that could be used to require a parent to exercise visitation via the contempt power. But such powers are rarely, if ever, used for that purpose, and whether to institute such proceedings is the choice of the custodial parent, not the state. n251

Third, she argues that geographical restrictions on the custodial parent won't achieve the goal of ensuring frequent contact with both parents if the custodial parent proceeds with her move, albeit without the child, after the court denies permission for it. On this point, she is correct about some cases. There are four possible outcomes: (1) permission to move granted, custodial parent moves, non-custodial parent does not; (2) permission to move granted, custodial parent moves, non-custodial parent also moves to be near child; (3) permission to move denied, custodial parent stays, non-custodial parent stays; (4) permission to move denied, custodial parent moves, non-custodial parent stays and is awarded custody. The goal of keeping frequent access for both parents is met in cases (2) and (3), but not in cases (1) and (4). Case (2)'s success in achieving this goal is purely dependent upon the choice and ability of the non-custodial parent to move. Case (3)'s success in achieving this goal is purely dependent upon the choice and ability of the custodial parent to stay. n252 In case (3), there are at least some cases in which court review and denial of permission to move have achieved the goal of keeping frequent contact for both parents. We believe that may be in the child's best interest in at least some cases. In cases (1) and (4), the goal of keeping frequent contact for both parents is not achieved, but that fact alone does not justify Bowermaster's overall conclusion that the state should, therefore, just let the custodial parent do whatever she wants to do without any analysis about the child's interests. The goal is achieved in other cases. **[*540]** A claim that the present system does not achieve its goal in all cases does not prove that there is a better alternative.

Fourth, she argues that no evidence shows that either the quality of the non-custodial parent's relationship with the child or the child's emotional well-being is influenced by either the duration or frequency of visitation. n253 Without such evidence, she concludes, "the conflict should be decided in such a way that supports the custodial parent's life choices, including relocation." n254 On this point, Bowermaster is simply giving a highly one-sided view of the social science literature. To be sure, evidence for the proposition that frequency of visitation is associated with positive effects on the child is mixed, with some evidence in support and most studies finding no statistically significant correlation. n255 However, there is good support for the proposition that the duration of visits with the father is associated with a higher quality relationship with him and that the relationship between the child and father is of substantial importance. n256 Interestingly, Bowermaster presented a more balanced view of the research in her 1993 article. n257 There is certainly sufficient evidence in support of the importance of the contact between non-custodial parents and children to justify a careful look at the best outcome for each case rather than a predetermined outcome. Resolving the conflict by supporting whatever "lifestyle choice" is made by the custodial parent is simply to say that even a choice made by whim will be upheld by the courts over the interests of the child and the other parent.

Bowermaster also argues that there should be a public policy rule against making a custodial parent choose between custody and "a committed new personal relationship, the parenting of other children, the support of friends or family, or educational or career opportunities." n258 On this point, we simply confront the phenomena of law professor as legislator. There is no indisputable social science research or logic that leads to this proposed public policy rule. If such a **[*541]** rule is to be adopted, it should be done by an elected legislature, not law professors or even the courts. In Kansas, the basic framework for considering child custody disputes has been established by statute. The legislature has determined that joint custody is preferred; that there is no maternal preference even for very young children; and that all decisions are governed foremost by the best interests of the child. If it is to be determined that custodial parents should always win if confronted with a choice between "a committed new relationship" and custody, it is up to the legislature to make that decision. As for the underlying policy argument, Bowermaster is claiming that there are certain sacrifices that a custodial parent should not be required to make for her child. Every parent must expect to make some sacrifices for his or her children. A *per se* rule that some sacrifices are just too great to require -- in the absence of a review of all of the facts of the case -- seems unwise.

Bowermaster also argues that relocation decisions often must be made promptly to secure a new job and make other arrangements, but court hearings may take months to obtain. n259 This is a valid point. When the entire future course of a family is at stake and quick decisions must be made for employment or other reasons, there is a conflict between allowing sufficient time for prePtion to present the case and the need for a prompt hearing and decision. n260 Court calendars may be a problem. At least in Kansas, and at least based on our experience, it should be possible to obtain a hearing of at least two hours on fairly short notice. Counsel should attempt to have a conference directly with the court and opposing counsel as quickly as possible after the issue arises to make sure that the judge is aware of all of the factors related to when a hearing must be held and a decision made. If necessary, it may be advisable to provide time limits on the presentation to insure that each side has a fair chance to present evidence at an expedited hearing. n261 Courts do need to be sensitive to the need for a prompt hearing and decision. However, we generally do not dispense with the **[*542]** oversight authority of the court simply because a quick decision is required.

Last, Bowermaster argues that a rule like that in place in Minnesota, in which the move is allowed without even a hearing being held unless the non-custodial parent can make a prima facie case of a "unique detriment" to the child from the move, is particularly helpful in domestic violence cases. n262 In these cases, she argues, such an approach "would send a strong message to abused and abusive parents alike that family courts will no longer participate in the continued abuse of women and children after sePtion and divorce." n263 A message is more effectively sent to those who commit domestic violence by directing it specifically at them, not at all parents who happen to be the non-custodial parent. In Kansas, spousal abuse is required to be considered in making custody decisions; n264 in so doing, the court can send whatever message is appropriate to the case at hand.

VI. CONCLUSION

Cases in which a custodial parent seeks to move to a distant location with the children are among the hardest to decide. Social science research does not offer definitive guidance. Although the relationship between fathers (still most frequently the non-custodial parents) and children are clearly important, no precise minimum level of visitation has been found to be either optimal or critical. Still, the cases are particularly difficult in part because the quality of contact between parents and children is in many respects unmeasurable, whether by psychologists or by judges. In Kansas, each case must be individually evaluated in an analysis of the best interests of the child. Consideration of the factors specifically set out in the statute, as well as those listed in this article for move-away cases, should assist the court in evaluating the difficult choice of what is truly in the child's best interests.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresStepparent AdoptionFamily LawChild CustodyAwardsStandardsBest Interests of ChildTax LawFederal Taxpayer GroupsIndividualsDivorce & Separation Payments (IRC secs. 62, 71, 215, 682, 1041)General Overview

FOOTNOTES:

n1 *See generally*, MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS (1994).

n2 *See, e.g.*, *Thomas v. Thomas, 335 S.W.2d 827, 828 (Tenn. 1960)* (stating that in *Evans v. Evans, 140 S.W. 745 (Tenn. 1911),* "the mother had the right to control the child's whereabouts and the father had no voice where the child should reside and could not make his duty to support the child depend upon the place of the child's abode").

n3 *365 A.2d 27 (N.J. Super. Ct. Ch. Div. 1976).*

n4 Carol S. Bruch & Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, *30 FAM. L. Q. 245, 281 (1996).*

n5 Nancy Zalusky Berg & Gary A. Debele, *Postdecree Custody Modification: Moving Out of State and Changes to the Parenting Relationship*, 10 AM. J. FAM. L. 183, 187 (1996).

n6 *See Yannas v. Frondistou-Yannas, 481 N.E.2d 1153, 1157 (Mass. 1985)* (terming the New Jersey standard the "real advantage" standard).

n7 *D'Onofrio* was approved by the New Jersey Supreme Court in *Cooper v. Cooper, 491 A.2d 606, 611 (N.J. 1984).*

n8 *See, e.g., Yannas, 481 N.E.2d 1153; Schwartz v. Schwartz, 812 P.2d 1268 (Nev. 1991); Stout v. Stout, 560 N.W.2d 903 (N.D. 1997). But see McQuade v. McQuade, 901 P.2d 421 (Alaska 1995)* (expressly declining to follow the "real advantage" approach).

n9 *D'Onofrio, 365 A.2d at 31.*

n10 *Id. at 32.*

n11 *Id. at 31-32.*

n12 *Id. at 29.*

n13 *Id. at 28* (quoting *N.J. STAT. ANN. § 9:2-2* (West 1993)).

n14 *Id. at 29.*

n15 *Id. at 30.* In *Holder v. Polanski, 544 A.2d 852, 856 (N.J. 1988),* the supreme court later stated, "To this extent, we [now] modify the 'cause' test that we announced in *Cooper* by holding that any sincere, good faith reason will suffice, and that a custodial parent need not establish a 'real advantage' from the move."

n16 There was testimony that when Mrs. D'Onofrio first suggested to Mr. D'Onofrio that she was considering moving to South Carolina, he said he did not have a problem with it, provided she would agree to give up alimony and child support. *D'Onofrio, 365 A.2d at 32.*

n17 *Id. at 30.*

n18 *Id. at 29-30* (emphasis added).

n19 *Id. at 30.*

n20 *868 S.W.2d 517 (Ark. Ct. App. 1994).*

n21 *Id. at 521* (Cooper, J., dissenting). Justice Cooper also did not think that the mother had met her burden under the *D'Onofrio* standard.

n22 *393 N.W.2d 903 (Mich. Ct. App. 1986).*

n23 *427 N.W.2d 627 (Mich. Ct. App. 1988).* Although the Supreme Court of Michigan has not yet expressly adopted this approach, a concurring opinion advocated its usage stressing how the quality of life is "intertwined" with that of the child because a new family unit had been formed. *Costantini v. Costantini, 521 N.W.2d 1, 2 (Mich. 1994)* (Riley, J., concurring).

n24 In affirming the trial court's finding that there was a real advantage to the move, the court listed the fact that the prospective step-father lived in a nice house and made $ 120,000 per year and that the mother would take a year off of work following the wedding as supporting factors. *Mills, 393 N.W.2d at 907.*

n25 *Anderson, 427 N.W.2d at 629.* As for the inevitable loss of frequent contact between the father and his daughter, the court stated that less frequent visitations of longer duration may foster a closer relationship. *Id.*

n26 *Gruber v. Gruber, 583 A.2d 434, 439-41 (Pa. Super. Ct. 1990).*

n27 *701 A.2d 227 (Pa. Super. Ct. 1997).*

n28 *951 S.W.2d 746 (Mo. Ct. App. 1997).*

n29 Missouri has an anti-removal statute resembling New Jersey's statute. *See MO. REV. STAT. § 452.377* (West 1997).

n30 *Shaw, 951 S.W.2d at 749* (citation omitted).

n31 *Id.*

n32 *MASS. GEN. LAWS ch. 208, § 30* (Law. Co-op. 1994).

n33 *N.D. CENT. CODE § 14-09-07* (1997).

n34 NEV. REV. STAT. § 125A.350 (1997).

n35 *Stout v. Stout, 560 N.W.2d 903 (N.D. 1997).*

n36 *Id. at 912* (quoting *D'Onofrio v. D'Onofrio, 365 A.2d 27, 29 (N.J. Super. Ct. Ch. Div. 1976)).*

n37 *481 N.E.2d 1153 (Mass. 1985).*

n38 *MASS. GEN. LAWS ch. 208, § 30* (Law. Co-op. 1994). Section 30 states: "A minor child of divorced parents who is a native of . . . this commonwealth . . . shall not, if of suitable age to signify his consent, be removed out of this commonwealth without such consent of both parents, unless the court upon cause shown otherwise orders." *Id.*

n39 *Yannas, 481 N.E.2d at 1158.*

n40 *Id.* The court stated that "every person, parent and child, has an interest to be considered. The judicial safeguard of those interests lies in careful and clear fact-finding and not in imposing heightened burdens of proof or in inequitably identifying constitutional rights in favor of one person against the other." *Id.*

n41 *Schwartz v. Schwartz, 812 P.2d 1268, 1271 (Nev. 1991).*

n42 *Id. at 1271* (citations omitted).

n43 These factors included:

> (1) whether positive family care and support, including that of the extended family, will be enhanced; (2) whether housing and environmental living conditions will be improved; (3) whether educational advantages for the children will result; (4) whether the custodial parent's employment and income will improve; (5) whether special needs of a child, medical or otherwise, will be better served; and (6) whether, in the child's opinion, circumstances and relationships will be improved.

Id.

n44 *750 ILL. COMP. STAT. 5/609* (West 1993).

n45 *In re Marriage of Eaton, 646 N.E.2d 635 (Ill. App. Ct. 1995).*

n46 The court described a reasonable visitation schedule as one that "would preserve and foster the children's relationship with the non-custodial parent. . . . When removal to a distant location will substantially impair the non-custodial parent's involvement with the children, the trial court should examine the harm which may result to the children." *Id. at 640* (citations omitted).

n47 *543 N.W.2d 639 (Minn. 1996).*

n48 *334 N.W.2d 393, 397 (Minn. 1983).*

n49 *Silbaugh, 543 N.W.2d at 641* (citations omitted) (emphasis added). Minnesota also is a state that has an anti-removal statute resembling New Jersey's statute. *MINN. STAT. ANN. § 518.175* (West 1990).

n50 *Silbaugh, 543 N.W.2d at 641.*

n51 *Id. at 640.*

n52 *Id. at 641-42.*

n53 *480 N.W.2d 823 (Wis. Ct. App. 1992).*

n54 *Id. at 825.*

n55 *Id.*

n56 *Id. See also WIS. STAT. ANN. § 767.327* (West Supp. 1997).

n57 *Love v. Love, 851 P.2d 1283, 1287 (Wyo. 1993).* Utah has also phrased its relocation standard as being in the best interest of the children, but an appellate court has determined that this best interest standard results in a presumption for the children moving with the custodial parent because of the importance of maintaining continuity of the primary care giver. *Larson v. Larson, 888 P.2d 719, 722-23 (Utah Ct. App. 1994).* West Virginia also has a "rule of preference" favoring the continued custody in the primary caretaker. *Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981).*

n58 *Love, 851 P.2d at 1288-89* (quoting *Arquilla v. Arquilla, 407 N.E.2d 948, 950 (Ill. App. Ct. 1980)).* Vermont also takes the position that, because the court had already decided initially that it was in the best interest of the child to be placed with the custodial parent, the court will not decide again based on the fact that now the custodial parent plans to take the child to a distant location. Thus, to successfully oppose the relocation, the non-custodial parent bears the burden of proving that "the [child's] best interests would be so undermined by a relocation with the custodial parent that a transfer of custody is necessary." *Lane v. Scheck, 614 A.2d 786, 792 (Vt. 1992).* This is a burden that would rarely, if ever, be met.

n59 *Love, 851 P.2d at 1289.*

n60 *Id. at 1286.*

n61 *Id. at 1285.*

n62 It should be interesting to note that the father was a member of the local school board in Sheridan. *Id. at 1286.*

n63 *913 P.2d 473 (Cal. 1996).* California made its landmark decision in a case involving a mother wanting to move a mere 40 minutes away, an easy commute for many. In fact, the contesting father even termed it as "an easy commute," and he often traveled there on alternate weekends to shop and visit friends. *Id. at 477.*

n64 *Id. at 476* (quoting *CAL. FAM. CODE § 7501* (West 1994)).

n65 *In re Marriage of Francis, 919 P.2d 776, 784-85 (Colo. 1996).* However, the Colorado Supreme Court limited the decision to cases in which a parent has sole physical custody. The court declined to extend this decision to situations in which the parents truly share joint residential custody. *Id. at 785. See also COLO. REV. STAT. § 14-10-131(2)* (1997). Kentucky also follows this presumption based on its similar statute on modification of custody. *See KY. REV. STAT. ANN. § 403.340(2)* (Michie Supp. 1996). Under both the Colorado and Kentucky statutes the non-custodial parent may also change custody if the custodian agrees to the modification or if the child has been integrated into the family of the petitioner with the consent of the custodian.

n66 *Russenberger v. Russenberger, 669 So. 2d 1044 (Fla. 1996); Aaby v. Strange, 924 S.W.2d 623 (Tenn. 1996).*

n67 *In re Marriage of Sheley, 895 P.2d 850, 856 (Wash. Ct. App. 1995)* (emphasis added). Iowa also places a heavy burden on the non-custodial parent. In *In re Marriage of Montgomery, 521 N.W.2d 471, 474 (Iowa Ct. App. 1994),* the court held that the non-custodial parent must demonstrate that the move will detrimentally affect the children's best interest. The fact that the move itself is traumatic is not a sufficient enough reason.

n68 *In re Marriage of Littlefield, 940 P.2d 1362, 1371-72 (Wash. 1997).* Mississippi also finds such agreements unenforceable. *Bell v. Bell, 572 So. 2d 841, 845-47 (Miss. 1990).*

n69 For example, Nebraska has held that the parent has the burden on both of these issues and has further stated that the custodial parent is limited to moves that are necessary for either a remarriage or a factually supported improvement in his or her career or occupation. *Harder v. Harder, 524 N.W.2d 325, 328 (Neb. 1994).*

n70 *Eckstein v. Eckstein, 410 S.E.2d 578 (S.C. Ct. App. 1991).* However, even with this presumption, the mother in *Eckstein* was allowed to move with the child when the court found that there was no showing that the best interests of the child would be better served by disallowing the move. *Id. at 580.*

n71 LA. REV. STAT. ANN. § 355.13 (West Supp. 1998).

n72 *Pollock v. Pollock, 889 P.2d 633, 635 (Ariz. Ct. App. 1995).*

n73 *Id. at 636.*

n74 *823 P.2d 299 (N.M. 1991).*

n75 *Id. at 305.*

n76 *Id.*

n77 *Id. at 306.*

n78 The court set forth its procedural guidelines:

> Either party can initiate a proceeding to alter an existing custody arrangement on the ground that a substantial and material change in circumstances affecting the welfare of the child has occurred or is about to occur, and the party seeking such change has the burden to show that the existing arrangement is no longer workable. In almost every case in which the change in circumstances is occasioned by one parent's proposed relocation, the proposed move will establish the substantiality and materiality of the change. It then becomes incumbent on the trial court to consider as much information as the parties choose to submit, or to elicit further information on its own motion from the sources mentioned above or such other sources as the court may have available, and to decide what new arrangement will serve the child's best interests. In such a proceeding, neither parent will have the burden to show that relocation of the child with the removing parent will be in or contrary to the child's best interests. Each party will have the burden to persuade the court that the new custody arrangement or parenting plan proposed by him or her should be adopted by the court, but that party's failure to carry this burden will only mean that the court remains free to adopt the arrangement or plan that it determines best promotes the child's interests.

Id. at 309.

n79 *Id. at 310.*

n80 The relocation of the custodial parent is a per se material change in circumstances, triggering a hearing to determine the best interests of the child. The factors that the court will consider are the relocating parent's motive for moving plus the factors listed in the state's "best interests" statute. *ALASKA STAT. § 25.24.150(c)* (Michie 1996). *See* also *House v. House, 779 P.2d 1204, 1207-08 (Alaska 1989).* Idaho also treats relocation cases as modification of custody cases with the relocation entitling the non-custodial parent to a hearing. However, Idaho then puts the burden on the parent moving for modification to show that the best interests of the child is in not moving. *Osteraas v. Osteraas, 859 P.2d 948, 951 (Idaho 1993).*

n81 *Rowland v. Kingman, 629 A.2d 613 (Me. 1993).* Maine has statutorily prescribed that the relocation of the custodial parent is a substantial change in circumstances that warrants a review by the court. *ME. REV. STAT. ANN. tit. 19-A, § 1657* (West 1998). The court will then apply the factors listed in its "best interests" statute. *Id.* § 1653(3).

n82 *Ramirez-Barker v. Barker, 418 S.E.2d 675 (N.C. Ct. App. 1992).* Although at first glance, it may seem as though the court has laid a standard favoring a presumption for the moving parent, it really is setting down a best interests standard. Like Alaska, North Carolina treats relocation cases as modification of custody cases. But, unlike Alaska, the non-custodial parent must show a substantial change in circumstances before the court will even consider the best interests of the child. The relocation would have to be "detrimental to the child's welfare" or "likely or probably adversely affect the welfare of the child" to even get to the best interests analysis. Otherwise relocation is allowed. *Id. at 679.* However, the court went on to state that, "it will be a rare case where the child will not be adversely affected when a relocation of the custodial parent and child requires substantial alteration of a successful custody visitation arrangement in which both parents have substantial contact with the child." *Id. at 680.*

n83 *In re Marriage of Elser, 895 P.2d 619 (Mont. 1995).* This case was decided under a now-repealed statute which had read exactly as the current California statute, entitling the custodial parent the right to change his residence. *MONT. CODE ANN. § 40-6-231* (1996) (repealed 1997). However, Montana chose to interpret this statute as an overall best interest standard rather than for the presumption that California now follows. Now that this statute is repealed, relocation cases are governed by the Montana statute on modification of custody, which allows the court to consider the relocation of a parent in determining the best interests of the child. *Id.* § 40-4-219 (1997). The factors that a trial court may consider are also statutorily listed. *Id.* § 40-4-212.

n84 *Domingues v. Johnson, 593 A.2d 1133, 1135-36 (Md. 1991).*

n85 *Jordan v. Jordan, 439 A.2d 26, 29 (Md. Ct. Spec. App. 1982).*

n86 *Domingues, 593 A.2d at 1136.*

n87 *Tropea v. Tropea, 665 N.E.2d 145 (N.Y. 1996).*

n88 *665 N.E.2d 145 (N.Y. 1996).*

n89 *Id. at 148-49* (citing *Weiss v. Weiss, 418 N.E.2d 377 (N.Y. 1981)).*

n90 *Id.* at 149.

n91 *Id.*

n92 *Id.* at 150.

n93 *Id.* at 149-50.

n94 *Id.* at 150.

n95 The court stated:

> We hold that each relocation request must be considered on its own merits with due consideration of all the relevant facts and circumstances and with predominate emphasis being placed on what outcome is most likely to serve the best interests of the child. While the respective rights of the custodial and noncustodial parents are unquestionably significant factors that must be considered . . ., it is the rights and needs of the children that must be accorded the greatest weight, since they

> are innocent victims of their parents' decision to divorce and are the least equipped to handle the stresses of the changing family situation.

Id. (citations omitted).

n96 *Id.* at 151.

n97 *Id.* at 145.

n98 For a general overview of developmental needs of children and the effects of those needs on divorce visitation arrangements, see MITCHELL A. BARIS & CARLA B. GARRITY, CHILDREN OF DIVORCE: A DEVELOPMENTAL APPROACH TO RESIDENCE AND VISITATION (1988), and WILLIAM F. HODGES, INTERVENTIONS FOR CHILDREN OF DIVORCE: CUSTODY, ACCESS, AND PSYCHOTHERAPY (2d ed. 1991). These developmental needs considerations are the basis for different recommendations for visitation by age in various suggested standard visitation schemes, including the Johnson County, Kansas, and Shawnee County, Kansas, family law guidelines. *See* JOHNSON COUNTY FAMILY LAW GUIDELINES, *reprinted in* PRACTITIONER'S GUIDE TO KANSAS FAMILY LAW app. A, at a5-a9 (Steve Leben, ed. 1997) [hereinafter PRACTITIONER'S GUIDE]; SHAWNEE COUNTY FAMILY LAW GUIDELINES, *reprinted in* PRACTITIONER'S GUIDE, *supra*, app. B, at b32-b37.

n99 It remains the case in America that most of the time, the custodial parent is the mother and the non-custodial parent is the father, which is reflected both in social science research articles and in judicial opinions. Rather than providing generic, gender-neutral pronoun references in this article, we have generally chosen to describe this typical case in which the mother is the custodial parent. By doing so, we do not suggest that no fathers are custodial parents and that no mothers face the situation as non-custodial parents of confronting the possible move of a custodial father with the children.

n100 *See, e.g.*, Robert D. Hess & Kathleen A. Camara, *Post-Divorce Family Relationships as Mediating Factors in the Consequences of Divorce for Children*, 35 J. SOC. ISSUES 79 (1979).

n101 *See* Amanda McCombs Thomas & Rex Forehand, *The Role of Paternal Variables in Divorced and Married Families: Predictability of Adolescent Adjustment*, 63 AM. J. ORTHOPSYCHIATRIC ASS'N, Jan. 1993, at 126, 126-28 (criticizing "weak methodology" of much of the research on non-custodial father involvement).

n102 *See, e.g.*, Frank F. Furstenberg, Jr., et al., *Paternal Participation and Children's Well-Being after Marital Dissolution*, 52 AM. SOC. REV. 695 (1987); Marla Beth Isaacs, *The Visitation Schedule and Child Adjustment: A Three-Year Study*, 27 FAM. PROCESS 251 (1988); Valarie King, *Nonresident Father Involvement and Child Well-Being: Can Dads Make a Difference?*, 15 J. FAM. ISSUES 78 (1994).

n103 Sanford H. Braver et al., *Frequency of Visitation by Divorced Fathers: Differences in Reports by Fathers and Mothers*, 61 AM. J. ORTHOPSCHIATRIC ASS'N, July 1991, at 448, 448.

n104 *Id.* at 449, 453.

n105 Amazingly, one law professor has suggested such an approach. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS., Summer 1975, at 226, 289-91 (suggesting that a coin flip to determine custody might have various advantages in meeting best interests of child). The existence of such a suggestion in a law review demonstrates some of the limitations on legal scholarship.

n106 Darrell Huff provides useful guidance for non-scientists on the problems involved in examining issues of causation. For example: "There are two clocks which keep perfect time. When 'a' points to the hour 'b' strikes. Did 'a' cause 'b' to strike?" DARRELL HUFF, HOW TO LIE WITH STATISTICS 87 (1954). In this example, the answer obviously is "no." The clocks are independently keeping their own time, which is being kept in accordance with a third standard. In this situation, there is at least some correlation between the variables studied (clocks "a" and "b") and a third factor, even though "a" and "b" are not directly related. In other circumstances, there may be no relation between the factors studied at all, even though a strong correlation appears. For example: "Take the figures that show the suicide rate to be at its maximum in June. Do suicides produce June brides -- or do June weddings precipitate the suicides of the jilted?" *Id.* at 90. Problems of "causation by coincidence" are hard to exclude in human relations studies.

n107 Even when a statistically significant correlation is found in a study with a small number of participants, the methodology of the study still must be scrutinized. A Huff example is particularly cogent here:

> A psychiatrist reported once that practically everybody is neurotic. Aside from the fact that such use destroys any meaning in the word "neurotic," take a look at the man's sample. That is, whom has the psychiatrist been observing? It turns out that he has reached this edifying conclusion from studying his patients, who are a long, long way from being a sample of the population. If a man were normal, our psychiatrist would never meet him.

Id. at 19. That problem can be encountered in surveys of self-selected populations and populations of people referred for counseling.

n108 Joan Kelly has noted that "findings are increasingly mixed or inconclusive regarding the role of the noncustodial parent in children's adjustment after divorce." Joan B. Kelly, *Current Research on Children's Post-divorce Adjustment: No Simple Answers*, *31 FAM. & CONCILIATION CTS. REV. 29, 37 (1993).* After noting the conflicting studies on the significance of frequency of visitation with the noncustodial parent, she speculates that "as newer research increasingly focuses on variables more centrally linked to child adjustment (parent adjustment, marital conflict, quality of parenting, and quality of father-child relationship), the significance of visitation frequency may be obscured or overshadowed." *Id. at 38.* She also notes that there are many factors -- such as the child's age and sex, the closeness of the father-child relationship before divorce, marital conflict, maternal and paternal adjustment, and the mother's hostility after sePtion -- that affect the child adjustment in addition to the amount of contact with the non-custodial parent. No one study has included all of these variables. *Id.* One may wonder how successfully all of those and other variables involved in such complex human relationships could be accurately measured and weighted.

n109 Hess & Camara, *supra* note 100; Linda Kurtz, *Psychosocial Coping Resources in Elementary School-Age Children of Divorce*, 64 AM. J. ORTHOPSYCHIATRY, Oct. 1994, at 544, 544.

n110 Hess & Camara, *supra* note 100, at 84. Of 19 families identified through court divorce records and asked to participate in the study, only three declined. *Id.*

n111 *Id.*

n112 *Id.*

n113 *Id.*

n114 *Id.* at 87. The negative effects of divorce on children, although significant both statistically and behaviorally, do not cause most children of divorced families to be disturbed in a clinical sense. Rather, the majority

of children of divorce, when assessed in the years after the divorce, function within normal or average limits on various measures of child behavior. Kelly, *Current Research on Children's Postdivorce Adjustment: No Simple Answers, supra* note 108, at 31-32. Kelly suggests that the age of the child at sePtion may be critical, noting a study of seventh and ninth graders in which the academic self-concept of the divorced children was not significantly lower than that of children from intact families when the parents had sePted before the child reached the third grade. *Id.* at 32.

n115 *Id.* at 89-90.

n116 *Id.* at 92.

n117 *Id.* at 94.

n118 *Id.* at 95.

n119 *Id.* at 93.

n120 *Id.* at 94.

n121 *Id.* As noted previously, however, all of the fathers in the Hess and Camara study actually lived in close proximity to the custodial mothers.

n122 Kurtz, *supra* note 109.

n123 *Id.* at 556-58.

n124 *Id.*

n125 *Id.* at 556.

n126 *Id.* at 558-59.

n127 As Kurtz notes, coping generally refers to mechanisms that influence resilience, acting as mediators between stress and well-being. *Id.* at 555. She provides significant background regarding coping methods and styles and their relationship to children of divorce. *Id.* at 555-56, 558-61.

n128 *Id.* at 557.

n129 *Id.* at 558, 560.

n130 *Id.* at 560.

n131 *Id.* at 561.

n132 Suzanne Southworth & J. Conrad Schwarz, *Post-Divorce Contact, Relationship with Father, and Heterosexual Trust in Female College Students*, 57 AM. J. ORTHOPSYCHIATRY, July 1987, at 371, 372.

n133 *Id.* at 372.

n134 *Id.* at 378.

n135 Contact in this study was a composite of frequency of visits, frequency of telephone calls and regularity of visits. *Id.* at 374.

n136 *Id.* at 376.

n137 *Id.* at 379.

n138 *Id.* at 373. The Heterosexual Trust Scale, a survey validated as reliable by other researchers, consists of 18 statements pertaining to interactions with men. Respondents indicate on a five-point scale their agreement with statements such as, "You can rely on a guy to keep his promises," and "If a girl doesn't watch out, she'll be used." *Id.*

n139 *Id.* at 377. Acceptance by the father was measured by another standardized test, the Children's Report of Parental Behavior Inventory (CRPBI). It consists of 108 items on 16 scales; two of these scales were used to measure the degree to which participants felt accepted or rejected by their fathers. *Id.* at 373. The Schwarz-Zuroff Love Inconsistency Scale was used to assess the daughter's perception of the consistency of the love and affection provided by the parent. *Id.*

n140 *Id.* at 378.

n141 Rebecca L. Drill, *Young Adult Children of Divorced Parents: Depression and the Perception of Loss*, 10 J. DIVORCE 169 (1986).

n142 *Id.* at 175.

n143 *Id.* at 176.

n144 *Id.* at 177-78.

n145 *Id.* at 178.

n146 *Id.* at 179.

n147 *Id.* at 169, 182-85.

n148 In a study of 44 third-grade boys, academic performance was significantly greater for boys who saw their fathers 14 or more hours per week, as compared to boys who saw their fathers less than six hours per week. Robert W. Blanchard & Henry B. Biller, *Father Availability and Academic Performance Among Third-Grade Boys*, 4 DEVELOPMENTAL PSYCHOL. 301, 301-02, 304-05 (1971). In a study of 77 elementary school children of divorced or sePted parents, 30% of the children experienced a marked decrease in academic performance after parental sePtion. Access to both parents seemed to be the single best protective factor against this decline, in that it was associated with better academic adjustment. Lise M.C. Bisnaire et al., *Factors Associated with*

Academic Achievement in Children Following Parental SePtion, 60 AM. J. ORTHOPSYCHIATRY, Jan. 1990, at 67, 67-70, 75. The authors concluded: "These data also support the interpretation that the more time a child spends with the non-custodial parent the better the overall adjustment of the child." *Id.* at 75.

n149 The study compared boys, ages 9 to 14, in 20 families with single fathers and 20 families with single mothers. All homes had been single-parent homes for at least a year. Self-esteem tests were given to the children. The self-esteem of the boys who saw their non-custodial parent once a month or more was significantly greater than the self-esteem of boys who saw their non-custodial parent less than once a month. Joyce S. Lowenstein & Elizabeth J. Koopman, *A Comparison of the Self-Esteem Between Boys Living with Single-Parent Mothers and Single-Parent Fathers*, 2 J. DIVORCE 195, 195, 197, 203 (1978).

n150 A study of 91 children, ages 6 to 17, all of whom were in their mother's custody, evaluated the children's adjustment to divorce through questionnaires given to the mother, a teacher and the child. Higher paternal involvement was generally associated with better adjustment to divorce in the children. Lawrence A. Kurdek, *Custodial Mothers' Perceptions of Visitation and Payment of Child Support by Noncustodial Fathers in Families with Low and High Levels of PresePtion Interparent Conflict*, 7 J. APPLIED DEVELOPMENTAL PSYCHOL. 307, 308, 310-14, 319-20 (1986).

n151 A study of 67 children, ages three to five, in low-conflict families found that a low frequency of visitation by the father was related to greater school disturbance problems, hyperactivity and dependency in the children, even when the mother's parenting quality was high. *HODGES, supra* note 98, at 167.

n152 In a follow-up study of 122 children of divorce two years after an initial study had been done and, on average, five and one-half years after sePtion of the parents, boys in the divorced households were found to display less appropriate behavior, less work effort and less happiness than boys from intact families. However, "it [was] apparent from Child Interview responses that divorced-group boys who maintained contact with the father performed better on several measures than those who [did] not have regular communication." John Guidubaldi & Joseph D. Perry, *Divorce and Mental Health Sequelae for Children: A Two-Year Follow-up of a Nationwide Sample*, 24 J. AM. ACAD. CHILD PSYCHIATRY 531, 532-33, 535-36 (1985). Another researcher studied 51 kids between 3 and 17 years old. The average time past parental sePtion was 140 days. The researcher concluded that the greater the amount of time lost with the father (pre-sePtion versus post-sePtion), the more problems occurred in areas of aggression, cognitive disability, inhibition and overall severity of maladjustment. The relationship between the amount of lost contact with the father and these effects was greater for older children, but it was present in all age groups studied. *HODGES, supra* note 98 at 168.

n153 *See, e.g.*, Sanford H. Braver et al., *supra* note 103, at 448 (stating that several researchers have "noted that children often desire or fantasize about frequent interactions with" absent non-custodial parents); Judith S. Wallerstein, *Children of Divorce: Preliminary Report of a Ten-Year Follow-up of Older Children and Adolescents*, 24 J. AM. ACAD. CHILD PSYCHIATRY 545, 547 (1985) (noting surprise more than five years after divorce "at the intensity of the longing for the absent or erratically visiting parent").

n154 Joan B. Kelly & Judith S. Wallerstein, *Part-Time Parent, Part-Time Child: Visiting After Divorce*, 6 J. CLINICAL CHILD PSYCHOL. 51, 52 (1977). This observation was made after a study of 131 children in 60 divorced families. The authors reported:

> Visiting on alternate weekends is a pattern accepted and promoted by the courts and society as a "reasonable visitation." Yet the children clearly said it was not enough. Further reflection forces one to the conclusion that twice a month is hardly adequate contact to nourish and make gratifying a relationship, particularly when a child is young, and where both child and non-custodial parent wish to continue what they have established . . . .

Id.

n155 *HODGES, supra* note 98, at 167.

n156 Kurtz, *supra* note 109, at 560.

n157 Joan B. Kelly, *Longer-Term Adjustment in Children of Divorce: Converging Findings and Implications for Practice*, 2 J. FAM. PSYCHOL., Dec. 1988, at 119, 127. Some studies have also suggested that children who live with their same-sex parent may tend to be better adjusted than those who live with their opposite-sex parent. ROBERT E. EMERY, MARRIAGE, DIVORCE AND CHILDREN'S ADJUSTMENT 85-85 (1988). As Professor Emery notes, however, this does not necessarily mean that boys should generally be reared by their fathers and girls by their mothers: other factors, particularly the quality of the parent-child relationships in a given case, are likely to be of even greater significance. *Id.*

n158 Joyce A. Arditti & Timothy Z. Keith, *Visitation Frequency, Child Support Payment, and the Father-Child Relationship Postdivorce*, 55 J. MARRIAGE & FAM., Aug. 1993, at 699, 706. The study found that the strongest direct influence on visitation quality was frequency of visitation. It also found that the only other significant influence on visitation was the relationship between the parents: the better the father's relationship with the mother, the higher the quality of his visits. *Id.*

n159 *Id.* at 702-03.

n160 *HODGES, supra* note 98, at 167.

N161 Frank F. Furstenberg, Jr., et al., *supra* note 102, at 695 (stating that frequency of visitation showed no consistent influence on available measures of child well-being); Hess & Camara, *supra* note 100, at 94 (stating that quality of child's relationship with father associated with duration of visits but not with frequency); Mary Beth Isaacs, *supra* note 102, at 254-55 (frequency of visitation was not predictive of child adjustment in first and third years after sePtion; better regularity of visitation was associated with better social competence by third year); Valarie King, *supra* note 102, at 87 (frequency of visitation not associated with various measures of child behavior); Amanda McCombs Thomas & Rex Forehand, *supra* note 101, at 134 (frequency of visitation not significantly correlated with adolescent adjustment).

n162 *HODGES, supra* note 98, at 169 (stating that child's adjustment unrelated to frequency of visitation, but related to time spent alone with non-custodial parent). Commenting on this finding, Professor Hodges noted: "Visitation duration that is shared with the parent's date or cohabiting partner may not be as important as exclusive visitation time. Given the tendency for noncustodial parents to share visitation with live-in boyfriends or girlfriends, this information is important to share with parents." *Id.*

n163 By limiting this discussion to the commission of abuse by fathers, we do not suggest that acts of physical abuse are never committed by women. However, the commission of acts of abuse by men is far more common. Julie Kunce Field, *Domestic Abuse and Torts, in* PRACTITIONER'S GUIDE, *supra* note 98 § 15.1, at 15-1. Because of this, we have not located any social science studies offering data regarding the effects on children of visitation by women who have committed acts of physical abuse on their spouses or children. Therefore, we have limited our discussion to the more typical situation, for which some research information is available. For a general discussion of domestic abuse, see PRACTITIONER'S GUIDE, *supra*, §§ 15.1-15.9.

n164 Most research has suggested that predictable and frequent contact with the non-custodial parent is beneficial except when the father is very poorly adjusted or extremely immature. *Kelly, supra* note 157, at 127 (summarizing several prior studies). *See also* Janet R. Johnston et al., *Ongoing Postdivorce Conflict: Effects on Children of Joint Custody and Frequent Access*, 59 AM. J. ORTHOPSYCHIATRY, Oct. 1989, at 576, 577

("Longitudinal research indicates that frequent visiting is beneficial only in the absence of sustained parental hostility and where the noncustodial parent is not emotionally disturbed."); Kenneth Kressel, *Parental Conflict and the Adjustment of Children in Divorce: Clinical and Research Implications*, 2 J. FAM. PSYCHOL., Dec. 1988, at 145, 146-47 (suggesting that in some cases with dysfunctional fathers the issue is not how to increase contact with them but how to minimize damage being done to children).

n165 Johnston et al., *supra* note 164, at 583. The authors cautioned, however, that these patterns of access and conflict, though apparently of significance, explained less than one-fifth of the variance in the children's disturbed behavior. The most important single factors influencing the child's welfare were the parents' psychological functioning and the quality of the parent-child relationship. *Id.* at 590. Thus, efforts to strengthen each parent's psychological functioning and ability to relate well to the child may help offset frequent visitation even in a high-conflict family. The authors also noted that they had not evaluated the extent to which custody arrangements may have disrupted the child's wider support system, including school and friends, and that children vary greatly in their coping responses. *Id.*

n166 Field, *supra* note 163, § 15.5. "There is a growing national awareness that children who witness or experience domestic violence suffer deep and profound harm." *Opinion of the Justices to the Senate, 691 N.E.2d 911, 914 (Mass. 1998).*

n167 *KAN. STAT. ANN. § 60-1620* (Supp. 1997). This applies to any crime specified in articles 34, 35 or 36 of Chapter 21 of *Kansas Statutes Annotated*.

n168 NATIONAL COUNCIL OF JUVENILE & FAMILY COURT JUDGES, FAMILY VIOLENCE: A MODEL STATE CODE § 401 (1994). The Massachusettes Supreme Court has determined that a legislatively established, rebuttable presumption against custody awards to someone who has committed abuse would be held constitutional against a due process challenge. *Opinion of the Justices to the Senate, 691 N.E.2d 911.*

n169 With respect to spousal abuse, the *Shawnee County Guidelines* provide:

> Witnessing spousal abuse has long-term, emotionally detrimental effects on children. Furthermore, a person who loses control and acts impulsively with a spouse may be capable of doing so with children as well. Depending on the nature of the spousal abuse and when it occurred, the court may require an abusive spouse to successfully complete appropriate counseling before commencement of unsupervised visitation.

PRACTITIONER'S GUIDE, *supra* note 98, app. B, at b39. With respect to child abuse, the *Shawnee County Guidelines* provide:

> When child abuse has been established and a continuing danger is shown to exist, the court generally will cease all visitation or allow it only under supervision, depending on the circumstances. Because allegations of child abuse can cause trauma to the child and damage relationships, the court deals harshly with false allegations.

Id. Note that, as discussed *infra* in text at notes 172 to 173, there are assumptions based on psychological research implicit in these guidelines.

n170 Even when parties would like to provide that information, it is likely that in many, if not most, cases, neither party can afford the fees of an expert witness in addition to lawyer fees, other litigation costs and the expense of ordinary living.

n171 The judicial author of this article was appointed to the bench in 1993 at the age of 37. At that time, he was single and had no children. Although he had handled contested divorce cases as a lawyer, he had specifically excluded child custody disputes from his practice for personal reasons.

n172 *KAN. STAT. ANN. § 60-1610(a)(2)(B)* (Supp. 1997).

n173 PRACTITIONER'S GUIDE, *supra* note 98 app. A, at a7; *id.*, app. B, at b32-b35.

n174 *Id.*, app. B, at b33.

n175 Michael J. Saks, *Judicial Attention to the Way the World Works*, *75 IOWA L. REV. 1011 (1990)*. The authors of this article find Professor Saks' work highly persuasive, but even he does not claim that it "is the definitive word on the subject." *Id. at 1031* (stating theories developed in his article are important and provide coherent advice to courts, but not necessarily the definitive word). Our article is primarily about how to approach custodial parent move-away cases, not the role of social science research in the law. To address the issues of move-away cases, it became necessary to address the social science research in detail because some courts and some scholars have begun to suggest that a presumption in favor of allowing such moves is supported by the lack of social science research data linking frequency of visitation to benefits to the child. As demonstrated in this article, we disagree with that approach, in part based upon a more complete view of the social science literature. Because of the close interrelationship between that literature and the decisions that must be made in contested custody cases, we also address the ways in which courts can and should use social science research information in these cases. We do this by adoption of the general approach of Professor Saks, whose approach seems appropriate on many levels. We caution, however, that we have not turned our research focus full-square on a critical analysis of this approach and, therefore, our adoption of it must be considered tentative, although we believe that it is the most sensible approach in this area that we have reviewed. Because child custody proceedings are tried only to the court and not to a jury, we express no opinion as to the proper application of the Saks approach in a jury case. Such an application is simply beyond the scope of this article. For other discussions of the use of social science research in the courts, in addition to the works of professors Monahan and Walker cited below, see Peggy C. Davis, *"There Is a Book Out . . .": An Analysis of Judicial Absorption of Legislative Facts*, *100 HARV. L. REV. 1539 (1987);* Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, *1987 WIS. L. REV. 107;* David L. Chambers, *The Abuses of Social Science: A Response to Fineman and Opie*, *1987 WIS. L. REV. 159;* and Martha L. Fineman, *A Reply to David Chambers*, *1987 WIS. L. REV. 165*.

n176 John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, *134 U. PA. L. REV. 477 (1986);* Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, *73 VA. L. REV. 559 (1987)* [hereinafter *Social Frameworks*]; Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, *76 CAL. L. REV. 877 (1988).*

n177 Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, *55 HARV. L. REV. 364 (1942);* KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT §§ 15.03, 15.05, 15.07, 15.09-15.10 (1972).

n178 JOHN WILLIAM STRONG, McCORMICK ON EVIDENCE § 331 (1992). *See also* KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §§ 10.5-10.6 (1993).

n179 Saks, *supra* note 175, at 1018-19.

n180 *Id.* at 1020.

n181 *Id.*

n182 *Id.*

n183 *Social Frameworks, supra* note 176, at 567. Walker and Monahan note the case of *State v. Myers, 359 N.W.2d 604 (Minn. 1984),* in which the court allowed the prosecution to present a social science expert witness' testimony that certain behavioral traits were "typically" observed in abused children. The Minnesota Supreme Court affirmed the conviction and upheld the use of such testimony, stating that "background data providing a relevant insight into the puzzling aspects of the child's conduct and demeanor which the jury could not otherwise bring to its evaluation of her credibility is helpful and appropriate." *Myers, 359 N.W.2d at 610.* Walker and Monahan note a similar case from Kansas, *State v. Marks, 647 P.2d 1292, 1299 (Kan. 1982)* ("Qualified expert . . . testimony regarding the existence of rape trauma syndrome is relevant and admissible in a case . . . where the defense is consent."). *Social Frameworks, supra* note 176, at 567 n.22. Another social framework information use is the presentation of common behaviors of battered women as a group when presented to demonstrate that an individual woman may have been battered. *Id.* at 569. *See also State v. Hodges, 716 P.2d 563 (Kan. 1986)* (allowing expert testimony into criminal jury trial to show why many women do not leave the batterer, which is said to be beyond the understanding of most jurors).

n184 Saks, *supra* note 175, at 1021.

n185 *Id.*

n186 *Id.* at 1022-24.

n187 *Id.*

n188 Monahan and Walker note that the New Jersey Supreme Court specifically approved the use of social science research about battered women to give the jury an appropriate social framework. *Social Frameworks, supra* note 176 at 580 (citing *State v. Kelly, 478 A.2d 364, 378 (N.J. 1984)* (allowing into evidence social science research regarding "an area where the purported common knowledge of the jury may be very much mistaken, an area where jurors' logic, drawn from their own experience, may lead to a wholly incorrect conclusion, an area where expert knowledge would enable the jurors to disregard their prior conclusions as being common myths rather than common knowledge.")). *See also Hodges, 716 P.2d 563* (allowing expert testimony into criminal jury trial to show why many women do not leave the batterer, which is said to be beyond the understanding of most jurors).

n189 *Social Frameworks, supra* note 176, at 570.

n190 *Id.* at 583-84.

n191 *Id.* at 585-88.

n192 *Id.* at 588-91; Saks, *supra* note 175, at 1022-23, 1024-25, 1029.

n193 Saks, *supra* note 175, at 1022-23, 1024-25, 1029.

n194 *Id.* at 1022-23, 1025-26, 1029.

n195 *Id.* at 1025-26, 1029.

n196 *In re Marriage of Ross, 783 P.2d 331, 338 (Kan. 1989)* (citing JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 17-20 (1973) and JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD (1979) for information about the child's psychological relationship with his or her parents and the danger of allowing replacement of presumed father who has relationship with child with biological father who does not). *See also* ***In re A.F., 767 P.2d 846, 849 (Kan. Ct. App. 1989)*** (citing SELMA FRAIBERG, EVERY CHILD'S BIRTHRIGHT: IN DEFENSE OF MOTHERING (1977); GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD, *supra*).

n197 In Johnson County, Kansas, where the authors work, domestic cases are randomly assigned along with other civil cases to one of eight judges. Thus, about one-half of each judge's docket consists of domestic matters. In Sedgwick and Shawnee counties in Kansas, domestic cases are assigned to judges who hear only family law cases. In less urban counties, judges routinely hear all types of cases, but it is a fact of life that divorce and child custody cases occur on a recurring basis in all jurisdictions. There is always background information that can be learned over time.

n198 Recent presentations have included ones from psychologists about false memory syndrome and presentations about domestic violence. An institute for state court judges associated with the University of Kansas now presents a two-week seminar on basic economic theory. Its most recent brochure indicates that three members of the Kansas Supreme Court and more than 25 other Kansas state judges have attended the program, along with judges from many other states. If judges were not expected to use background knowledge from the social sciences in formulating legal rules, this extensive use of the time of judges, who are public officials attending on public time, would be without a valid purpose.

n199 *See* Stephen R. Tatum, *On Starting a Domestic Violence Court*, 34 COURT REV., Summer 1997, at 14, 14.

n200 As Professor Saks argues:

> The alternative to an explicit inquiry into the nature of things is to ignore information necessary to reaching a rational judgment or to assume without thought that one knows the answer. The worst kind of judicial thoughtlessness would be to arrive at an answer without appreciating that there is a question.

Saks, *supra* note 175, at 1015. He also states, "Courts, as so often is the case, cannot escape their duty to inquire, to learn, and to think." *Id.* at 1016 n.20.

n201 *Id.* at 1029.

n202 The advisory committee notes quote extensively from Professor Kenneth Culp Davis. After a quotation from another professor about the ways in which a judge may find the law of another state, *i.e.*, by consulting briefs of the parties or making an independent search of his or her own, the notes state:

> This is the view which should govern judicial access to legislative facts. It renders inappropriate any limitation in the form of indisputability, any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level.

FED. R. EVID. 201 advisory committee's notes. *See also generally* CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., 21 FEDERAL PRACTICE AND PROCEDURE §§ 5101-03 (1977 & Supp. 1997).

n203 Kansas was the first state to adopt the Uniform Rules of Evidence and the only one to adopt them in their entirety. Only three other states, California, New Jersey, and Utah, adopted a majority of that code. Barbara C. Salken, *To Codify or Not to Codify -- That Is the Question: A Study of New York's Efforts to Enact an Evidence Code*, *58 BROOKLYN L. REV. 641, 655-56 (1992).* Utah subsequently enacted a new evidence code based on the federal rules, leaving only three states still relying at least in part on the original Uniform Rules. *Id. at 656 n.102. See also* Spencer A. Gard, *Kansas Law and the New Uniform Rules of Evidence*, *2 U. KAN. L. REV. 333, 333-35 (1954)* (summarizing process of drafting of the Uniform Rules of Evidence).

n204 In comments written immediately after adoption of the Kansas statute, commentators noted that both trial courts and appellate judges regularly took notice "of facts which are disputable and which are to be found in books, treatises, magazine articles and the like" in finding legislative facts. KAN. CIV. PROC. CODE ANN. § 60-409 cmt. 409.2 at 208-09 (West 1965). The comments noted that courts use such "'facts' not in evidence for the purpose of deciding what the law should be. To this kind of reasoning, or problem, the rules on judicial notice [in § 60-409] do not address themselves." *Id.* at 209.

n205 *In re Marriage of Ross, 783 P.2d 331, 338 (Kan. 1989).*

n206 BARIS & GARRITY, *supra* note 98, at 8, 16-18; *HODGES, supra* note 98, at 174-75.

n207 *Compare HODGES, supra* note 98, at 175-76 (suggesting that "some instability to the child may be worth the trade-off" in supporting bonding between the child and the non-custodial parent in this age range), *with* BARIS & GARRITY, *supra* note 98, at 16-18 (recommending against overnight visitations, even in long distance situations, for this age group because of lack of data showing effects on very young children).

n208 Saks, *supra* note 175, at 1020.

n209 *Id.*

n210 *Id.*

n211 *KAN. STAT. ANN. § 60-252* (Supp. 1997). *See also generally* PRACTITIONER'S GUIDE, *supra* note 98 § 21.22. In some cases, a party may be required to file such a motion or lose the ability to challenge the adequacy of the trial court's findings on appeal. *Id.*

n212 *KAN. STAT. ANN. § 60-1610(a)(3)* (Supp. 1997).

n213 *Anhalt v. Fesler, 636 P.2d 224, 226 (Kan. Ct. App. 1981)* ("The same considerations which determine the custody of children are applied to the question of removal of children from the state. Of primary concern are the best interests and welfare of the children; all other issues are subordinate.").

n214 *Carlson v. Carlson, 661 P.2d 833, 834-35 (Kan. Ct. App. 1983).*

n215 *899 P.2d 471 (Kan. 1995).*

n216 Citing *Bradley*, professors Bowerstein and Bruch listed Kansas as one of the states without "clearly articulated doctrines" for handling relocation cases. Bruch & Bowermaster, *supra* note 4, at 302.

n217 *Bradley, 899 P.2d at 474.* Section 60-1610(a)(3)(A) states:

> If the parties have a written agreement concerning the custody or residency of their minor child, it is presumed that the agreement is in the best interests of the child. This presumption may be overcome and the court may make a different order if the court makes specific findings of fact stating why the agreement is not in the best interests of the child.

KAN. STAT. ANN. § 60-1610(a)(3)(A) (Supp. 1997).

n218 *Id.* (quoting *KAN. STAT. ANN. § 60-1610(a)(2)(A)* (Supp. 1997)).

n219 *Id. at 475* (citing *KAN. STAT. ANN. § 60-1620(c)* (Supp. 1997)).

n220 *Id.* Under the abuse of discretion standard, the appellate court was required only to find that a reasonable person *could* have agreed with the trial court in this finding.

n221 *KAN. STAT. ANN. § 60-1610(a)(3)*.

n222 *Anhalt v. Fesler, 636 P.2d 224, 225 (Kan. Ct. App. 1981).*

n223 *KAN. STAT. ANN. § 60-1620*.

n224 *Id.* § 60-1610(a)(3)(B)(v).

n225 *See infra* notes 243 to 245 and accompanying text.

n226 *KAN. STAT. ANN. § 60-1610(a)(3)(B)(vi)*.

n227 *See* Bruch & Bowermaster, *supra* note 4, at 268 (arguing that "viewed strictly from the child's vantage point, it seems clear that a parent's motives for moving are generally irrelevant" as a rationale not to scrutinize even selfish or foolish reasons for relocation).

n228 *KAN. STAT. ANN. § 60-1610(a)(3)(B)*.

n229 These factors include:

> (i) The length of time that the child has been under the actual care and control of any person other than a parent and the circumstances relating thereto; (ii) the desires of the child's parents as to custody or residency; (iii) the desires of the child as to the child's custody or residency; (iv) the interaction and interrelationship of the child with parents, siblings and any other person who may significantly affect the child's best interests; (v) the child's adjustment to the child's home, school and community; (vi) the willingness and ability of each parent to respect and appreciate the bond between the child and the other parent and to allow for a continuing relationship between the child and the other parent; and (vii) evidence of spousal abuse.

Id.

n230 *Yannas v. Frondistou-Yannas, 481 N.E.2d 1153, 1158 (Mass. 1985).*

n231 *Id.* The Nevada Supreme Court has gone further to announce sub-factors that may be used to help determine the potential for improvement in the child's life from a move with the custodial parent. *Schwartz v. Schwartz, 812 P.2d 1268, 1271 (Nev. 1991).* These factors are listed *supra* note 43.

n232 *Yannas, 481 N.E.2d at 1158.*

n233 *Id.*

n234 *Pollock v. Pollock, 889 P.2d 633, 636 (Ariz. Ct. App. 1995).*

n235 *Yannas, 481 N.E.2d at 1158.*

n236 *Id.*

n237 *Schwartz v. Schwartz, 812 P.2d 1268, 1271 (Nev. 1991).*

n238 *Love v. Love, 851 P.2d 1283, 1288 (Wyo. 1993).*

n239 Bruch & Bowermaster, *supra* note 4; Janet M. Bowermaster, *Sympathizing with Solomon: Choosing Between Parents in a Mobile Society*, *31 U. LOUISVILLE J. FAM. L. 791 (1993)* [hereinafter *Sympathizing with Solomon*]; Janet M. Bowermaster, *Relocation Custody Disputes Involving Domestic Violence*, *46 U. KAN. L. REV. 433 (1998)* [hereinafter *Relocation Custody*]. We express our appreciation to Professor Bowermaster and the staff of the *University of Kansas Law Review* for making drafts of her latest article available to us prior to publication. For other articles discussing custodial parent move-away cases, see Sondra Miler, *Whatever Happened to the 'Best Interests' Analysis in New York Relocation Cases?*, *15 PACE L. REV. 339 (1995);* Merril Sobie, *Whatever Happened to the 'Best Interests' Analysis in New York Relocation Cases? A Response*, *15 PACE L. REV. 685 (1995);* Paula M. Raines, *Joint Custody and the Right to Travel: Legal and Psychological Implications*, *24 J. FAM. L. 625* (1985-86); and Katherine C. Sheehan, *Post-Divorce Child Custody and Family Relocation*, *9 HARV. WOMEN'S L.J. 135 (1986).*

n240 We do not respond to every argument from Bowermaster's three articles. We do respond to those raised in her 1998 article and some from the earlier articles that appear to have particular appeal or strength.

n241 *Relocation Custody, supra* note 239, at 444-45.

n242 As Professor Bowermaster puts it:

> If the openly articulated rationales do not adequately support geographic restrictions on custodial parents, deeper unspoken influences must be at work. At least one of these influences is the cultural residue of traditional marriage laws in which unquestioned deference to the husband's choice of domicile was the law of the land.

Id. at 447.

n243 *Id.* at 445-46.

n244 Section 60-1620 requires 21 days notice if a child is to be moved out of state for more than 90 days. It also provides that a move out of state of more than 90 days "may be considered a material change of circumstances" justifying a change of custody. *KAN. STAT. ANN. § 60-1620* (Supp. 1997).

n245 *Id.* § 60-1610(a)(3)(B)(v) (Supp. 1997).

n246 *Relocation Custody, supra* note 239, at 446-47.

n247 *Id.* at 446.

n248 *Id.*

n249 Bowermaster stated:

> Why, then, are custodial parents expected to sacrifice opportunities to return to their families of origin, possibilities for better employment, or even the chance to remarry and live with their new spouses while courts do not ask noncustodial parents to make similar sacrifices? . . . Custodial parents are required to make all the sacrifices because it is only the custodial parents over whom the courts have any leverage.

Sympathizing with Solomon, supra note 239, at 857.

n250 In theory, a court could condition the non-custodial parent's visitation rights on his not moving. But would it be in the child's best interests to *forbid* visitation altogether just because it will now be less frequent that the optimal level? In any case in which the father is neither abusive nor emotionally disturbed, the answer would clearly be "no."

n251 Indirect civil contempt proceedings are initiated when one of the parties files a motion seeking an order requiring the other party to appear to show cause why he or she should not be held in contempt of court for violation of a court order. *E.g. KAN. STAT. ANN. § 20-1204a* (Supp. 1997). They are not initiated by the court or the state.

n252 No data have been located indicating how often custodial parents who are denied permission to move with the children choose to stay as compared to how often they choose to move without retaining primary custody. We have seen both situations occur in contested cases in Johnson County, Kansas, and have no reliable way to gauge which is more common. We suspect that it is more common that the custodial parent who is denied permission to move stays and retains custody.

n253 *Relocation Custody, supra* note 239, at 447-48.

n254 *Id.* at 448.

n255 *See supra* notes 158 to 162 and accompanying text.

n256 *See supra* notes 109 to 162 and accompanying text.

n257 At that time, she noted that the reasoning underlying protection of the non-custodial parent's relationship with the child began "with the proposition that whenever possible, the best interests of a child lie in being

nurtured and guided by both natural parents after divorce. This premise . . . was derived from the results of social science research . . . ." *Sympathizing with Solomon, supra* note 239, at 804 (citations omitted). Later she said, "Although research has yielded mixed results on this issue [whether frequent and regular visitation by the non-custodial parent is necessary], it is generally conceded that continued contact with both parents after divorce enhances a child's well-being." *Id.* at 834. She also noted that most children generally expressed a desire to spend more time with their non-custodial parents. *Id.* at 839.

n258 Bruch & Bowermaster, *supra* note 4, at 267-68.

n259 *Id.* at 248.

n260 Either party may or may not be represented by an attorney at the time the issue arises. Some reasonable time to obtain counsel would need to be provided. If a home study by court services staff is desired, that could take several weeks in the ordinary course of events.

n261 The placement of reasonable time limits on the presentations of evidence by each party at trial has been approved by courts elsewhere, although no case law authority has been found in Kansas. *See Johnson v. Ashby, 808 F.2d 676, 678 (8th Cir. 1987)*(affirming trial court discretion to adopt reasonable time limits for trial presentations); NATIONAL CENTER FOR STATE COURTS, JURY TRIAL INNOVATIONS 91-94 (G. Thomas Munsterman, et al. eds., 1997) (discussing pros and cons of time limits, along with bibliography). *See also KAN. STAT. ANN. § 60-216(b)(8)* and (c)(7) (authorizing trial court orders necessary for "proper management of the action" and to "aid in the disposition of the action"); *FED. R. CIV. P. 16(c)(15)* (specific authorization, adopted in 1993, for orders "establishing a reasonable limit on the time allowed for presenting evidence").

n262 *Relocation Custody, supra* note 239, at 460-62.

n263 *Id.* at 462.

n264 *KAN. STAT. ANN. § 60-1610(a)(3)(B)(vii)* (Supp. 1997).