

CHILDREN’S RIGHTS AS RELATIONAL RIGHTS: THE CASE OF RELOCATION

RUTH ZAFRAN*

Prologue.....	164
I. Introduction	165
II. Mapping the Parties’ Rights and Interests	168
A. The Custodial Parent Who Wants to Relocate.....	168
B. The Non-Custodial Parent Who Wants to Keep His Children in the United States.....	169
C. The Children	170
III. Current Statutory and Case Law	171
IV. Keeping Children in Mind.....	177
A. Does the “Best Interests” Test Serve the Best Interests of Children? The Need to Reconsider the Regulation of Relocation.....	177
B. “From Father’s Property to Children’s Rights”	179
C. Rights and Children’s Rights in the Family Context	184
1. In General	184
2. Criticisms and Problems of the Rights Model.....	185
3. Criticisms and Problems with the Liberal Rights Model in the Context of Parent-Child Relationships	188
D. The Relational Model	192
1. General Characteristics.....	192
2. Children’s Rights as Relational Rights.....	194
V. Legal Consequences	198
A. The Test Case in Light of the Relational Perspective	198
1. Setting the Stage	198
2. The Custodial Parent	199
3. The Non-Custodial Parent.....	200

* Assistant Professor, Radzyner School of Law, Interdisciplinary Center Herzliya. I am grateful to Amnon Reichman, Joel Linsider, Ayelet Blecher-Prigat and Tamar Morag for valuable comments on a previous draft. I am also grateful to Dasi Anderman, Yaniv Cohen, Gilad Ronen, and Omri Sarig for superb research assistance.

4. The Children	200
B. Legal Implications of the Relational Model.....	204
1. Agreed upon Relocation: The Preferred Alternative	204
2. Decision by the Court: A Three-Prong Test.....	205
3. Decisional Criteria.....	206
VI. Between Children’s Rights and Women’s Rights: The Limits of the Relational Model in the Relocation Context.....	212
VII. Conclusion	216

PROLOGUE

Imagine the following scenario: John, a citizen and resident of the United States, travels to Paris to complete his doctoral studies in history at the Sorbonne. There he meets Léa, a local student who is about to complete her doctorate in art. They fall in love and enter into a romantic relationship that goes on for three years. At the conclusion of his studies, and before his return to Washington D.C. (where a lectureship awaits him at a leading university), John proposes to Léa, and she, as madly in love as he is, replies “I do.”

After she quits her job at a prestigious museum, Léa joins John in Washington. They get married, establish their joint household, and, after a few years, they have a son and a daughter. As the years pass, Léa—a loving and devoted mother—cannot find an art-related job. She works as a French teacher but is not professionally fulfilled. John, for his part, is doing well professionally and is delighted to be a father. He and Léa share childcare responsibilities.

Seven years into their marriage, following escalating disputes and fights, John and Léa decide to separate. They enter into a separation agreement that reflects their understanding to live near each other and to divide childcare between them. According to the agreement, Léa will be the primary caregiver and the children will spend most of the week with her, but John will retain a significant role in caring for them. The children will split their vacation time between the parents, and Léa will be allowed to take the children to France for three weeks every summer and for one week every winter.

The parties carry out the terms of the agreement, each of them serving as a devoted and loving parent. After two years, however, Léa informs John that she wants to return to Paris with their children. She tells him that for the past year, she has been in a relationship with a French man who, during her last vacation in Paris, raised the idea of marriage. She confesses that she wants to return “home” to her previous job and establish a new family near her family and old friends.

John, emotionally devastated by Léa's news, refuses to accept the possibility of her leaving D.C. with their children. He opposes the relocation petition submitted by Léa to the court and requests that the court grant him sole or primary physical custody of the children. A professional opinion submitted to the court asserts that both parents have good relations with the children; that the children are attached to both parents and both serve as significant figures for them; and that the children want to remain in permanent contact with both parents, but have a slight preference for remaining in the D.C. area, in familiar surroundings near friends and close family. How would a court of law rule on the petition?

I. INTRODUCTION

A petition for relocation of children when parents separate is among the most complex matters that can come before a judge.¹ Whichever way the decision goes, it determines the fate of the family. Granting the mother's petition to leave for another country with her children necessarily implies an end to the father's weekly physical contact with them. Conversely, denial of the petition means severed relations between the mother and the children, should the mother carry out her intention to move. Alternatively, if she remains with her children, this may entail separation from her new partner, her desired job, and her extended family. The dilemma becomes even sharper when mother and father are equally capable parents and the children enjoy warm, close relationships with both.

The case I want to examine is one whose facts, set forth in the Prologue, poses the relocation dilemma in all of its force. The primary caregiver—the mother—wants to relocate with her children, who are in her physical custody, to another country. The father objects. As a practical matter, his objection implies a request to transfer the children to his care. The generally accepted view is that the father (the non-custodial parent) cannot prevent the mother from leaving the country; the most he can do, if anything, is prevent her from taking the children with her.² In order for his position to be accepted, he must prove, at the least, that the mother's request to leave with the children is unjustified or harmful, and that he is fit to serve as a custodial parent. He bears a heavy burden of justifying the change of custody.³

1. See *Tropea v. Tropea*, 665 N.E.2d 145, 148 (N.Y. 1996) (explaining that the court must consider the parents' conflicting wishes, as well as the child's best interests, all of which may be irreconcilable).

2. See, e.g., WIS. STAT. § 767.481 (2008) (providing that the non-custodial parent seeking to prevent relocation may file a petition, motion, or order which supports his objections to the removal of the children).

3. See *Burgess v. Burgess*, 913 P.2d 473, 476 (Cal. 1996) (placing the burden on the objecting parent to overcome the custodial parent's presumptive right to relocate).

The case described in the Prologue raises the question of international relocation, a factor that can potentially affect a court's decision. On the one hand, the difference between interstate relocation and trans-Atlantic relocation is essentially a technical one. The latter, to be sure, will typically involve longer distances, but that is not necessarily the case. A move from D.C. to France, for example, is effectively the same, with regard to physical distance, as a move from Miami to Seattle. In both cases (and others within the United States), the resulting geographic distance between the parties is so substantial as to significantly diminish the prospect of regular face to face meetings. Yet relocation to another country may entail not only geographic distance, but cultural differences. A move from California to Massachusetts is not conceptually the same as a move from the United States to France, Spain, or beyond. A large part of academic literature and court cases are directed toward relocation within the United States (and sometimes even toward intrastate relocation). The discussion here will take account of that existing literature while drawing the distinctions needed when the relocation is international.⁴

Over the past years, the issue of relocation has drawn considerable attention, as greater mobility has been accompanied by a corresponding increase in the number of petitions for relocation. The complexity of the competing interests implicated in these petitions places a heavy burden on legislatures, judges, and other legal policy makers. Various jurisdictions have had difficulty in arriving at a coherent solution that optimally protects the rights and interests involved.

In this article, I suggest an alternative scheme for resolving these cases, one making use of a model that perceives children's rights as relational rights. This model, discussed below in detail, builds upon Martha Minow's recognition of children as rights-bearers which simultaneously calls for a

and show that relocation would be too detrimental to the child); *see also* Sanford L. Braver & Ira M. Ellman, *Relocation of Children After Divorce and Children's Best Interests: New Evidence and Legal Considerations*, 17 J. FAM. PSYCH. 206, 208 (2003).

4. An examination of international relocation cases reveals differing orientations among the courts and that there is no single analysis implemented, with some courts making little or no distinction between international and interstate relocations. *See, e.g.*, *Abargil v. Abargil*, 131 Cal. Rptr. 2d 429, 434 (Cal. Ct. App. 2003) (weighing the benefits derived from living under a mother's care against the potential danger of living in Israel, and ultimately finding that the benefits outweigh the dangers); *In re Marriage of Condon*, 73 Cal. Rptr. 2d 33, 34 (Cal. Ct. App. 1998) (allowing a mother to relocate her child to Australia since it would not adversely impact the child's best interests); *Carmcross v. O'Connell*, N.Y.S.2d 916, 916 (N.Y. App. Div. 2003) (directing that analysis in relocation cases must be considered individually, and in this case the benefit of living abroad and attending an international school while allowing for extended visitation rights with the non-custodial parent was in the child's best interest); *Osmanagic v. Osmanagic*, 872 A.2d 897, 899 (Vt. 2005) (acknowledging that while relocating to Bosnia would be difficult for the child, the destination of the relocation is not dispositive, so long as it is in the child's best interest).

new conceptualization of those rights.⁵ The traditional liberal framework construes rights primarily as separating one individual from another by granting each autonomous individual the legal power to prevent encroachments on those rights by others.⁶ The relational model, in turn, accepts the premise of the ethics of care, according to which individuals are considered to be embedded in relationships. Under this societal configuration, approaching rights as an individualistic concept becomes problematic.⁷ Rather than discrediting the concept of rights altogether (or dismissing the value of liberty and autonomy), the model of relational rights infuses the meaning (or content) of rights with the notion of responsibility towards the people with whom the rights-bearer forms care-based relationships.

Under the alternative model I propose, the child enjoys rights, but their meaning and manner of implementation differ from conventional understanding. The child's existing rights are construed to require protection of her relationships with others, and new rights are established for the purpose of doing so. Similarly, the rights are applied in a manner that recognizes responsibilities toward maintaining nurturing personal and family relationships. This article presents this alternative model and considers its rationale, as both a general matter and in the context of the doctrinal question of relocation.

Part II of the article maps out the rights and interests of the parties, the parents and children whose case is at issue in a dispute over relocation.⁸ Part III then presents existing legal doctrine, briefly surveying the treatment of relocation in legislation and case law and showing the inconsistencies in that treatment.⁹ This survey will uncover the weaknesses in some of the perspectives on the issue, especially when children—whose interests are, or should be, central—are involved. Part IV offers an alternative analysis of the issue. I will propose, in the spirit of relational theory, a model of “children's rights as relational rights” and will present a different conceptual approach to the issue, one that sets the child, her rights, and her relationships with the central figures in her life at the center of the decisional process. I will consider the justifications for adopting this model as well as its advantages, both over the current “best interests of the child” standard and over the position, which some would adopt, that the child's

5. See generally Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 24 (1986).

6. *Id.* at 15 (discussing the traditional rhetoric that recognized separate individuals, entitled to exercise rights and to be held accountable for their own actions).

7. E.g., JOAN C. TRONTO, *MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE* (1993).

8. See *infra* Part II.

9. See *infra* Part III.

rights should be construed as rights in the liberal sense of the term.¹⁰ Part V of the article will be devoted to applying the proposed approach to the relocation dispute introduced in the Prologue.¹¹ In the course of that inquiry, I will examine the relevant rights here: the right to identity and the right to meaningful family relationships. Finally, I will consider, from a gender perspective, the effect of the relational model on the situation of mothers.¹²

II. MAPPING THE PARTIES' RIGHTS AND INTERESTS

A. The Custodial Parent Who Wants to Relocate

The mother, the primary caregiver, wants to move to France with her children. She wants to return to her native land, establish a family there, and perhaps embark upon a new career.¹³ It is clear that she has the right, as a personal matter, to exercise her freedom to relocate and establish a residence outside the United States. Her right to autonomy allows her, as a matter of principle, to start a new life (or return to her prior one) in another country.¹⁴ Her right to begin a (new) family is established by her basic liberty to "write her life story," and the right to privacy and travel provide the legal basis for her to relocate.¹⁵ Her desire for professional fulfillment likewise may be legally grounded in the liberty to pursue a vocation (sometimes known as the freedom of occupation) and the right to self-realization. The mother's identity, her familial and social ties to her country of origin, and her cultural affiliation bolster her request to change her residence (and, impliedly, to take her children with her). It is clear that, as an individual, her request will be denied only on account of very weighty countervailing interests.¹⁶

Once she is involved in caring for children, however, her freedom to fulfill herself and choose her way of life ceases to be absolute. She is now

10. *See infra* Part IV.

11. *See infra* Part V.

12. *See infra* Part VI.

13. *See Braver & Ellman, supra* note 3, at 207 (developing a similar fact pattern and considering the logical options available to the judge).

14. *Cf. Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (recognizing a right of privacy in the Constitution that extends to activities in a woman's personal life).

15. *See Arthur B. LaFrance, Child Custody and Relocation: A Constitutional Perspective*, 34 U. LOUISVILLE J. FAM. L. 1, 81-96 (1996) (positing that preventing a mother from relocating interferes with the fundamental right of interstate mobility); *see also Jones v. Helms*, 452 U.S. 412, 418 (1981) (invoking the constitutionally safeguarded right to travel); *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) (stating that freedom to travel is a fundamental right); *Shapiro v. Thompson*, 394 U.S. 618, 637 (1969) (identifying the constitutional right of interstate movement).

16. *See LaFrance, supra* note 15, at 130.

bound by commitments to her children and, perhaps, even to their father, notwithstanding the end of the marital relationship. Moreover, the fact that she had signed a separation agreement, stipulating that she and the children will remain in a specified area, is at least relevant. While it is clear that a person may not bind herself into servitude—nor legally waive fundamental liberties by tying herself contractually to a given location for eighteen years without exception—it is still the case that people may exercise their autonomy by entering into agreements such as the one in here. The question, then, becomes one of balance between a parent's obligations and her freedoms.

B. The Non-Custodial Parent Who Wants to Keep His Children in the United States

From the father's perspective, the mother's emigration to France with the children would mean his extended physical separation from his children. His warm, close, intense, and almost daily contact with his children would become much more limited and rare. The geographical distance between them would limit meetings between father and children to once every few weeks at best and, perhaps, to no more than once or twice a year. From his perspective, the principal concern is the likelihood of substantial and irreversible harm to his meaningful ties with his children.¹⁷ By its nature, any relocation would entail that risk, but a trans-Atlantic relocation would not only interpose great physical distance between the father and his children, but would also entail a significant economic burden, given the travel costs associated with meeting even infrequently. Nor would virtual means of communication—telephonic or web-based—be so simple to maintain, given the time differences between the regions. The life experiences of children who have moved to another land—where they speak another language, relate to new key figures in their lives (figures unknown to their father), and assimilate into a different culture from their father's—will accentuate the physical separation and intensify the alienation between the parties.

Emigration can impair the father's parental interests—the interest in making substantive decisions regarding his children's lives and the interest in playing an active, substantial role in caring for them.¹⁸ Even though the father does not originally have primary, physical custody, his standing as

17. See, e.g., *Weiss v. Weiss*, 418 N.E.2d 377, 380 (N.Y. 1981) (recognizing that relocation can upset the quality of a filial relationship); *Lavane v. Lavane*, 608 N.Y.S.2d 475, 476 (N.Y. App. Div. 1994) (permitting the mother to relocate where the father did not spend significant time with his children before the move).

18. See *Tropea v. Tropea*, 665 N.E.2d 145, 150 (N.Y. 1996) (acknowledging that separating a non-custodial parent from his or her child may deprive both of meaningful and frequent contact and may have a devastating effect on their relationship).

joint legal guardian enables him (or, at least, provides a basis for arguing that he should be able) to participate in deciding the children's place of residence and the country in which they will live.¹⁹ In the case at issue, moreover, the father is not only a joint legal guardian, he is also an active and meaningful participant in his children's lives.

The parents have opposing views regarding the relocation of their children and each will likely advance a set of arguments to support his or her position. Each can cite interests (and, perhaps, legal rights) on which his or her claim is grounded. Moreover, as legal guardians of their children, the parents are supposed to represent the children and advance the relevant arguments in their children's names. It is unlikely, in a typical relocation dispute, that the parents will argue that the children would be better off staying (or leaving) with the other parent. It is usually helpful to approach the relocation dispute by recognizing the independent perspective of the child.

C. The Children

An array of arguments for and against the relocation petition can be advanced in the name of the children. First, and among the most important arguments in support of relocation from the children's perspective, is that allowing them to move with their mother would maintain continuity in the care provided by the primary custodial parent. In support of her petition, therefore, the mother would cite the importance of allowing the children to remain with her as primary caregiver. She could also cite the benefits inherent in the prospect of living within a "whole" family. That family could offer, in addition to her devoted mothering, the presence of her new partner and, perhaps, of the additional children she might bear with him as siblings for the children whose relocation is being sought. She could refer to the relationships already in place between the children and their extended family in France (whom they have come to know through their visits over the years) and to the children becoming part of the cultural heritage she has imparted to them ever since their birth.

Arguing against the petition is the trauma the children would endure in being separated from their father. In addition to leaving a loving, beneficent, and significantly involved parent they would be removed from their familiar surroundings, including their school, friends, extended family, and the range of activities in which they had taken part.²⁰ In

19. See Paula Raines, *Joint Custody and the Right to Travel: Legal and Psychological Implications*, 24 J. FAM. L. 625, 625 (1986) (distinguishing between joint physical custody and joint legal custody, and noting that a joint legal custodian retains full parental responsibilities, and thus has the right to confer with the other parent on matters affecting their child's welfare).

20. See generally Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L.

opposition to the mother's petition, the father could cite this severance of relations and its destructive potential. These arguments, like those of the mother in support of the request, would be advanced in the name of the children, represented by devoted parents.

The children themselves might want to move overseas, might object to the move, might be torn between the two alternatives, or might be indifferent to them. They might be too young to express their preferences or even to crystallize them clearly. In any case, the grant or denial of the petition would profoundly change the children's lives. Because of the decision's importance to the children, and because they are innocent victims of circumstance, I will argue in this article that children must be at the center of any decision regarding a change in residence.²¹

III. CURRENT STATUTORY AND CASE LAW

Like any area of family law, relocation is a matter to be dealt with by the states. A review of legislation and case law shows a lack of uniformity within the states regarding all issues pertaining to relocation;²² decisional trends vary over time and the differences among the approaches are significant.²³ In some jurisdictions, clear decisional guidelines have taken

REV. 833 (2007) (citing the importance of extra-familial context).

21. See *Tropea*, 665 N.E.2d at 150 (indicating that the court's focus should be on the rights and needs of children, as they have no say in the divorce and are not prepared to handle the stress associated with their changing family dynamic).

22. E.g., *Gruber v. Gruber*, 583 A.2d 434, 437 (Pa. Super. Ct. 1990) (addressing the courts' failure to reach a uniform approach to deciding when a custodial parent may relocate despite the non-custodial parent's objections, and denouncing the lack of guidance given to trial courts on how to resolve critical issues that arise in relocation cases).

23. See Theresa Glennon, *Divided Parents, Shared Children – Conflicting Approaches to Relocation Disputes in the USA*, 4 UTRECHT L. REV. 55, 57 (2008) (noting that relocation was favored in the 1990s and 2000s, but that the trend now is moving away from a presumptive right to relocate towards requiring the custodial parent to prove a move is in the child's best interests) [Glennon, *Divided Parents*]; Raines, *supra* note 19, at 631-32 (exemplifying the failure of states to develop a unanimous approach by signaling to certain states' liberal policies which allow a parent to remove a child, and to other states' efforts to prevent mobility by implementing financial penalties, for example); Kenneth Waldron, *A Review of Social Science Research on Post Divorce Relocation*, 19 J. AM. ACAD. MATRIMONIAL L. 337, 338-39 (2005) (highlighting the inconsistency of courts and legislatures on the issue of relocation); Kimberly K. Holtz, Comment, *Move-Away Custody Disputes: The Implications of Case-by-Case Analysis and the Need for Legislation*, 35 SANTA CLARA L. REV. 319, 321-22 (1995) (observing that without legislative guidelines for how to address move-away custody cases, there is no way to ensure that an objective decision will be reached); see also STUDY COMM. ON RELOCATION OF CHILDREN, FINAL REPORT OF THE STUDY COMM. ON RELOCATION OF CHILDREN 2 (2006), http://www.nccusl.org/nccusl/Scope&Program/ChildReloc_ScopeRpt_060106.pdf (reporting that only thirty states have statutes pertaining to the relocation of children, many of which are not consistent in their approaches).

shape; in others, matters remain to be clarified.²⁴

For a time during the 1990s, it appeared that the position in favor of allowing relocation (usually to a new residence within the United States) and easing the burden on a custodial parent seeking to relocate had gained ascendancy. Several prominent cases, including *Tropea*²⁵ in New York and *Burgess*²⁶ in California, substantially increased the burden on the non-custodial parent seeking to block a move. Several states have favored presumptions in favor of relocation.²⁷ The Minnesota Supreme Court for example, held that removal may occur without an evidentiary hearing unless the non-custodial parent can plead a prima facie case against removal.²⁸ The custodial parent may be presumptively entitled to permission to remove the child from the state, unless the parent opposing the move establishes that removal would endanger the child's physical or emotional health and is not in the best interests of the child, or that the purpose of the move is to interfere with visitation rights of the non-custodial parent.²⁹ More recently, the trend towards a straight presumption seems to have weakened and state legislation has imposed greater burdens on parents seeking to relocate.³⁰ It appears that states are moving away from presumptions in favor or against a move and are aiming toward a fact-based analysis of each case.

It is no wonder, then, that an extensive review of decisions regarding petitions for change of residence (not necessarily trans-Atlantic

24. See Linda D. Elrod, *States Differ on Relocation: A Panorama of Expanding Case Law*, 28 FAM. ADVOC. 8 (2006) (noting that some states have a well developed case law on relocation while others have little); see also groupings presented, *infra* pp. 174-76.

25. See *Tropea*, 65 N.E.2d at 152 (overruling the non-custodial father's objections to the relocation despite the fact that the move would deprive him of contact with his children).

26. See *Burgess v. Burgess*, 913 P.2d 473, 476 (Cal. 1996) (concluding that the parent seeking to relocate has a right to change residences, thus requiring the objecting party to bear the burden of proving that the move would be against the child's best interests).

27. See, e.g., S.D. CODIFIED LAWS § 25-5-13 (2009) (granting the custodial parent the right to change residence, unless it would negatively affect the rights or welfare of the child); TENN. CODE ANN. § 36-6-108 (2007) (providing that there is a presumptive right to relocate, so long as the relocation has a reasonable purpose and does not pose a threat of specific harm to the child).

28. *Auge v. Auge*, 334 N.W.2d 393, 399 (Minn. 1983).

29. See *Geiger v. Geiger*, 470 N.W.2d 704, 708 (Minn. Ct. App. 1991) (arguing that the parent is entitled to seek a better life for herself and her children, thus it should be the burden of the challenging parent to prevent relocation).

30. Compare ALA. CODE § 30-3-169.4 (2009) (enunciating that there is a rebuttable presumption that relocating is not in the best interest of the child), and CONN. GEN. STAT. § 46b-56d (2008) (providing that the presumption is that relocating with a custodial parent is in the child's best interest), with MINN. STAT. § 518.175 (2008) (necessitating a court order or consent from the other parent so that a custodial parent may relocate with their children).

moves) shows, as Theresa Glennon has noted, an almost even divide: among the cases that have reached courts, the percentage of petitions that has been granted is about the same as the percentage that has been denied.³¹ In a substantial number of states, court decisions cannot be predicted, a situation likely to promote and extend litigation.³²

The rising number of litigated cases and the unclear legal situation led to efforts to promote uniformity among state laws. Two highly regarded groups—the Academy of Matrimonial Lawyers³³ and the American Law Institute³⁴—directed their attention towards drafting a proposed uniform act.³⁵ These proposals, which I will briefly discuss below, have yet to be adopted in most states.³⁶

Notwithstanding the variety of legal approaches to the issue, it is possible to point out one feature common to them all. When the request for change of residence arises as part of the initial decision regarding custody and visitation upon separation, it is more likely to be decided with reference to the best interests of the child standard as part of the overall consideration of parental responsibilities.³⁷ When the request for a change in the arrangement is brought post-separation, the best interests of the child standard continues to play a central role, but is used and interpreted differently, depending on the weight ascribed by the courts to the competing variables.³⁸

31. See Theresa Glennon, *Still Partners? Examining the Consequences of Post-Dissolution Parenting*, 41 FAM. L. Q. 105, 123-125 (2007) [hereinafter, Glennon, *Still Partners?*] (summarizing that out of 602 cases on Westlaw, 505 were decided, with 46 percent decided in favor of the custodial parent seeking relocation and 43 percent denying the relocation).

32. See Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE L. & POL'Y REV. 267, 270-273 (1987) (positing that there is a correlation between the vagueness in the law and increased litigation since the lack of a bright line rule permits parents to argue over details in their custody agreements); Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1181 (1986).

33. See MODEL RELOCATION ACT: AN ACT RELATING TO THE RELOCATION OF THE PRINCIPAL RESIDENCE OF A CHILD (Am. Acad. Matrimonial Lawyers, Proposed 1998).

34. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATION (2002) [hereinafter ALI PRINCIPLES].

35. See UNIF. RELOCATION OF CHILDREN ACT (Nat'l Conference of Comm'rs on Unif. State Laws, Draft 2008) (developing a study group on the issue, which recommended the formulation of uniform legislation).

36. *But see* Dupre v. Dupre, 857 A.2d 242, 255-59 (R.I. 2004) (invoking the ALI principles in deciding how to commence analysis in a relocation case); Hawkes v. Spence, 878 A.2d 273, 278 (Vt. 2005) (applying § 2.17(1) of the ALI principles, which provides that relocation constitutes a significant change in circumstances warranting a reexamination of parental rights).

37. See Elrod, *supra* note 24, at 8 (recognizing that while the parents' fundamental rights to care and travel are among the courts' considerations, the foremost consideration tends to be that of the child's best interests).

38. See *id.* (identifying the individual's right to relocate and travel as one of the

More specifically, as surmised by Lucy McGough, we can lump legal attitudes to post-separation relocation into four main groups.³⁹ **The first group** recognizes (at least implicitly) the presumption that a custodial parent may change his or her place of residence and that of the children.⁴⁰ Courts or legislatures adopting this approach do not regard a change in residence as something that necessarily leads to reopening the matter of custody and they acknowledge the custodial parent's autonomy to decide the matter as he or she sees fit. Under this approach, the presumption may be refuted and relocation forbidden only if the non-custodial parent can show the relocation to be detrimental to the child's best interests.⁴¹ To provide grounds for preventing the move, the demonstrated harm must exceed the "usual" harm associated with any move, which entails separation from familiar surroundings and from persons with whom the child is close.⁴²

Jurisdictions subscribing to this approach do not necessarily require the custodial parent to obtain the court's consent for a move or even to provide the non-custodial parent meaningful advance notice of the change.⁴³ Other jurisdictions require the custodial parent to provide notice, but impose on an objecting non-custodial parent the burden of petitioning the court and working actively to prevent the relocation.⁴⁴

most important factors for courts to consider when deciding a relocation case).

39. See Lucy S. McGough, *Starting Over: The Heuristics of Family Relocation Decision Making*, 77 ST. JOHN'S L. REV. 291 (2003); see also Elrod, *supra* note 24, at 9 (articulating three basic attitudes regarding relocation cases: relocation is an insufficient change in circumstances, a sufficient change in circumstances, or a change in circumstances requiring the parents to establish the child's best interests); Glennon, *Divided Parents*, *supra* note 23.

40. See, e.g., *Hollandsworth v. Knyzewski*, 109 S.W.3d 653, 657 (Ark. 2003) (holding that relocation is not a material change in circumstances justifying a modification of custody); *Burgess v. Burgess*, 913 P.2d 473, 476 (Cal. 1996) (providing that a custodial parent seeking to relocate bears no burden of establishing that the move is necessary).

41. See, e.g., *Hollandsworth*, 109 S.W.3d at 657 (maintaining that in order to successfully object to relocation, the objector must rebut the relocation presumption); *Kaiser v. Kaiser*, 23 P.3d 278 (Or. Ct. App. 2001) (finding that without proof that the welfare of a child could be potentially harmed by the move, a custodial parent has a statutory, presumptive right to change his or her child's residence).

42. E.g., McGough, *supra* note 39, at 318 (citing specifically to Ohio, where courts have held that a relocation is not detrimental if the resulting harm merely resembles that of adjustment to a move).

43. See *In re Marriage of Green*, 812 P.2d 11, 11 (Or. Ct. App. 1990) (stating that absent a provision prohibiting removal from the state without prior approval of the court, the custodial party may move the child without being held in contempt). The court also stated that "a move out of state by a custodial parent, in and of itself, is not a change of circumstances sufficient to warrant changing custody, unless the move is shown to have had an adverse impact on the child." *Id.*

44. See S.D. CODIFIED LAWS § 25-4A-19 (2009) (mandating that, should the non-relocating parent seek it, the relocating parent must give notice after which a hearing shall be held).

The second group, situated at the opposite end of the spectrum, imposes a dual burden on the custodial parent wanting to change residences, requiring him or her to prove, first, that the relocation is being requested in good faith and, second, that it suits the best interests of the child.⁴⁵ With respect to the first element, the parent wanting to move must show that the move has a legitimate goal and does not have the concealed purpose of impairing the child's ties to the other parent.⁴⁶ Courts often consider a list of criteria in determining whether the move is consistent with the child's best interests, including: the characteristics of the child and the move's projected influence on her; the extent to which relationships between the child and the other parent could be maintained after the move; the attitude of the custodial parent to the connection between the child and the other parent; and the wishes of the child and whether the move has the potential to improve her life.⁴⁷ An even stricter version of this sort of a legal arrangement requires the parent wanting to move to demonstrate that the move will substantially *advance* the welfare of the parent and/or the child.⁴⁸

The third group includes intermediate regimes in which the burden can shift from parent to parent; in the final analysis, however, the burden borne by the parent wanting to relocate is not a heavy one.⁴⁹ Thus, there are a group of cases in which the parent wanting to move must show that the request is made in good faith, that the move serves legitimate purposes, and that it is not meant to impair the child's connection with the other parent.⁵⁰

45. See, e.g., LA. REV. STAT. ANN. § 9:355.13 (2008) (charging that the burden of proof is on the relocating parent to establish that the move is in good faith and in the child's best interest); *Baures v. Lewis*, 770 A.2d 214, 226 (N.J. 2001) (stating that the relocating parent bears the initial burden to prove that the proposed relocation is made in good faith and will not be inimical to the child's best interests).

46. See *Russenberger v. Russenberger*, 669 So. 2d 1044, 1046 (Fla. 1996) (ruling that a court should deny relocation when the parent seeks relocation as a means of interfering with the other parent's visitation rights).

47. See MODEL RELOCATION ACT: AN ACT RELATING TO THE RELOCATION OF THE PRINCIPAL RESIDENCE OF A CHILD § 405 (Am. Acad. Matrimonial Lawyers, Proposed 1998) (listing additional factors for the court to consider when determining a contested relocation).

48. See ALA. CODE § 30-3-169.4 (2009) (establishing a rebuttable presumption that relocating is not in the child's best interest and placing the burden on the parent seeking to relocate to prove that the move is, in fact, in the child's interest).

49. See *In re Marriage of Ciesluk*, 113 P.3d 135, 139 (Colo. 2005) (requiring that a parent seeking to relocate make a prima facie case that there is a sensible reason for the move, which shifts the burden to the non-custodial parent to demonstrate that the move is not in the best interests of the child); see also N.H. REV. STAT. ANN. § 461-A:12 (2009) (subscribing to the standard that the relocating party bears the burden of proof to show the legitimacy of the move and that it is reasonable); *Russenberger*, 669 So. 2d at 1046-47 (reaffirming that upon a custodial parent's demonstration of good faith, that parent is entitled to a rebuttable presumption in favor of the request to relocate with the minor child).

50. See, e.g., *Burgess v. Burgess*, 913 P.2d 473, 473 (Cal. 1996) (noting that the mother was not attempting to frustrate the father's contact with the children as an important factor in finding she had a right to relocate); *Kaiser v. Kaiser*, 23 P.3d 278,

Once that aspect has been established, the burden shifts to the parent opposing the move to show that the move would run counter to the best interests of the child.⁵¹

The fourth group corresponds to the approach proposed by the American Law Institute.⁵² Under this approach, the arrangements depend on whether the law identifies the petitioner as a primary custodial parent or a joint custodial parent. If the parent wanting to move has assumed a majority of the custodial responsibilities, a presumption favoring the request attaches, as long as the move is sought in good faith and for a legitimate and valid purpose.⁵³ The move will not be authorized if the goals which the custodial parent seeks to achieve could be reached without moving or by moving to some closer destination.⁵⁴ If the custody is joint, however, the determination will be made by applying a best interests of the child test,⁵⁵ without any presumptions one way or the other. The nature of the custody arrangement—whether it is joint or whether one parent takes the lead—is determined, first, in light of the amount of time each parent spends with the child; a parent spending at least sixty percent of the time with the child will be identified as the custodial parent. Second, the evaluation also takes account of the nature of the child's attachments to each parent.⁵⁶

The above categorized approaches may vary with respect to the factors they weigh in their analyses. They may take into account, for example, one or more of the following: whether the request to relocate is made in good faith; why the custodial parent wants to move; whether the parents share physical custody or whether the parent wanting to move has sole custody; the current scope of the custody exercised by the custodial parent and the role taken by the other parent in caring for the child; and the effect of the

282 (Or. Ct. App. 2001) (indicating that a showing that the relocating parent was trying to interrupt contact may not be sufficient to overturn the parent's presumptive right to relocate, although it may be a factor to consider, particularly if it upsets the child's best interests).

51. See, e.g., IND. CODE § 31-17-2.2-5 (2008) (prescribing that the individual who is relocating has the burden to prove that the move is being made in good faith and for a legitimate reason, which shifts the burden to the non-relocating individual to show that the move is detrimental to the child).

52. See Janet Leach Richards, *Resolving Relocation Issues Pursuant to the ALI Family Dissolution Principles: Are Children Better Protected?*, 2001 BYU L. REV. 1105, 1109 (embracing the ALI's child-centered model, which places the utmost focus on promoting stability within the custodial relationship).

53. ALI PRINCIPLES, *supra* note 34, § 2.17 (4)(A).

54. *Id.* § 2.17 (4)(A)(iii).

55. *Id.* § 2.17 (4)(C).

56. See McGough, *supra* note 39, at 315-16 (proposing a flat time calculation for assessing primary custodianship in order to measure the parent-child bond and the potential harm that relocation would pose to that relationship).

move on the relations between the child and the non-custodial parent who remains behind, and whether those relations can be maintained.

The various regimes take differing combinations of these factors into account and sometimes change the burden of proof to suit the circumstances presented. Most of the cases involve a factual inquiry, one that examines the conditions under which the child now lives and those that can be anticipated in the proposed new residence.⁵⁷ Some approaches are focused on the child while others assign more significant weight to the parents' interests, either separately or as integrated with the interests of the child.

IV. KEEPING CHILDREN IN MIND

A. Does the "Best Interests" Test Serve the Best Interests of Children? The Need to Reconsider the Regulation of Relocation

The diversity of statutory approaches and the variation seen in the case law make it genuinely difficult to ensure the protection of the best interests of the child.⁵⁸ Moreover, it appears that the best interests of the child may very well be impaired by the existence of a wide range of approaches and their inconsistent applications. This muddled legal situation, with an array of approaches to the question and inconsistent court decisions, is likely to result in increased litigation and a lack of guidance to parents, thereby posing a threat to the best interests of the child.⁵⁹ It is generally accepted that extensive litigation between the parents over allocation of parental responsibility (including questions related to place of residence) is in itself harmful to the child.⁶⁰ The injury to a child caused by a conflict between the parents can be even more severe than the injury caused by separation

57. See Glennon, *Divided Parents*, *supra* note 23, at 60 (detailing a court's evaluation of the benefits of the current location against those of the proposed location usually involves consideration of the quality of life at both locations, including relationships with friends and family, educational opportunities, and the potential for involvement in the locations).

58. See *Gruber v. Gruber*, 583 A.2d 434, 437 (Pa. Super. Ct. 1990) ("[O]ur research has failed to reveal a consistent, universally accepted approach to the question of when a custodial parent may relocate out-of-state over the objection of the non-custodial parent. In fact, the opposite is true. Across the country, applicable standards remain distressingly disparate.").

59. See Glendon, *supra* note 32, at 1181 (arguing that the vagueness of the best interest of the child standard likely increases disputes); see also Charlow, *supra* note 32, at 270-73 (contending that the best interest standard increases litigation by the uncertainty in its application).

60. See generally Gregory Firestone & Janet Weinstein, *In the Best Interests of Children: A Proposal to Transform the Adversarial System*, 42 FAM. CT. REV. 203 (2004) (examining the harmful effects of the adversarial system and the traditional family law litigation process on children and families).

from a beloved parent.⁶¹ Moreover, the law is not adequately committed to the use of alternative dispute resolution (“ADR”) mechanisms.⁶² Although many systems encourage parents to reach an agreement or to use non-adversarial dispute resolution processes, the resources allocated to ADR remain inadequate and many disputes over relocation still reach the courts.⁶³ As a practical matter, this harms the child, who often finds himself or herself at the center of a painful, lengthy, and tension-ridden dispute.

The emergence of systems that vary substantively in their approach to the actual role ascribed to “the best interests of the child” rule may suggest that the term is used loosely enough so as to grant the decisive power to other interests, such as those of the parents or the state. Put more bluntly, it may be the case that contrary to their explicit commitment to the best interests of the child, some jurisdictions, by instituting multiple presumptions and procedures, in fact constitute practices that are *de facto* much less committed to the superior interests of the child. Alternatively, the various ways to apply the best interests of the child standard may attest to the difficulty in determining precisely what “the best interest of the child” is.⁶⁴ In other words, notwithstanding the common, declared commitment of the various systems to the best interests of the child, the absence of consensus about what “the best interests of the child” actually dictates is apparent. This argument is consistent with the familiar criticism voiced against using the “best interests of the child” as a decisional standard in family matters—that it is a vague, subjective, and malleable principle.⁶⁵

61. See generally Zeynep Biringen & Jennifer Gerber Moné, *Perceived Parent-Child Alienation: Empirical Assessment of Parent-Child Relationships Within Divorced and Intact Families*, 45 J. DIVORCE & REMARRIAGE 131 (2006) (examining the effect of a parent’s efforts to distance the child from the other parent); Christy M. Buchanan & Parissa L. Jahromi, *A Psychological Perspective on Shared Custody Arrangements*, 43 WAKE FOREST L. REV. 419 (2008) (assessing the psychological effects of shared custody environments on children); Robert E. Emery, *Interparental Conflict and the Children of Discord and Divorce*, 92 PSYCHOL. BULL. 310 (1982) (looking at the relationship between marital discord and children’s behavior problems).

62. See Buchanan & Jahromi, *supra* note 61, at 437 (arguing that the court should embrace alternative methods of dispute resolution).

63. Either way, mediation alone is not enough and there is often a need for therapeutic and parental educational services. See Solangel Maldonado, *Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce*, 43 WAKE FOREST L. REV. 441 (2008).

64. See Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN’S STUD. 133, 172 (1992) (describing the difficulties in determining and implementing what is in the best interest of the child).

65. See, e.g., Mary Becker, *Judicial Discretion on Child Custody: The Wisdom of Solomon?*, 81 ILL. B.J. 650, 651 (1993) (illustrating the range of judicial interpretations of the best interest standard); Hon. Tim Carmody, *International Judicial Perspectives on Relocation: Child Relocation: An Intractable International Family Law Problem*, 45 FAM. CT. REV. 214, 215 (2007) (comparing the variety of outcomes when the standard

In addition to the foregoing flaws, the principle of the best interests of the child suffers from being a paternalistic (or, more precisely, parentalistic) criterion, formulated by the parent or by the state standing in the parent's shoes.⁶⁶ In that sense, there is a substantive conceptual difference between the principle of the best interests of the child—which reflects the understanding of “the responsible adult” who determines for the child where her best interests lie—and a decision grounded in the rights of the child. The latter is supposed to reflect the will of the child herself (when it can be ascertained) and her rights, just like any decision reached with respect to any individual. In that sense, the deep (or “true”) interest of the child is to be treated as a right-bearer; adopting the “best interests of the child” standard is therefore inconsistent with the child's fundamental interest. It is necessary therefore to seek an alternative approach. A prudent way to proceed would be to take a step back and examine the evolution of the legal concepts pertaining to children in general (i.e. not only in relocation disputes) and then to propose a model mindful of the advantages and disadvantages, both practical and analytical, of the current situation. Such a model can then be applied in the context of relocation decisions. In the following, I turn to this endeavor.

B. “From Father's Property to Children's Rights”⁶⁷

Throughout the years, there have been substantial changes in the social and legal status of the child and her relationships with her parents and other adults.⁶⁸ Although historical research has produced no consensus, it may

is applied in relocation decisions across different states); Sarah McGinnis, Comment, *You Are Not the Father: How State Paternity Laws Protect (and Fail to Protect) the Best Interests of Children*, 16 AM. U. J. GENDER SOC. POL'Y & L. 311, 313 (2008) (arguing that state laws do not act in the best interest of the child).

66. See Rebecca M. Stahl, “Don't Forget About Me”: Implementing Article 12 of *The United Nations Convention on the Rights of the Child*, 24 ARIZ. J. INT'L & COMP. LAW 803, 820 (2007).

67. Title inspired by MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES (1994) [hereinafter, MASON, FATHER'S PROPERTY].

68. See generally PHILIPPE ARIES, CENTURIES OF CHILDHOOD – A SOCIAL HISTORY OF FAMILY LIFE (Robert Baldick, trans., 1962); JEFFREY BLUSTEIN, PARENTS AND CHILDREN: THE ETHICS OF THE FAMILY 17-98 (1982) (constructing a philosophical look at the family unit); JANE FORTIN, CHILDREN'S RIGHTS AND THE DEVELOPING LAW (1998) (exploring the impact of English law and policy on the rights of children); MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 1-16 (2005) (providing a brief history of children's rights in the U.S.); JOSEPH M. HAWES, THE CHILDREN'S RIGHTS MOVEMENT: A HISTORY OF ADVOCACY AND PROTECTION (1991) (delineating the themes of the children's rights movement in the last century); MASON, FATHER'S PROPERTY, *supra* note 67 (combining a historical and legal approach to provide a perspective on child custody); Jill Handley Andersen, *The Functioning Father: A Unified Approach to Paternity Determination*, 30 J. FAM. L. 847 (tracing the parent-child relationship's evolution from common law through the modern era); John

be said as a general matter that in the distant past, the child was seen as an object—a resource of sorts, to be used, if not exploited.⁶⁹ Beginning in the sixteenth century, the child’s status underwent gradual improvement and the child herself came to be seen as a human being in need of protection.⁷⁰ During the nineteenth century, the “best interests of the child” standard was formulated.⁷¹ At this stage, children were recognized as deserving of legal protection but not as “actual people” equal to adults in their standing and rights.⁷² The focus on the child brought about substantive changes in legal regimes and led to the development of welfare institutions aimed at providing assistance to children and their families. Although notions of control and ownership of children did not disappear entirely, the era was characterized by a movement away from a perspective that saw the child as her parents’ possession to one that regarded her as a human being deserving of special protection.⁷³

Recent decades have seen further changes to the legal status of children, as their human rights have come to be recognized and emphasis has been placed on their realization. The weaknesses in the “best interests of the child” doctrine—its susceptibility to manipulation and exploitation; the ability of the decisional authority to twist the doctrine to conform to the court’s own perspective; and the sense that it does not reliably serve the interests of the child and, instead, discriminates against her and impairs her rights as an independent agent of equal worth—have fostered a view that calls for recognition of the child’s rights, at least in the international arena.⁷⁴

Eekelaar, *Families and Children: From Welfarism to Rights*, in *INDIVIDUAL RIGHTS AND THE LAW IN BRITAIN* 301 (C. McCrudden & G. Chambers eds., 1994) (drawing out three paradigms of parental relations with their children); Lucy S. McGough & Lawrence M. Shindell, *Coming of Age: The Best Interest of the Child Standard in Parent-Third Party Custody Disputes*, 27 *EMORY L.J.* 209, 209-12 (1978) (conducting a historical analysis of the parental rights doctrine and its impact on children’s interests).

69. See Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 *J.L. FAM. STUD.* 337, 343 (2008) (recognizing a time where children were considered products).

70. See *id.* at 345 (looking at common law England’s imposition of moral obligation on fathers to protect their children).

71. See McGinnis, *supra* note 65, at 314 (stating that American courts have utilized the best interest of the child standard since 1854); McGough & Shindell, *supra* note 68, at 209-12.

72. See Justin Witkin, Note, *A Time For Change: Reevaluating the Constitutional Status of Minors*, 47 *FLA. L. REV.* 113, 119-20 (1995) (stating that the numerous decisions “reject the idea that children have the same rights as adults”).

73. See Barbara Bennett Woodhouse, “*Who Owns the Child?*”: Meyer and Pierce and the Child as Property, 33 *WM. & MARY L. REV.* 995, 1037-60 (1972) (providing a brief history of the family from the patriarchal ownership model to the confrontation with the emerging idea of children’s rights).

74. See Janet L. Dolgin, *Suffer the Children: Nostalgia Contradiction and New Reproductive Technologies*, 28 *ARIZ. ST. L. J.* 473 *passim* (1996) (claiming the best

Commitment to the rights of the child joined together with protection of the child's welfare implies a profound change in the way in which issues related to the child are perceived and determined. According to this approach, every child-related matter that involves legal intervention—be it the formulation of general legal arrangements or the resolution of specific legal disputes—requires examining the situation with an eye toward the needs of the child and in a manner that takes account of her interests. This differs, however, from the approach that treats the best interests of the child as the central consideration and allows the responsible adult or the state to determine those interests by using paternalistic standards to assess the child's needs. A commitment to the child's rights dictates acting in accordance with the legal rights that have been granted to the child, albeit in a manner consistent with her age and level of development.

In addition, according to the model of children's rights, in any case involving a child old enough to be able to formulate and express her wishes, the child should be heard and her position should be taken into account in resolving the matter.⁷⁵ To that end, there should be mechanisms that ensure her proper representation. Granting the child a direct or indirect hearing will allow for clarification of her wishes or, at least, allow for a more precise determination of what constitutes her best interest. The call for affording the child a hearing has two principal rationales. The first pertains to the child's best interests, which are said to be furthered by allowing the child to be heard; doing so will ensure that the relevant authority will come to know the child, her needs, and her unique qualities. That, in turn, will help ensure an optimal response suited to the child. The second rationale pertains to the child's rights; as an autonomous individual, it is argued, she is entitled to be heard, to participate in decisions that affect her, to be represented, and thereby to be certain that her rights are realized in accord with and in light of her desires.

interest standard in application does not serve the interests it purports to); Jehnna I. Hanan, *The Best Interest of the Child: Eliminating Discrimination in the Screening of Adoptive Parents*, 27 GOLDEN GATE U. L. REV. 167, 191-07 (1997) (arguing that adoption policies focusing on the best interest standard incorporate factors such as race that have little to do with parenting skills); Arlene Skolnick, *Solomon's Children: The New Biologism, Psychological Parenthood, Attachment Theory, and the Best Interests Standard*, in ALL OUR FAMILIES – NEW POLICIES FOR A NEW CENTURY 236, 243 (Mary Ann Mason et al. eds., 1998) (listing some common critiques of the best interest standard); Carmody, *supra* note 65, at 215 (arguing that best interests are value judgments and as a result are susceptible to multiple interpretations); Stahl, *supra* note 66, at 820 (calling for implementation of the Convention on the Rights of the Child standard where rights of children are more than semantics); Witkin, *supra* note 72, at 115-20 (arguing the courts repeatedly fail to take into account the certain interests or rights of children).

75. For a picture of the current practices regarding hearing children in court, see and compare *Simcox v. Simcox*, 511 F.3d 594 (6th Cir. 2007), *Reineke v. Reineke*, 2003 ND 167, 670 N.W.2d 841 (N.D. 2003), and *Anderson v. Acree*, 250 F. Supp. 2d 876 (S.D. Ohio 2002).

Even though the United States has not ratified the International Convention on the Rights of the Child (“CRC”)—a convention ratified by almost all other nations—it would be erroneous to conclude that the rights enumerated in the convention have no force or effect in the United States.⁷⁶ Legislators have sought to bolster the rights of children to welfare and to proper care.⁷⁷ By turning to the Convention for guidance, courts have also worked to protect children as rights’ bearers.⁷⁸ Over the last thirty years, a line of cases illustrates the courts’ attention to children and shows an understanding of their unique needs and relevant differences from adults.⁷⁹ In fact, as early as the middle of the last century, before the convention was adopted, it was determined that a child is entitled to some of the legal rights enjoyed by adults.⁸⁰ Later case law recognized children as persons endowed with rights and ensured their rights in the personal, communal, and educational domains.⁸¹ For example, children’s right of self-expression was enhanced by decisions that overturned limitations on internet surfing; the authority of schools to search students’ possessions was limited; efforts by schools to impose sweeping limitations on political expression were overturned; the rights of children in criminal proceedings were ensured; and protection of their bodies and lives was strengthened.⁸²

76. See United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; Elisa Poncz, *Rethinking Child Advocacy After Roper v. Simmons: “Kids Are Just Different” and “Kids Are Like Adults” Advocacy Strategies*, 6 CARDOZO PUB. L. POL’Y & ETHICS J. 273, 276 (2008) (arguing that the CRC could serve as the proper foundation for U.S. policy on children’s rights). See generally Roger J.R. Levesque, *The Internationalization of Children’s Human Rights: Too Radical for American Adolescents?*, 9 CONN. J. INT’L L. 237 (1994) (explaining the U.S. position); Lainie Rutkow & Joshua T. Lozman, *Suffer the Children?: A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARV. HUM. RTS. J. 161 (2006) (stating the United States as the only self-governed nation yet to ratify the CRC).

77. See Howard Davidson, *Children’s Rights and American Law: A Response to What’s Wrong with Children’s Rights*, 20 EMORY INT’L L. REV. 69, 70-73 (2006) (illustrating the legislative victories in the expansion of children’s rights in the U.S.).

78. See generally GUGGENHEIM, *supra* note 68, at 159 (explaining that in more than twenty decisions rendered between 1989 and 2005, the courts have cited the CRC as a worthy guide for decision making and have reached their conclusions in light of its rationales).

79. See generally Martha Minow, *What Ever Happened to Children’s Rights?*, 80 MINN. L. REV. 267 (1995) (reviewing prominent cases that have furthered children’s rights).

80. See *In re Gault*, 387 U.S. 1, 1 (1967) (holding that juveniles in criminal proceedings must be afforded the same due process rights as adults). See generally Minow, *supra* note 5, at 10-12 (analyzing court cases prior to adoption of the CRC that resulted in children’s rights).

81. See, e.g., *DeShaney v. Winnebago County Dep’t of Soc. Serv.*, 489 U.S. 189, 263 (1989) (recognizing that a minor child may have due process rights).

82. See *Ashcroft v. ACLU*, 542 U.S. 656, 661 (2004) (recognizing minors’ First Amendment rights); *Bd. of Educ. of Indep. Sch. District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 828 (2002) (subjecting the authority of schools to search students to conditions of reasonableness); *Tinker v. Des Moines Indep. Sch. Dist.*, 393

That said, case law and legislation do not convey a uniform message. Along with the recognition of children's rights, there still remains a protective position that seeks to avoid granting rights that might impair the best interests of the child.⁸³ As a result, children's rights in the public sphere are not protected in the same way as the rights of adults. Children's rights are adjusted to suit their particular needs, taking account of the limitations implied by their age or level of development.⁸⁴

An area in which the rights of the child receive less recognition is the area of primary concern to us here: the family.⁸⁵ Three main factors weigh against such recognition. First, the principle of family autonomy limits intervention on the part of the authorities, including the courts. Second, to the extent that rights are recognized in the familial arena, they are the rights of the parents to decide matters pertaining to the family.⁸⁶ This holds with respect to both conflicts with agents external to the family and to conflicts among family members.⁸⁷ Third, in cases where the courts do intervene in the familial sphere, the principle of the best interests of the child may serve as a mechanism for resolving conflicts between the rights of the two parents, and thus *de facto* further limiting any recourse to the rights of the child. Legislators and courts have been concerned about importing the rights of the child into the family arena, fearful it might bring about a loss of parental authority and ultimately harm the family and the child herself.⁸⁸

U.S. 503, 511 (1969) (holding that the First Amendment protects students in public schools subject to some limitations); Poncz, *supra* note 76, at 283-91 (discussing the rights of juveniles in criminal proceedings); *Roper v. Simmons*, 543 U.S. 551, 551 (2005) (holding the death penalty unconstitutional for crimes committed by minors under the age of 18).

83. See Elizabeth P. Miller, *DeBoer v. Schmidt and Twigg v. Mays: Does the "Best Interests of the Child" Standard Protect the Best Interests of Children?*, 20 J. CONTEMP. L. 497, 519 (1994).

84. See Poncz, *supra* note 76, at 273 (examining the "kids are just different" approach which accounts for physical, developmental, and social differences in children as compared to adults).

85. See James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 848-50 (2003) (stating that U.S. law does not frequently look at the child's interests in relation to her family).

86. See Elizabeth Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2406-08 (1995) (discussing the slow elevation of parental rights from unrecognized social construction to a constitutionally recognized right); see also Sacha M. Coupet, *Neither Dyad Nor Triad: Children's Relationship Interests Within Kinship Caregiving Families*, 41 U. MICH. J.L. REFORM 77 (2007) (discussing the hierarchy of adults' rights over children).

87. See Scott & Scott, *supra* note 86, at 2405-14, 2440-41 (discussing the protection of parental rights, including the confused role of stepparents and biological parents). See generally MARY ANN MASON, *CUSTODY WARS: WHY CHILDREN ARE LOSING THE LEGAL BATTLE AND WHAT WE CAN DO ABOUT IT* (2000) [hereinafter MASON, *CUSTODY WARS*]; Jeffrey Shulman, *Spiritual Custody: Relational Rights and Constitutional Commitments*, 7 J.L. FAM. STUD. 317 (2005).

88. See Lewis Pitts, *Fighting for Children's Rights: Lessons from the Civil Rights*

We can well understand why the law has shied away from full adoption of the concept of the rights of the child. The rights model, in its liberal sense, raises serious difficulties when applied to a child in the context of the family. After all, a child is dependent on her family and still requires its protection (and the protection of the state); recognizing the child as a fully developed moral agent possessing the entire array of liberal rights would not only place the child apart from her family but would also allow the child to act in a manner harmful to herself. And yet, it is questionable whether the position that has been adopted, which so wholly excludes the rights of the child from the family arena, is the only possible one. A closer look at the family arena and the unique concerns raised therein is necessary to ascertain whether indeed a viable alternative model can be developed, one that responds to the unique concerns while still preserving the benefits associated with the recognition of children as rights-holders.

C. Rights and Children's Rights in the Family Context

1. In General

The family is one of the arenas in which the adoption of children's rights might be expected to leave a prominent mark: the family is where a considerable number of the interactions potentially subject to rights-analysis are played out. Obviously, most family dealings are a matter of routine, and legal (or societal) intervention would be relatively rare.⁸⁹ However, the law stands ready to intervene when it becomes evident that the more vulnerable members of the family are in danger.⁹⁰ The law will similarly intervene in response to the petition of a family member seeking help in dealing with some crisis within the family unit or requesting its dissolution.

An increased commitment to the rights of the child will likely change the form and substance of legal intervention in family matters. First, recognizing the rights of the child will necessarily be accompanied by an increase in the occasions for legal intervention. In a system that recognizes children's rights and takes them seriously, children are able, and may be expected, to ensure the enforcement of those rights through legal processes,

Movement, 16 U. FLA. J.L. & PUB. POL'Y 337, 345-47 (2005) (discussing the general reluctance to declare affirmative rights for children).

89. See Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 *passim* (1983) (discussing the separation between the family and the market in comparison to similar dichotomies: state/civil society and male/female). But see Clare Huntington, *Mutual Dependency in Child Welfare* 82 NOTRE DAME L. REV. 1485, 1514 (2007) (stating that "the ideological construct of family autonomy is overdeterminate").

90. See Stahl, *supra* note 66, at 840 (showing that the courts do not like to intervene in family units unless there is a problem).

either by initiating proceedings on their own or by participating in proceedings initiated by others. In that sense, family autonomy will be weakened. In all cases where legal intervention is taken for granted—for example, those involving the parents' separation—the child may represent her independent position and the court may be obligated to conduct a hearing or otherwise allow the child's position to be heard. The routine legal process thereby gains an additional dimension, for its scope must be expanded to encompass matters related to the child, sometimes through her independent representation and/or direct participation. A second effect will pertain to substance, as the rights of the child come to influence the content of the courts' decisions. The commitment to enforce the child's rights will likely produce judicial decisions that differ substantively from those that would be reached under the traditional model that emphasizes the "best interests of the child" standard. A commitment to the child's rights will most often be accompanied by a call to place the child at the center, or at least on equal footing with other rights-holders.⁹¹ In these circumstances, recognizing the child's rights will impact the legal weight accorded to the rights of the parents and generate a commitment to reach a decision mindful of the rights of all concerned, not only the rights of the parents.

The influence of the rights model may extend (for good or ill) beyond the terms of a concrete dispute. On the view that recognizes the expressive force of the law,⁹² the formulation of family matters in terms that are committed to individual rights can affect the family members, even before any dispute has arisen and even if no such dispute ever arises. According to this view, the law conveys an ideological message with a symbolic effect transcending the boundaries of its application in specific legal proceeding. In the family context, that would entail reconfiguring the nature of the interaction between family members by envisioning family members as separate atoms interacting with each other as neighboring atoms would: by way of contracts or by resorting to the protection provided by tort law. This, of course, may raise serious concerns.

2. Criticisms and Problems of the Rights Model

The changes that may be anticipated as a result of importing the rights of the child into the family (in either the conceptual or the practical sense) will

91. See generally Barbara Bennett Woodhouse, *Defending Childhood: Developing a Child-Centered Law and Policy Agenda*, 14 U. FLA. J.L. & PUB. POL'Y vii, xi (2002) [hereinafter Woodhouse, *Defending Childhood*]; Barbara Bennett Woodhouse, "Out of Children's Needs, Children's Rights": *The Child's Voice in Defining Family*, 8 BYU J. PUB. L. 321 (1994); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective On Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993) [hereinafter Woodhouse, *Hatching the Egg*].

92. See generally Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

likely entail significant difficulties.⁹³ The difficulty is grounded in the alleged unsuitability of the model to the domestic arena—a mismatch that generates two principal concerns. First is the concern that the standards implicit in the rights model will lead to solutions that are ill-suited to the nature of the family.⁹⁴ Second is the concern that the standards will dictate an approach to domestic disputes that will do harm to the web of relationships among the parties, for example, by allowing more lawsuits and making them more contentious or disruptive in nature.⁹⁵ These concerns have been expressed in several lines of criticism directed specifically at the liberal rights model in general, not necessarily in the family context.

One line of criticism focuses on the nature of the rights model as divisive and egoistical.⁹⁶ It emphasizes that the role of the law, as understood in this discourse, is to define the rights of individuals in a way that draws boundaries between them. The inclination to formulate a dispute as a clash between competing rights, it is argued, will likely impede open discussion, attempts of compromise, and the search for common ground, and instead, promote polarization. A related criticism is the one that attacks traditional rights discourse as competitive and possessory.⁹⁷ This view maintains that

93. On the effects of a rights-based liberal individualism on the family see, generally, ELISABETH BECK-GERNSHEIM, *REINVENTING THE FAMILY* (Patrick Camiller trans., 2002); JANET L. DOLGIN, *DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE* (1997); MARY ANN GLENDON, *RIGHTS TALK – THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991) [hereinafter GLENDON, *RIGHTS TALK*]; MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989); MILTON C. REGAN, *FAMILY LAW AND THE PURSUIT OF INTIMACY* (1993); MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1996); SELMA SEVENHUIJSEN, *CITIZENSHIP AND THE ETHIC OF CARE – FEMINIST CONSIDERATION ON JUSTICE, MORALITY AND POLITICS* (1998); Elisabeth Beck-Gernsheim, *On the Way to a Post-Familial Family: From a Community of Need to Elective Affinities*, 15 *THEORY, CULTURE & SOC'Y* 53 (1998); Bruce C. Hafen, *Individualism and the Autonomy in Family Law: The Waning of Belonging*, 1991 *BYU L. REV.* 1 (1991).

94. See Hafen, *supra* note 93, at 2-3 (stating that autonomous individualism fails to nurture intrafamily relationships).

95. See generally Minow, *supra* note 5, at 15-18 (noting the problematic nature of applying the adversarial liberal rights discourse to the family sphere).

96. See Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1 *REV. CONST. STUD.* 1 (1993) (stating that the rights model hinders the discussion of values and results in the pursuit of individual priorities without considering or supporting those of others). See generally Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685 (1976); Gloria Chan, Comment, *Reconceptualizing Fatherhood: The Stakes Involved in Newdow*, 28 *HARV. J.L. & GENDER* 467 (2005).

97. See generally JEREMY WALDRON, *LIBERAL RIGHTS – COLLECTED PAPERS 1981-1991* (1993) (asserting that rights are used to secure goods for individuals); Alon Harel, *Theories of Rights*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* (Martin P. Goldberg & William A. Edmundson eds., 2005) (characterizing certain rights as expressing the importance of individual interests).

the language of rights, as we know it today, employs terms that originate in the individualist, capitalist world. The conventional rhetoric and its associated substance frame rights as a limited resource and emphasize the element of struggle, suggesting that A's enjoyment of a right necessarily impairs a right possessed by B.⁹⁸

The adversary system associated with liberal rights discourse tends to sharpen conflict.⁹⁹ A conflict conducted under adversarial rules of procedure will suffer from the inability of the rival parties and of the court—which is limited to the evidence brought before it by the parties—to see the picture in its entirety. The system tolerates concealment and provides incentives to battle and pursue victory more than justice.¹⁰⁰ Proceedings under that system are highly sensitive to the economic considerations of the parties and tend to undervalue the emotional costs of the struggle—costs associated with emerging feelings of alienation, tension, and, sometimes, guilt.¹⁰¹ The proceedings, conducted with the goal of victory “at any cost,” will sometimes involve injury to the other party and to his or her sense of justice, thereby imposing a high moral price.

A further criticism pertains to the nature of the legal solutions offered by the prevailing system.¹⁰² When rights embedded in an adversarial system clash, the usual resolution of such a clash that one party emerges victorious while the other party suffers defeat. The resolution of a typical case by the court is thus binary: a party either has or does not have a right to do something and therefore a motion is either granted or denied. This structure yields a rather rigid set of outcomes. Coupled with the incomplete nature of the information brought before the court, such a design sharply limits the court's ability to propose creative and flexible solutions that might satisfy the underlying wishes of both parties.

These concerns, voiced by critics of the liberal rights discourse, become even more forceful when the discourse is applied to family relationships.

98. See Scott & Scott, *supra* note 86, at 2440-41 (suggesting that a focus on rights assumes that parents view their relationship with their children as a self-interested investment furthering their own rights, which ultimately supports the notion that parental rights count against those of children).

99. See Firestone & Weinstein, *supra* note 60, at 204 (determining that zealous advocacy escalates conflicts and controversies, causing greater harm to the child in family dispute cases).

100. See *id.* at 205 (denouncing the adversary system as facilitating the exclusion of all relevant information and individuals critical to determining the appropriate outcome of a case).

101. See *id.* at 204 (inferring that the dehumanizing nature of the adversary system and the expense of litigation do not further the best interests of children).

102. See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 756, 784 (1984).

The introduction of the rights discourse into intra-familial disputes leads to focusing on the individual rather than on the family unit; this will likely diminish the family members' sense of solidarity and mutual responsibility.¹⁰³ The substance of the rights-based discourse and the manner in which it is deployed make it possible for the parties, especially in times of crisis or in circumstances of separation, to renounce their mutual responsibility and, in a moral sense, start a new life, as if the old one never existed. In a culture that sanctifies individualism,¹⁰⁴ the affinity to others is weakened. The risk inherent in the rights model is clear: it can unravel the tapestry of thriving, familial relationships that serves as an emotional anchor for the individual and as a basis for the child's development. Even in cases where the family maintains its intimate character, the tools provided by a rights-based discourse to manage interactions, such as contract or property rules, are not equipped to embody the uniqueness of the family situation, the place of interpersonal relationships, and the unique characteristics of the parties.¹⁰⁵

3. Criticisms and Problems with the Liberal Rights Model in the Context of Parent-Child Relationships

The discussion detailed above reveals that a legal discourse focused on the rights of the child, at least in their liberal-individual understanding, does not do justice to domestic reality or to the nature of the bond between parents and children.¹⁰⁶ The concept of rights is foreign to many or most of the various relationships between parents and their children. Even if this component is present, and properly so, in some sets of relationships, it reflects only a narrow aspect of those relationships and does not come close to reflecting their complexity or correct treatment overall. For example,

103. See Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy – Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463 (1983) (inferring that the rise of individualism within family law is detrimental to not only families but society as a whole); Linda J. Lacey, *Mimicking the Words, but Missing the Message: The Misuse of Cultural Feminist Themes in Religion and Family Law Jurisprudence*, 35 B.C. L. REV. 1, 20 (1993) (rejecting the emphasis on rights as “selfish individualism”).

104. GLENDON, RIGHTS TALK, *supra* note 93.

105. See Caroline Forder, *Constitutional Principle and the Establishment of the Legal Relationship Between the Child and the Non-Marital Father: A Study of Germany, the Netherlands and England*, 7 INT'L. J.L. & FAM. 40, 97 (1993) (hypothesizing that applying existing standards to new types of relationships disregards the precise nature of the parties' interests); see also Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution: The Case for Opening Closed Records*, 2 U. PA. J. CONST. L. 150, 174 (1999).

106. See Coupet, *supra* note 86, at 80 (stating that “in its current state, the rights based regulation of children's relational lives is wholly sensitive to the competing rights of parents, but is insufficiently keyed to children's psychological, emotional and developmental needs. It remains more attuned to a hierarchy of adult rights of access to children.”).

parents' obligation to listen to what their child has to say does not fully exhaust a child's right to freedom of expression or right to participate. As such, the rights-of-the-child model cannot faithfully serve the parties' interests. The protection afforded by rights in their familiar liberal sense is not adequate and reliance on that protection is insufficient for children, whose relations with others are inherent to their existence.¹⁰⁷ In that sense, one may say that the rights-of-the-child model is too narrow to encompass the full array of children's needs vis-à-vis their parents. It pertains to a single, non-sufficient, aspect of their complex lives, which is woven into different interpersonal attachments and familial relationships. While this argument may be valid in other contexts as well, the force of interpersonal bonds is more prominent in legal matters related to families, particularly for continuing, long-lasting families.

To be clear, the foregoing criticisms are not meant to imply that children's rights are a superfluous notion in a world where parent-child relations are based on care (and on a deeper level on love and altruism). The argument pointing to the weakness of rights as a mechanism for regulating parent-child relationships is not based on the presence of some ideal form of devoted parental care and concern. My intention is to promote values of parental care, nurture, and responsibility as a normative matter and to implement them as obligatory, not to assume their existence.

Another aspect of the critique warns that a commitment to the current formulation of the rights-of-the-child can result in an excessive focus on the child, sometimes to the detriment of the family as a whole.¹⁰⁸ And that, in turn, may redound to the child's detriment, for it is clear that a child is likely to suffer when her rights are asserted at the expense of the family's continued existence or wellbeing. Similarly, taking excess account of the child to the detriment of other players in the family—first and foremost, the parents—can seriously harm the parents and injure the child and her interests, which are inextricably bound with family welfare.

This line of criticism, that posits single-mindedness on the child, is

107. See Minow, *supra* note 5, at 18.

108. This concern is valid only when the rights-of-the-child model is applied hand-in-hand with a position committed to favoring the rights of the child in every situation. As I shall argue, commitment to the rights model is usually accompanied by the principle requiring that the child be placed at the center. In that case, recognition of the rights of the child will likely dictate their categorical triumph over the rights of others. But that position is not necessarily required and commitment to the rights model might, in fact, weaken the child's position in comparison to what would result from a model committed to the best interests of the child. The latter is taken to be a "meta-principle," while the former, in its liberal conception, may require only that the child's rights be balanced against those of others. In that event, the rights model might turn out to produce a weaker commitment to ensuring the child's interests. Cf. Woodhouse, *Defending Childhood*, *supra* note 91, at xi (indicating that the rights model requires placing the child at the center).

integrated with the key argument against the application of the rights-of-the-child approach, an argument related to the possible effect of the child's rights on the web of relationships. Broadening the scope of legal intervention will likely raise the level of tension and sharpen the conflict between the parties.¹⁰⁹ The present criticism of the rights discourse does not advocate non-intervention. Rather, it recognizes that the process through which legal intervention is conducted can itself instigate harmful effects, for its adversarial qualities may lead the parties to adopt a confrontational posture as they struggle to protect their positions. The child's demand will be formulated as an entitlement, and the relief being sought will be regarded as the parent's fulfillment of a duty, the enforcement of which represents a detriment to the other parent. In this way, the "victory" of one implies a "loss" for the other. If the dispute is viewed as a zero-sum game, then even when the child is not formally a party to the fight, her involvement in the process will likely make her into a pawn, used by one side against the other.

In contrast to relations between the parents themselves, relations between parents and children are not regarded as severable as long as the parents remain capable of caring for the children; that is generally so even in cases of profound conflict or where the family itself is dissolved due to separation or divorce. In light of that premise, courts are expected to make sure that when deciding a parent-child controversy, or a controversy between other parties that may have a bearing on parent-child relations, that they do not permit impairment of the quality of the parties' relationships.

As already noted, the rights-of-the-child model has not yet been fully received into American law. Although a rights discourse is not foreign to the realm of domestic relations, especially from the perspective of parents' rights, it seems even today that parent-child relations constitute an enclave in which efforts are made to preserve a different sort of legal interaction. Given the best interests of the child standard, which sees the child as an object of legal protection, the law treats the child and her relations with her parents in a unique way and dictates such values as devoted care and responsibility. The position that recognizes family autonomy likewise limits the ability of the law to intervene in the family unit in the name of the rights of the child, especially when parents agree on how the child

109. This does not mean, of course, that we should restore the traditional arrangements that precluded intervention in the family unit since identifying the family as a separate, closed domain preserved its patriarchal structure and provided an excuse to avoid intervention, even when the family's more vulnerable members suffered harm. Intervention, for example, is the conventional way to resolve disputes over child support, even though one would expect non-intervention to be the norm since the expectation is that a caring parent will want to ensure the child's development and wellbeing.

should be cared for.

The prevailing normative use of the best interests of the child standard is problematic. First, as already noted and illustrated in the context of relocation, the bounds of the principle are vague, it is formulated in subjective terms, and it can be used to justify contradictory positions, thereby lending itself to manipulation.¹¹⁰ Second, the principle of the best interests of the child is used as part of an approach that emphasizes, sometimes to excess, the rights of the parents.¹¹¹ That reality is highly evident in disputes between parents and third parties, where the parents and their rights are afforded a clear, sometimes overwhelming, preference over third parties (such as the state or other individuals) without regard to the nature of the ties the child may have with these third parties or the emotional needs of the child.¹¹² The preference for parental rights can appear even when the dispute is between the parents themselves or between parent and child, and the child is compelled, sometimes even by force, to obey the parents and submit to their demands, even when doing so impairs her best interests.¹¹³ It turns out that the declared commitment to the standard of the child's best interests may fail to be translated into practice or may be interpreted as an element reflecting a possessory concept of parental relation to the child.¹¹⁴ Even if the principle could be refined so as to reflect the child's welfare and not merely the parent's interests in their child, that still would not be good enough because it would allow for the standard of the child's best interests to be presented, to a considerable degree, as competing with the parents' rights or as a means for deciding a conflict between them.¹¹⁵ That reality does not adequately protect children, their needs, or their wellbeing.

Accordingly, we cannot be satisfied with the existing situation. The relational rights model, as an alternative to the application of the traditional liberal rights model can respond to the foregoing concerns and criticisms

110. See Coupet, *supra* note 86, at 80 (proffering the notion that the vague nature of the best interests of the child principle may subject it to manipulation, causing harm to children).

111. See MASON, CUSTODY WARS, *supra* note 87, at 66-69.

112. See McGough & Shindell, *supra* note 69, at 241-43 (noting psychological studies proving that nurturing relationships that may be in the child's best interests to maintain are not totally dependent on biological ties).

113. See MASON, CUSTODY WARS, *supra* note 87, at 68 (reiterating that because the rights of the adults are often given more weight during custody proceedings, the child's wishes, feelings and, ultimately, best interests are ignored).

114. See generally Janet Farrell Smith, *Parenting and Property*, in MOTHERING: ESSAYS IN FEMINIST THEORY 201 (Joyce Trebilcot ed., 1984).

115. See Woodhouse, *Hatching the Egg*, *supra* note 91, at 1756-57. See generally Susan A. Wolfson, *Children's Rights: The Theoretical Underpinning of the "Best Interests of the Child,"* in THE IDEOLOGIES OF CHILDREN'S RIGHTS 7 (Michael Freeman & Philip Veerman eds., 1992).

while still retaining the benefits of rights.¹¹⁶

D. The Relational Model

1. General Characteristics

The relational model, as presented here, comprises a conceptual blending of two familiar moral voices. One is the ethics of rights, which serves as the underpinning of the liberal rights discourse; the other is the ethics of care, as first defined by Carol Gilligan in the early 1980s and more fully formulated in later writings.¹¹⁷ The ethics of care serves as the central anchor for the relational model as a legal paradigm and colors its characteristics. Consistent with the ethics of care, the relational model is sensitive to interpersonal ties, works to facilitate their formation, seeks to protect those that already exist, and emphasizes one person's caring and dependable response to another. According to this approach, care means understanding the other with whom one is in a meaningful relationship and aiming to ensure her wellbeing.

The liberal rights model focuses on abstract principles and on hierarchical decisions regarding the primacy of competing rights. The relational model focuses instead on the concrete person and emphasizes the fabric of relationships between her and others. In contrast to dichotomous confrontation which is so typical of the rights model (plaintiff/defendant, winner/loser), the marks of the relational model are its attentiveness to the other, its triumph over alienation, and its non-hierarchical deliberations, which make for fewer binary outcomes.

The influence of the relational model is clearly evident in the area of procedure. In general terms, one may say that there is a connection between the ethics of care and the development of ADR mechanisms to replace adversary proceedings.¹¹⁸ An agreed-upon resolution arrived at

116. Martha Minow & Mary Lyndon Shanley, *Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law*, 11 HYPATIA 4 (1996) (first defining and developing this concept, not necessarily in the context of children's rights).

117. E.g., SEYLA BENHABIB, *SITUATING THE SELF: GENDER, COMMUNITY AND POSTMODERNISM IN CONTEMPORARY ETHICS* (1992); GRACE CLEMENT, *CARE, AUTONOMY, AND JUSTICE: FEMINISM AND THE ETHIC OF CARE* (1996); NEL NODDINGS, *CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION* (1984); SEVENHUIJSEN, *supra* note 93; TRONTO, *supra* note 7; See CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

118. See generally Cynthia Grant Bowman & Elizabeth M. Schneider, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 FORDHAM L. REV. 249 (1998); Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665 (1993); Jennifer A. Freyer, *Women Litigators in Search of a Care-Oriented Judicial System*, 4 AM. U. J. GENDER SOC. POL'Y & L. 199 (1995); Paul J. Zwier & Ann B. Hamric, *The Ethics of Care and Reimagining the Lawyer/Client Relationship*, 22 J. CONTEMP. L. 383 (1996); Wesley Mack Bryant, Comment, *Solomon's New Sword:*

through a properly conducted mediation process will probably have better prospects for successful implementation and will diminish tension and conflicts.¹¹⁹ Because children may be seriously harmed by adversarial legal proceedings, the mediation alternative is seen as particularly desirable in this area. Of course, it is necessary to ensure that the resolution reached through mediation is suitable, and, in that context, to verify that the mediation process successfully protects the interests of the weaker (and sometimes invisible) parties, including children.¹²⁰

Even when the proceeding is adjudicatory, the goal of the inquiry is not to bring about the victory of one side over the other—a victory that will not be well-suited to a substantial portion of the domestic disputes related to children—but to arrive at a result that embodies the interests and rights of the various parties. A proceeding of this sort will strive to protect plaintiff and defendant alike by means of a solution that will take into account both parties' positions and strive to preserve the relations between the parents and between the parents and their children. In the context of an approach that aims to take account of all parties' interests and is not committed to a binary decision, the solutions arrived at in most cases will be tailored to the needs of the parties and the characteristics of the dispute.¹²¹ It may be assumed that the creativity and flexibility of the solutions reached will enhance their long-term applicability.¹²² At the same time, it must be clear

Tennessee's Parenting Plan, The Roles of Attorneys, and the Care Perspective, 70 TENN. L. REV. 221 (2002).

119. Compare Frank E. A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1, 32-35 (2006) (insisting that mediation for family disputes is superior to the adversary system in many aspects, including satisfaction with settlement outcomes and increased parental involvement with their children), with Joan B. Kelly, *Parent Interaction After Divorce: Comparison of Mediated and Adversarial Divorce Processes*, 9 BEHAV. SCI. & L. 387, 397 (1991) (suggesting that the positive effects of mediation are not long-lasting).

120. See, e.g., S. JAMES GARBARINO, WHAT CHILDREN CAN TELL US (2001); GUGGENHEIM, *supra* note 68; MASON, CUSTODY WARS, *supra* note 87; MARIAN ROBERTS, MEDIATION IN FAMILY DISPUTES – PRINCIPLES OF PRACTICE 196-210 (3d ed., 2008); Robert E. Emery, Commentary, *Easing the Pain of Divorce for Children: Children's Voices, Causes of Conflict, and Mediation Comments on Kelly's "Resolving Child Custody Disputes,"* 10 VA. J. SOC. POL'Y & L. 164, 166-70 (2002); Melissa J. Schoffer, Note, *Bringing Children to the Mediation Table: Defining a Child's Best Interest in Divorce Mediation*, 43 FAM. CT. REV. 323, 326-33 (2005).

121. See Zwier & Hamric, *supra* note 118, at 433.

122. See Howard H. Dana, Jr., *Court-Connected Alternative Dispute Resolution in Maine*, 57 ME. L. REV. 349, 355 (2005) (stating that one of the benefits in ADR processes is a creation of opportunities for a wider range of outcomes by designing creative possible solutions); Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395, 409 (2000) (stating that the ADR processes generally result in greater consumer satisfaction, less expenses and better parent-child relationships, compared to adversary litigation); Andrew Schepard & James W. Bozzomo, *Efficiency, Therapeutic Justice, Mediation, and Evaluation:*

that it will not always be proper or possible to formulate a flexible result that affords expression to the full range of interests and desires of all parties. In extreme cases that bear on defining relationships or determining the boundaries of the family, or in circumstances where the relationships themselves are destructive or violent, the decision reached may well be a binary one.

The relational model of children's rights will have a bearing not only on how the dispute is resolved but also on the substance of the solution. That influence is relevant both to the disposition of the case at issue and to the legislator's formulation of a statute. These substantive issues are the focus of the following sections.

2. *Children's Rights as Relational Rights*

As already noted, the relational model attempts to infuse elements derived from the ethics of care with those from the ethics of rights. Combining the two makes it possible to continue protecting the standing of rights even in the context of a system committed to relationships.¹²³ The concept of "right" does not disappear, and liberty, autonomy, and equality remain ensured. At the same time, the bringing to bear of qualities drawn from the other ethical paradigm will shape the concepts of liberty and equality differently and bring about decisions that differ from those that would have been reached under the rights model in its Kantian form. Within the framework of the relational model, it will be possible to continue using the concept of "right" without impairing the other values sought to be advanced, including ongoing responsibility and care. These values will provide guidance in formulating the rights themselves and in applying them to the circumstances of particular cases.

The implications of the relational perspective are relevant in three aspects. First, it changes what work rights do, by affecting the way in which the concept of "right" is formulated and understood. The rights to be taken into account in reaching the decision—that is, the rights of the child and of the other family members, including the meaning, definition, and scope of those rights—will be differently formulated under the relational model and therefore will most likely be given interpretations different from those in conventional legal discourse. Application of this model shifts the emphasis, as Professor Nedelsky explains, from regarding a right as a barrier against the involvement of the other to seeing it as

Reflections on a Survey of Unified Family Courts, 37 FAM. L.Q. 333 (2003); see also Barbara J. Bautz & Rose M. Hill, *Divorce Mediation in New Hampshire: A Voluntary Concept*, 7 MEDIATION Q. 33 (1989); Sander & Rozdeiczer, *supra* note 119.

123. See Minow & Shanley, *supra* note 116, at 22 (reiterating the fact that people are both distinct individuals and dependant, relational beings in complex relationships).

something that draws on, reflects, and advances interaction between the individual and her surroundings.¹²⁴ This understanding of rights is almost *ipso facto* bound up with an emphasis on their positive and protective aspects. A right interpreted in accordance with the relational model will be understood not as something that promotes separation between individuals, but as something that embodies and advances elements of ongoing responsibility and mutual concern for those with whom one is in a meaningful relationship.¹²⁵

The second aspect involves a call for the establishment of some new rights—rights meant to form and advance nurturing family relationships. Such rights include, for example, the right to meaningful family relationships, the right to parental care, and the right to development. This plane is embodied in the CRC, which formulated and declared special children's rights consistent with the foregoing concerns.¹²⁶

Finally, the third aspect unique to relational rights pertains to how rights are implemented within the framework of legal decision making. As a rule, relational rights should be implemented so as to preserve nurturing family relationships. Put differently, the implementation should be sensitive to the mutual responsibilities upon which relational rights are premised. In practice, this commitment can be broken down to the following three elements:

First, the resolution arrived at must take into account the wishes of all relevant parties—something that can be done by listening to what each party has to say, including the children.

Second, the resolution must aim to cause minimum harm to all parties

124. See Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 12 (1989) (stating that autonomy is rooted in interdependence and that rights could permit and promote relationships).

125. See Minow & Shanley, *supra* note 116, at 6 (developing the concept of relational rights by noting the claims on the public to provide the means necessary to maintain caring relationships critical to human development and wellbeing). For related models in different contexts see JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* (Cambridge University Press 2006); Ayelet Blecher-Prigat, *Rethinking Visitation: From a Parental to a Relational Right*, 16 DUKE J. GENDER L. & POL'Y 1, 15 (2009) (incorporating children's relational rights to the visitation context and noting that visitation should be awarded to reward the care for the child rather than biological relationships); Chan, *supra* note 96, at 473, 477-79 (insisting that courts consider the concept of relational rights and its values of sustaining relationships before dismissing custody proceedings for lack of standing); Coupet, *supra* note 86, at 81-83 (noting the lack of consideration for children's relational rights in public child welfare and dependency law); Shulman, *supra* note 87, at 320-22 (applying relational values to the context of children's religious upbringing).

126. See CRC, *supra* note 76, arts. 3, 5, 7, 9, 27 (delineating the primary consideration of the best interests of the child, obligations of the extended family or community to provide direction and guidance, and the child's right to identity, parental care, and a suitable standard of living).

concerned or, at least, avoid bringing about overly severe harm.¹²⁷ In other words, the decision must be optimally balanced between the preservation of family relationships and individual rights. Doing so requires the adjudicator to examine a range of solutions and their possible outcomes and to adopt those that are best tailored to the specific case. That approach by its nature is associated with ADR procedures, but it is applicable in an adversarial judicial proceeding as well.

Third, if a clash cannot be avoided, the interests of those whose welfare depends most on the relationship take precedence. That usually means that when arriving at the proper balance between the rights of various family members, preference should be given to protection of the child and ensuring that her welfare flows both from the element of responsibility on which the model is centered and from the need to afford protection to weaker parties.

Because the family is the focus for the formation of meaningful, intimate attachments and because of the family's purpose and importance to its members, especially to children, the third criterion identified above dictates an examination of the effect on the family for every solution proposed. It requires as well that the resolution chosen be one that ensures the formation and long-term maintenance of high-quality relationships. The relationships to be cultivated and preserved are those that embody concern, devotion, nurture, and long-term responsibility—or, at least, the potential for those ideals. The emphasis here is on the quality of the relationships, not on the formal structures within which they are formed. In particular, the criterion recommends a degree of legal recognition of quasi-parental figures that play significant roles in the child's life, including stepparents and grandparents.

In arriving at the proper balance among the rights of various family members, preference should be given, as mentioned, to protection of the child and her welfare.¹²⁸ Given the personal, familial, and societal interest in taking care of a child's needs, the child stands at the heart of the model. The development of the child into a moral, mature, and independent individual depends, quite literally, on the care and concern provided to her in the context of interpersonal relationships.¹²⁹ As a vulnerable actor, the

127. Cf. Freyer, *supra* note 118, at 211 (stating that "the morality of care" is concerned with relationships between people and therefore recognizes a duty to minimize harm).

128. See Mary Ann Mason, et al., *Introduction*, in ALL OUR FAMILIES: NEW POLICIES FOR A NEW CENTURY 8 (Mary Ann Mason et al. eds., 1998) (describing the rejection of child-centered approaches as harmful to the child); see also Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child Centered Model for Adoption Policy*, 68 TEMP. L. REV. 1649, 1670-71 (1995) (discussing the central status of the child in the context of varying family forms and adoption policies).

129. See TRONTO, *supra* note 7, at 162 (highlighting the dependent and inter-

child is at the center of concerned activity and she generates an obligation to take account of her needs and to establish arrangements that are consistent with her welfare—specifically, by the preservation and cultivation of the family relationships around her.¹³⁰ Hearing the child's voice, whether directly or through a representative, can be helpful in devising solutions that are consistent with the child's wellbeing and particular needs. This element must be realized in each case, and even if the child's voice cannot be heard directly for reasons of capacity, the effect of the contemplated resolution on her situation must be examined.¹³¹

The consideration calling for a heightened focus on the welfare of the child overlaps with the familiar standard of the "best interests of the child," but differs in meaning and scope. In its current format, the standard is a limited element in a court's deliberations, serving as a counterweight to the interests or rights of the parents. In many cases, the declared focus on the child's best interest goes unrealized or is set aside in the face of contrary elements.¹³² In the context of the relational model, however, the child's welfare will be the consideration that provides the model's overall orientation. It will reflect the shared interest of parent and child, resting on the premise that parent and child are not in conflict.¹³³ Even where that premise is belied, the consideration will serve as a normative element, compelling the use of a standard that favors, in the event of a clash, the relational rights of the child. Given the centrality of the family in the life of the child and the importance of interpersonal bonds and attachments to the child (especially nurturing parental ones), ensuring the welfare of the child will mean, in the context of this model, striving to establish and maintain beneficent and optimal family relationships.

The relational model is contextual. It calls for examining all relevant aspects of the issue—the circumstances of the case and the characteristics of the parties. Therefore, for its application to be meaningful, the facts pertaining to the decision must be detailed with a greater degree of precision. Still, the general outline of the model will enable us to consider

relational aspect of human beings and how such interdependence is a necessary precondition of autonomy); Nedelsky, *supra* note 124, at 12 (attributing the support and guidance received from relationships as necessary for autonomy).

130. See Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J.L. & FEMINISM 83, 124 (2004).

131. See Barbara Bennett Woodhouse, "Are You My Mother?": *Conceptualizing Children's Identity Rights in Transracial Adoptions*, 2 DUKE J. GENDER L. & POL'Y 107 (1995).

132. See McGinnis, *supra* note 65, at 314 (describing the conflict when courts attempt to honor the child's best interest while also protecting the father's wishes and rights in custody).

133. See Scott & Scott, *supra* note 86, at 2475, for a thought-provoking model that deals with the problem of parent-child conflict of interests.

how we should approach the question of relocation, and compare this approach with that of other models.

V. LEGAL CONSEQUENCES

A. The Test Case in Light of the Relational Perspective

1. Setting the Stage

Examining the situation described in the Prologue from the relational perspective will lead to a mode of analysis different from the one prevalent under much existing state law. This is significant even if the outcome of the case may be reached via alternative paths as well, since the process through which the law is ascertained and applied is of consequence for the welfare of the child and other family members. If the child is indeed taken seriously throughout the process, chances are she will suffer less from the process itself.¹³⁴ Furthermore, the proposed path may lead the way for approaching other disputes within the family about parental responsibility and may subsequently influence the way in which individuals conduct their daily lives in matters unrelated to relocation under the shadow of the law.¹³⁵

As a general matter, disputes regarding relocation are best resolved by the parties themselves (provided, of course, the agreement rests on genuine consent of all parties). The law can, and should, construct mechanisms that offer incentives to reach such agreements. A binding decision by the court should therefore be issued only where there is no consensual alternative. Our test case assumes negotiations have failed, and therefore a judicial intervention is necessary. As mentioned, these cases are often complex and involve numerous variables, but the relational model offers a roadmap with which to navigate conflicting rights by situating the rights in relationships and by infusing their content with the responsibility to maintain caring relationships. More specifically, the relational perspective may regard the situation as involving a clash narrower in scope than the one that might be perceived through the lens of the liberal model, for the former assumes, at least as a normative matter, that both parents desire a similar outcome: protecting the network of relationships in which the child is rooted and thereby maximizing her welfare. After examining parties' arguments in

134. See Robert E. Oliphant, *Relocation Custody Disputes – A Binuclear Family-Centered Three-Stage Solution*, 25 N. ILL. U. L. REV. 363, 395-99 (2005) (stating that approximately half of the states either mandate or encourage parenting plans when joint custody is ordered); Stahl, *supra* note 66, at 820 (embracing that children given the opportunity to participate in living arrangement decisions have less negativity towards the family situation).

135. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

light of this model, the concrete criteria that the legal regime should incorporate will be presented.

2. *The Custodial Parent*

In the hypothetical case before us, as in most real world cases, it is the mother (who, also, in most cases, is the custodial parent) that seeks to relocate.¹³⁶ The determination regarding the mother's petition will be arrived at by weighing the interests and needs of the parties—hers, her children's, and the children's father.¹³⁷ Despite the limitations on the exercise of her rights—limitations deriving, as already noted, from the duties and responsibilities she bears toward her children and their father—she cannot necessarily be expected to remain permanently in the United States. Accordingly, the circumstances underlying her request to emigrate carry genuine weight insofar as the request grows out of a true opportunity to improve the family's economic condition, embodies the possibility of broadening the mother's support network (which can alleviate the difficulties of raising children in a single-parent family), or results from a meaningful romantic attachment. On the other hand, if the request is a mere caprice, rooted in nothing more than a desire for a change of scenery, the relational model will regard it less sympathetically, and it will be given even less weight (or none at all) if it is deliberately meant to impair sound relationships between the child and the other parent.

Distinguishing the various motives that might underlie the request to emigrate is not unique to the relational perspective, and it characterizes, as we have seen, a significant number of the legal regimes that are in place today. But the relational perspective goes beyond clarifying the reasons for relocation. Despite the mother's freedom of movement and despite her having custody over her two children, her desire to move abroad, even if grounded in solid and worthy motives, does not carry unlimited weight and is not necessarily dispositive. The decision regarding her request to relocate must also take into account the needs and rights of the other parties. In that way, this position differs from prevailing law today, which affords, under some approaches, almost unlimited weight to the will of the custodial parent. The relational perspective is unique in that it requires the members of the family to bear a burden greater than the one imposed on

136. See U.S. CENSUS BUREAU, GENERAL MOBILITY OF FEMALE FAMILY HOUSEHOLDERS (2008), <http://www.census.gov/population/www/socdemo/migrate/cps2008.html> (highlighting the greater number of female heads-of-household who choose to relocate); see also Braver & Ellman, *supra* note 3, at 206 (finding that approximately twenty-five percent of mothers with custody moved to a new location within four years of divorce).

137. It is clear that there is a preference for settlement by the parties. An external determination by the court, to be made in accord with these standards, should be sought only when there is no alternative.

individuals in any other legal context.

The mother bears the responsibility, first and foremost, to ensure the relational wellbeing of her children, but she also bears a responsibility toward the children's father. Even though the legal tie between the parties has been severed by divorce, their original choice to establish a family together bears consequences even after they go their separate ways, especially when they share childcare (provided, of course, these relations have not turned violent or otherwise injurious to the parties). In that sense, her freedoms are not unlimited, and they must be exercised in a way that takes account of the rights of her children and their father, primarily their rights to maintain a nurturing relationship.

3. The Non-Custodial Parent

The position of the father, who wants to prevent the children's relocation by having them transferred to his physical custody, is likewise entitled to recognition. He will argue in the name of his right to maintain and nurture meaningful family relations and to exercise active parenting. As long as the father has not been found unqualified to play a parental role and his parental skills demonstrate that he is well qualified, his request cannot be denied out of hand. In this context, importance attaches to the role played by the father in the routine of the children's lives. The more he is a central figure in their lives and takes a significant part in raising them, the more sympathy his demand will evoke and the greater the burden that will be borne by the mother, the custodial parent, in showing that her request is justified. This position derives not only from recognition of the father's own rights, but also from recognition of the children's rights to have a relationship with him.

A distinction between this approach and that of the model that concentrates on the parent's rights bears emphasizing. The relational model assigns no inherent significance to a legally recognized "parent" and does not sanctify parents' ability to "control" their children just by virtue of being a legally recognized parent. The relational model place significance neither in the right to parent nor in the "battle" between the father's and mother's rights, but in the quality of the parental bond.

4. The Children

Weighing the mother's interests against the father's cannot by itself produce a resolution in favor of one or the other. Either way, their positions and their interests can only provide background for the decision, which must be centered on the children's needs and rights. Two leading rights arise in this context: (1) the right to participate—or more accurately, the right to meaningful participation—in arriving at the decisions that

determine the child's fate, a right that pertains to every decision affecting her; and (2) the right to identity, which relates to the right to meaningful family relationships, but includes additional personal and communal aspects.

Should we approach these rights as classical liberal rights? As relational rights? Or simply as manifestations of the child's best interests? I propose to adopt the relational model because I believe it best fits our moral concerns: children are rights-bearing entities, but they are in need of special care. Because there is room to ask whether the choice of model really makes a difference, my analysis of these two rights also highlights the distinctions among the rights-based liberal approach, the best interests of the child standard, and the relational rights model.

a. The Right to Meaningful Participation

The centrality afforded to the child in the relational perspective can be misread as simply maintaining the principle of the best interests of the child in its paternalistic sense. That reading, however, is unwarranted. We are not speaking of the best interests of the child as determined entirely by the "other." The model does not purport to speak in the name of the child or from "above" her. Instead, it grants her the right of participation, which makes it possible for her to express her opinion on matters affecting her life, and it grants her opinions proper weight, consistent with her age and level of development.¹³⁸ That right embodies one of the prominent differences between the children's rights model and the best interests of the child model.

The child's right to take part in reaching decisions that bear on her life and the decision maker's obligation to consider her wishes are a fundamental condition for ensuring individual rights. We cannot speak seriously about rights unless the individual has the opportunity to seek their recognition. Similarly, rights cannot be effectively exercised unless the authority responsible for upholding them can know whether and how the individual wants to enjoy them.

So why not use the liberal rights model? First, adoption of that model would require granting the child other rights as well, such as freedom of movement and of emigration (relevant in our case).¹³⁹ But moral intuition

138. See Barbara A. Atwood, *The Child's Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform*, 45 ARIZ. L. REV. 629, 650 (2003) (recognizing the international adoption of the right to participate as one of the four guiding principles to children's rights); see also Merrill Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 TOURO L. REV. 745, 775-76 (2003) (explaining that many states have statutes prescribing the child's right to participate); Stahl, *supra* note 66, at 820.

139. See, e.g., *Jones v. Helms*, 452 U.S. 412, 418 (1981) (constitutionally safeguarded right to travel); *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) (freedom to

suggests that children might be seriously harmed by being granted such broad rights; at a minimum, doing so would conflict with our understanding that children are not yet able to fully grasp the implications of exercising their autonomy.

Second, listening to the child does more than allow her to express her autonomy or provide a mechanism for actualizing her rights. It also provides an important communication channel that will likely help the decision maker consider the child's needs and thereby promote her welfare.¹⁴⁰ Hearing the child does not necessarily mean granting her the right to argue and to appear via a representative in every judicial hearing, and it certainly does not dictate that conclusive weight be given to her position. It must be done with sensitivity and possible negative consequences must be recognized. In other words, conceiving the right to meaningful participation as a relational right obligates the state to develop procedures for minimizing the harm to the child's relationships that might be caused by her participation. In any event, it is important to remember that the relational model takes account of the child's rights even where the child's position cannot be heard, for the rights exist independently of any concrete expression of will.

b. The Right to Identity and Meaningful Relationships

Having heard Léa and John's children, the court must consider their right to identity.¹⁴¹ That right has several aspects. First, there is the **familial aspect**, which aims to preserve and nurture one's ties to family members. The hope is that a child will be cared for by members of her family and will maintain an ongoing relationship with them. In our context, the right to identity entails the right to maintain meaningful relationships with a parent following a parental separation in which the question of custody is posed. In the specific case before us, this aspect of the right dictates a result that may be impossible to achieve in practice—having the child remain in proximity to both parents.

The right can go beyond relations with a parent and extend to relations with other family members and even to the preservation of the child's **communal or ethnic identity**. The court must therefore inquire into whether separating the children from family members and friends will be so harmful to the children as to warrant a denial of the mother's petition to

travel is a fundamental right); *Shapiro v. Thompson*, 394 U.S. 618, 637 (1969) (constitutional right to interstate movement).

140. See Woodhouse, *Defending Childhood*, *supra* note 91, at x (stating that we need to listen to children's voices in order to respond effectively to their needs).

141. This section follows, in many ways, Ya'ir Ronen's perception of the "right to identity." Cf. Ya'ir Ronen, *Redefining the Child's Right to Identity*, 18 INT'L J.L. & FAM. 147 (2004).

relocate with them. Alternatively, the court must examine whether frequent visits to the United States will allow the children to adequately maintain those meaningful relations.

The right to identity has yet another aspect, one that involves the child's **self-fulfillment**. In other contexts, this aspect would entail rights such as freedom of expression, including the right to receive information, and freedom of thought, conscience, and religion. More relevant to our context are the rights to education and to respect for one's cultural identity. This aspect is relevant to the child's development in the various spheres of her life—her home, her school, her community—and it is involved, naturally, in the decision to relocate.

One may say that the right to identity, in the sense of development and self-fulfillment, has two facets—one related to **preserving identity** and one related to **developing identity**. Let me begin with the latter, which bears on the ability to shape an identity separate and distinct from that supposedly dictated by circumstances of birth. For the right to development to be meaningful, the child must be given the opportunity to be exposed to information about communities, religions, and narratives other than the ones she comes to know in the immediate environment in which she lives.¹⁴² In our case, this may involve exposing the children to their mother's language, land of origin, and culture, as well as to their mother's extended family and the new family she wants to establish. At the same time, nothing here dictates the extreme outcome of relocation, for invocation of the right to development of identity is always subject to maintaining the child's relationships within the interpersonal network in which she is already rooted.

The other facet of the right to identity pertains to identity as already developed, particularly as affected by the child's community and family. She authentically belongs to those groups and the right to identity must be protected with respect to them. Also pertinent here are the child's spoken language, the environment she is familiar with, her ethnic and religious characteristics, and the history and traditions of the group she has been a part of since birth. This aspect of the right tilts the balance toward denial of the mother's petition to relocate with the children, for the practical effect of granting her request would be to impair the substantive ties between the children and their home, their familiar surroundings, their schoolmates, their culture and language, and their extended family living in the United

142. This should not be read as implying that the parents or the state have a duty to expose the child to all possible variations of culture, as that would not only be impractical, but it would run against the idea of developing a sense of belonging to a community. The right to development does imply, however, the right to be exposed to relevant cultures that bear at least indirectly on the child's life in the interpersonal, communal, and social space in which she is involved.

States. This, too, is not necessarily the decisive factor, though it might dictate the terms on which the petition, if found warranted on the basis of other considerations, might be granted. In that case, the court should make sure that the children's original cultural ties are protected, whether by finding some alternative within the community to which they are moving (for example, enrolling them in an English-speaking school in Paris) or by maintaining ongoing ties with the United States through visits or some other means of preserving cultural and communal ties.

B. Legal Implications of the Relational Model

1. Agreed upon Relocation: The Preferred Alternative

The starting point of the proposed legal regulation is the concluding point of the previous section: that relationships matter; that the facts of each case matter; that guidelines should be developed to constrain court discretion. Because relationships matter, the legal regulation of relocation must include, preliminarily, a mechanism for verifying that the decision to relocate was reached with the knowledge of both parents. This is important because the move will be a fateful step for the child, which should not be taken without its merits having been examined by both her parents. To that end, the custodial parent, who desires to move, must be required to notify the other parent at least two months in advance of the contemplated move.

When the parents reach an agreement, sound regulation would require the parents to put together a detailed visitation plan to be implemented following the child's move. The frequency of the visits, their location, coverage of the associated expenses, and other means of staying in touch (telephonic or other virtual contacts) must all be determined in the agreement. Furthermore, the regulation should strive to ensure that the agreement provides ongoing substantial ties between the child and the non-custodial parent, and between the child and other significant figures in her life—other family members, close friends, and the like. In addition, the regulation should encourage agreements to maintain the child's cultural anchors and her heritage in the community of which she was hitherto a part and in which the parent left behind remains. One should consider how best to maintain language skills and preserve the customs that have been a part of the child's life until now. While it would be a good idea to agree on a visitation plan that preserves the child's original set of attachments, it is an equally good idea to allow her to forge a new routine and allow her to become established in her new place of residence. Prior approval of the court should be a precondition to the effectuation of an agreement between the parents; in that way, the court can make certain that the relational rights

of the child have been protected. Beyond that, the court that approves the agreement must clarify whether alternatives to moving have been considered and whether the non-custodial parent weighed the possibility of his own move to join the custodial parent and the child in their future place of residence.

2. *Decision by the Court: A Three-Prong Test*

As mentioned earlier, a court ruling should be a last resort, issued only if an agreement between the parties, with court approval, cannot be reached. In the absence of an agreement, the default position should not be that the parent is authorized to relocate at will; an application to a court of law should be required to ensure that the rights of all concerned are protected. Given the emotional harm to the child occasioned by lengthy proceedings, the law should set a maximum time limit within which a judicial decision on these motions must be rendered.¹⁴³

Substantively, the motion to relocate may fall into one of three factual categories, detailed below, depending on the custody arrangements and the extent of the ties between the child and each of her parents.¹⁴⁴ Each of these categories will trigger different burdens of proof and presumptions.

The first category consists of cases where child care is divided between the parents on an equal or nearly equal basis or when the non-custodial parent plays a central role in caring for the child—that is, where the child is under the care of the non-custodial parent at least forty percent of the time. In these circumstances, the regulation proposed here calls for a rebuttable presumption against the move. The burden of rebutting that presumption should fall on the custodial parent wishing to relocate; that parent will have to show that the move is sought for substantive reasons and that denying permission to move would cause harm to the child.

The second category consists of cases where the custodial parent cares for the child almost exclusively and the child's relationship with the other parent is limited, confined, perhaps, to a weekly visit or two. In these circumstances, a presumption favoring permission to relocate should attach. If the custodial parent shows her petition to move was made in good faith, it will be granted unless the other parent meets the burden of showing that the move, and the custodial parent's potential near-exclusive custody, will significantly harm the child.

143. Limitations on the time allowed for an inquiry are already known; they exist, for example, in cases involving removal of a child from a household where she is in danger of violence or neglect. Cf. Pamela McAvey, Note, *Families, Child Removal Hearings, and Due Process: A Look at Connecticut's Law*, 19 QUINNIPIAC L. REV. 125, 129 (2000) (mandating a hearing within ten days of removal).

144. ALI PRINCIPLES, *supra* note 34, § 2.06, 2.08 (allocating different presumptions to custody arrangements dependent on the past caretaking functions of the parent).

The third category will be applied in cases falling somewhere in the middle of the first two groups—cases in which the custodial parent plays a leading parental role but the other parent also occupies a significant (albeit limited) place in the child's life. In these circumstances, there should be no presumption regarding relocation. The burden of proof will initially be on the parent seeking to move, who will have to show that the request is made in good faith and motivated by legitimate considerations. If this initial burden is met, the burden shifts to the parent opposing relocation, who must show that the move is not in the best interests of the child.

Assigning burdens of proof is only the beginning of the solution. The question then shifts to the criteria for meeting the assigned burdens. The complexity of the decision and its momentous impact on the life of the family require that each case be carefully examined. At the same time, a degree of uniformity in the courts' decisions is necessary, for the chaotic state of affairs that will otherwise ensue will intensify litigation to the detriment of the child.¹⁴⁵ The optimal arrangement thus appears to be a set of criteria or guidelines,¹⁴⁶ premised on the ethics of care that should inform the court in deciding whether a burden has been met.¹⁴⁷

3. *Decisional Criteria*

The following criteria, are proposed in an effort to realize the goal of preserving relationships among family members. They are designed to help reach an almost impossible balance between two competing bonds: the children's bond with their mother, the primary caregiver who seeks relocation, and their bond with the father, whose relationships with his children also merit protection and who would be profoundly harmed if the petition were granted.

The first criterion, relevant to every decision regarding relocation, relates to the reasons for advancing the request. Given the potentially huge effect of the move on child's relations with the second parent, on her daily life, and on her ties to other family members and friends, it is necessary for the petitioning parent to have substantial reasons that warrant the move. A move that is sought only to provide "a change of scenery" should not be viewed as sufficient to meet the burden of proof. Similarly, a move whose direct purpose is to impair positive relations between the child and the

145. See *supra* text accompanying notes 59-60.

146. But see *Tropea v. Tropea*, 665 N.E.2d 145, 151 (N.Y. 1996) (criticizing the use of threshold tests to determine relocation cases).

147. Arguments to the contrary notwithstanding, the ethic of care is capable of providing standards clear enough for establishing a workable degree of legal certainty. See SAMUEL J. M. DONNELLY, *THE LANGUAGE AND USES OF RIGHTS: A BIOPSY OF AMERICAN JURISPRUDENCE IN THE TWENTIETH CENTURY* 105 (1994); see also Ellmann, *supra* note 118, at 2667.

other parent lacks good faith and thus should count against the person seeking to move. This position necessarily follows from an approach that aims to preserve familial relations.

If, on the other hand, the child's ties to the other parent are found to be destructive, and if it is determined that efforts to improve them have been unavailing, a request whose purpose is to distance the child from the cause of harm and thereby ease the tension to which she is subjected should not be considered unjustified *per se*. In that sense, it is not only the custodial parent seeking to move whose good faith must be evaluated; an assessment must be made as well regarding the good faith of the parent opposing the move. An inactive parent who avoids contact with the child—and, even more so, a parent whose attitude or behavior is found harmful to the child—will have a difficult time in meeting the burden to oppose the move.¹⁴⁸

Significant weight in any relocation decision must be given to the visitation plan proposed by the relocating parent. The second criterion to be applied consists of examining that plan. The plan should show the court how the petitioning parent proposes to enable the child and the other parent to exercise their rights to meaningful relationships under the new situation. The plan can serve as an indirect indicator of the petitioning parent's commitment to ensuring that the child's ties to the other parent are maintained. The extent of custodial parent's willingness to ensure that ties with the other parent are maintained is something that will have to be examined only in extreme circumstances. Factual inquiry into this question will open the door to an examination of the parties' day-to-day conduct and to accusations regarding visitation; for the most part, that sort of inquiry will only burden the proceeding and foul the atmosphere. Accordingly, it would be reasonable to exclude such data as irrelevant, except in unusual cases where the custodial parent actively undermines the bond between the child and the visiting parent where that bond is sound and beneficial. Proving that allegation will usually involve a claim that the purpose of the move is to impair the bond between the child and the non-custodial parent.

A third criterion, associated with the child's rights to identity and affiliation, calls for consideration of the child's relations with additional key figures in her life. These might include figures playing a parental role (for example, the non-custodial parent's new partner or grandparents who play an active care-giving role), other key family figures (siblings or half-siblings and aunts and uncles), and close friends. The court will also have to weigh the potential future ties: the child's ties to the persons who, as a

148. See Braver & Ellman, *supra* note 3, at 207 (explaining that a parent who has not taken an active role in spending time with their child is in a relatively poor position to argue that a child's relocation will unduly burden their relationship).

result of the move, will come to play a more significant part in her life. These might include the mother's new partner or the members of her extended family whom she will join in her new place of residence. Overall, it is clear that the decisive element will be the quality and scope of the child's relations with the non-custodial parent.¹⁴⁹ As already explained, the closer and more meaningful that relationship is, the more difficult it will be for the custodial parent seeking to move to meet the burden of proof.

In ruling on a relocation petition, the court should, when appropriate, consider the possibility that the non-custodial parent might himself change his place of residence.¹⁵⁰ Taking account of that possibility might indirectly encourage that parent to join the child, thereby enhancing the prospect of continued contact with both parents. To raise this consideration is to declare an expectation that the non-custodial parent will take positive steps to realize the child's rights to significant family relations. Even if the father cannot be compelled to move, a regime that calls for consideration of that possibility signifies an expectation that each parent, not only the custodial parent, will alter his or her way of life in order to ensure that the child's needs are met and her rights realized. A similar purpose could be achieved by a requirement that the non-custodial parent, no less than the custodial parent, provide advance notice of his planned move. Notice would be given to the custodial parent and to the child and a plan would be submitted regarding visitation arrangements.¹⁵¹

Clearly, a disposition that weighs the child's connection with one parent against her connection with the other parent must do so in a manner compatible with the child's emotional wellbeing. Accordingly, the fourth criterion requires that the decision be consistent with the most updated psychological knowledge and be supported, where necessary, by concrete professional evaluation(s) of the child and her parents.

Interestingly, the research on relocation issues has invoked two opposing psychological views that embody, in a sense, the two different legal positions—one which would make it easier for the custodial parent to relocate and the other, which would make it more difficult. Little empirical work examines directly the effects of relocation on the welfare of children, but various professional statements have drawn on studies dealing with the effects of separation between a child and her parents and the overall

149. See Carmody, *supra* note 65, at 235 (explaining that the quality of the child's relationship with the non-custodial parent is directly correlated to the weight of the child's right to contact).

150. See Merle H. Weiner, *Inertia and Inequality: Reconceptualizing Disputes over Parental Relocation*, 40 U.C. DAVIS L. REV. 1747 (2007).

151. See MODEL RELOCATION ACT, *supra* note 33, § 202 (stating that notice of change in residence of non-custodial parents enhances the relationships between the child and the adults involved).

consequences of divorce for children.¹⁵² One faction takes the view that the important element is the child's bond to the primary, custodial parent and the quality and stability of that tie. Naturally, those advancing that position are less concerned about the effects of relocation, for the bond with the custodial parent remains as it was before the move. It is hardly surprising that those who want to make a move easier and emphasize the importance of maintaining ties with the custodial parent—the central parental figure—rely on the results of the foregoing studies.¹⁵³ The other position holds that the child's psychological welfare requires continuation of the ties with both parents.¹⁵⁴ According to this view, a move entailing severance (at least in part) from the other parent is highly likely to harm the child.¹⁵⁵

Whatever psychological position one may adopt, it is clear that its application in a given case will be affected by the quality of the existing ties between the child and her parents. In that context, an additional psychological criterion may come into play, namely, the importance of stability in the life of a child.¹⁵⁶ Stability can be expressed in several ways; one is by maintaining existing custody arrangements and preserving a stable and ongoing tie with the custodial parent.¹⁵⁷ But stability can also

152. See Marion Gindes, *The Psychological Effects of Relocation for Children of Divorce*, 15 J. AM. ACAD. MATRIMONIAL LAW 119, 120 (1998) (considering the idea that the lack of research on child relocation stems from the difficulty in obtaining sufficient sample cases and the geographically widespread nature of the problem). *But see* Braver & Ellman, *supra* note 3, at 207 (examining the effects of relocation on children and families); Robert Pasahow, *A Critical Analysis of the First Empirical Research Study on Child Relocation*, 19 J. AM. ACAD. MATRIMONIAL LAW 321, 335 (2005) (detailing the social science literature and research results regarding the effects of parents' and children's relocation away from non-custodial parents).

153. See Judith Wallerstein & Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L.Q. 305, 305 (1996) (concluding that the custodial parent should have the presumption of a right to relocate the child's residence). For a critical perspective, see Richard A. Warshak, *Social Science and Children's Best Interests in Relocation Cases: Burgess Revisited*, 34 FAM. L.Q. 83 (2000); Braver & Ellman, *supra* note 4.

154. See Raines, *supra* note 19, at 655 (contending that maximum contact with both parents is in the child's best interest and parents should not be allowed to remove a child from the marital jurisdiction unless it is clear that such a move is in the child's best interest). *But see* Warshak, *supra* note 153, at 84 (disagreeing with any presumption and favoring an analysis fitting the circumstances of the family).

155. See Braver & Ellman, *supra* note 3, at 206 (finding an important but not conclusive correlation between children who relocate and long term negative effects); *see also* Carmody, *supra* note 65, at 237 (inferring that moving causes children substantial harm).

156. See Carol S. Bruch & Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 FAM. L.Q. 245, 250 (1996) (explaining the need for stability and the assumption that the child's primary caretaker is most likely to provide it). *See generally* JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (2d ed. 1979).

157. See *Burchard v. Garay*, 724 P.2d 486, 488 (Cal. 1986) (stressing the importance of continuity and stability in custodial arrangements).

mean preserving the tie with the second parent and other important figures in the child's life, as well as her physical environment. It appears that the importance of a stable relationship with the primary caregiver increases as the relationship with that parent becomes more nearly exclusive.

The best interests and welfare of the child do not flow solely from preserving her ties with her parents and others, no matter how central they are. The fifth criterion therefore broadens the perspective and examines the anticipated effects of the move on the child's overall emotional wellbeing. This criterion considers the move's other effects on the child; it requires courts to compare the effects of the move with the effects of disallowing it, thereby ascertaining whether the move will enhance or degrade the quality of the child's life overall. For example, attention may be directed (to a limited degree) to whether the move will afford the child better educational conditions or superior health care, especially in cases where the child may have special needs or where her basic conditions are poor.

It is evident that there is a connection between the child's welfare and that of the parent, especially the primary caregiver.¹⁵⁸ But while that connection should be identified and taken into account, it must be examined with care. Where the relocation is sought in good faith and for legitimate reasons, the child may benefit from it rather than being harmed. A move intended to fulfill the aspirations of the care-giving parent will usually enhance the parent's emotional and/or economic wellbeing, thereby improving conditions for the family as a whole and indirectly benefiting the child. In that sense, taking account of the desires of the custodial parent will recognize the child's welfare. At the same time, it is clear that the interests of the child and of the parent are not identical. Courts, therefore, must avoid exaggerated use of this argument and be aware of the potential for abuse by the custodial parent.

A sixth criterion relates to the characteristics of the place to which the custodial parent proposes to move. How distant is it? What language is spoken there? How different is its culture? The greater the geographical distance and cultural difference from the existing residence, the heavier the burden of justifying the move is. As distances—physical and cultural—increase, the effects of being separated from the former place of residence become more pronounced and the threat to the child's right to identity increases (in the sense of belonging to her family and community of origin, and her right to maintain significant relations with her father). In these circumstances, the great distance and cost of travel make it physically more difficult to meet, and time differences make it more difficult to use virtual

158. See Carmody, *supra* note 65, at 219 (explaining that security and stability can come from a child's emotional and psychological dependence on their primary caregiver).

alternatives. Beyond those factors, the differences in a child's day-to-day experiences, her communities, and her way of life can transform father and child into strangers who perceive each other as being from "another world."

The increased use of virtual communication alternatives in cases of trans-Atlantic relocation warrants a quick comment from the relational perspective.¹⁵⁹ There is no need to explain why virtual relations, at least at the current state of technology, are an inadequate substitute for unmediated contact. A telephone conversation or internet chat cannot replace a face-to-face conversation, a hug, or a touch, even with visual images transmitted via webcam. These virtual alternatives can serve as an additional means of staying in touch but cannot, and should not, be used to replace unmediated visits. Only after the court has decided on other grounds to allow relocation would it be reasonable to use virtual alternatives to supplement the visitation plan, for virtual contact is preferable to no contact at all during the lengthy periods between visits. Still, the availability of virtual alternatives should not make it easier for the petitioning parent to legitimize distancing the child from the second parent.

A seventh criterion is the age of the child. While age should be part of the decision, its effects are complex. It is pertinent not only to deciding whether and to what extent the child's wishes should be taken into account—something considered here shortly as a separate criterion—but also as a factor in implementing her right to maintaining relationships. The younger the child is, the less likelihood there is of maintaining meaningful ties to the non-custodial parent through relatively infrequent visits. From that premise, the younger the child, the harder it should be for the petitioning parent to obtain the court's consent to relocate with the child. At the same time, it should be recalled that an infant of very tender age may not yet have developed significant ties to both parents. In those circumstances, the determination should weigh not only the relationship that already exists but also the potential relationship that may develop.

Finally, according to the last and eighth criterion, the determination reached with respect to a relocation petition should take account of the wishes of the child. To ascertain the child's wishes—just as to ascertain her needs—it is necessary to allow her to be heard. Various mechanisms are available for doing so which should be tailored to the developmental

159. See Elisabeth Bach-Van Horn, Comment, *Virtual Visitation: Are Webcams Being Used as an Excuse to Allow Relocation?*, 21 J. AM. ACAD. MATRIMONIAL LAW. 171, 171 (2008) (indicating that email, instant messaging, and webcams have been ordered by some courts to provide regular contact between a child and their non-custodial parent); Sarah L. Gottfried, Note, *Virtual Visitation: The New Wave of Communication Between Children and Non-Custodial Parents in Relocation Cases*, 9 CARDOZO WOMEN'S L.J. 567, 571 (2003) (suggesting that virtual visitation will be increasingly implemented in child relocation cases).

stage of the child and the circumstances of the case. The child can be heard directly by the court, indirectly through a professional appointed to render an opinion on the child's needs and wishes, or, perhaps, through an attorney or guardian *ad litem* appointed to represent the child in court.¹⁶⁰ The more mature and fully developed the child, the greater the weight that should be given to her position.¹⁶¹ But even a younger child's position may be taken into consideration in some situations, for example, where the alternative outcomes are evenly balanced and the court is having difficulty deciding between them, especially if the child has a clear preference.

VI. BETWEEN CHILDREN'S RIGHTS AND WOMEN'S RIGHTS: THE LIMITS OF THE RELATIONAL MODEL IN THE RELOCATION CONTEXT

Currently, custodial parents enjoy an advantage in relocation decisions in many states.¹⁶² The overall effect of applying relational standards would diminish this advantage because the court will have to seriously consider the relationship between the child and the non-custodial parent as well. This outcome might be problematic from a gender perspective.¹⁶³ Denying the request of the custodial parent to relocate or transferring custody to the other parent would have a negative impact on women, as most custodial parents are mothers.¹⁶⁴

It is fair to assume that in some percentage of the cases in which a court rules against them, the petitioners, typically women, will be unwilling to leave their children behind and will remain in the place of residence they had wanted to leave.¹⁶⁵ In many other cases, we may assume, the emotional and economic costs of litigation will lead women simply to forgo the possibility of moving and to avoid even presenting the matter to a court. These effects are at least worthy of attention, especially when they flow

160. See generally Bruce A. Green & Annette R. Appell, *Representing Children in Families*, 6 NEV. L.J. 571, 578-79 (2006) (reinforcing the importance of the child's voice being heard in the attorney-client relationship, legal proceedings, and in formulating policy).

161. See Harry Brighthouse, *How Should Children Be Heard?*, 45 ARIZ. L. REV. 691, 695 (2003) (illustrating that maturity may be considered in determining the weight of a child's voice); Stahl, *supra* note 66, at 807 (stating that age and maturity of children affect the implementation of their participation right).

162. See *supra* Part III.

163. Cf. Linda K. Thomas, *Child Custody, Community and Autonomy: The Ties that Bind?*, 6 S. CAL. REV. L. & WOMEN'S STUD. 645, 667, 670 (1997) (arguing that increased judicial power under the best interests test may infringe upon a mother's autonomy).

164. See IRA M. ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 571-72 (4th ed. 2004); Carmody, *supra* note 65, at 226.

165. See Sanford L. Braver et al., *Experiences of Family Law Attorneys with Current Issues in Divorce Practice*, 51 FAM. REL. 325, 331 (2002) (finding that in the majority of cases the parent either did not move, or would not move, if they were denied in their relocation petition).

from a model that draws its inspiration from cultural feminism. An outcome that more often than not harms and weakens women raises second thoughts.

Beyond these constraints on the ability of women to advance their desires, application of the model may also affect women's economic condition.¹⁶⁶ As already noted, it is not unusual for a woman to want to relocate in order to improve her economic condition, her employment opportunities, or to receive support—and any ensuing economic benefits—from relatives. Even women of relatively high socioeconomic status, with established careers or independent businesses, may want to relocate in order to obtain a promotion. Forgoing a move may thus carry detrimental economic consequences for separated women and single-parent families. An even heavier burden may be imposed on those who already suffer socioeconomic inferiority.¹⁶⁷

Glennon suggests an interesting way to confront this difficulty.¹⁶⁸ When relocation is sought for economic reasons and is denied because of the other parent's objections, the latter, she believes, should be obligated to provide compensation.¹⁶⁹ That result, in her view, protects the interests of the custodial mother and limits the economic harm she suffers and the gender discrimination implicit in it.¹⁷⁰ Although the suggestion is attractive, it has problematic consequences. In at least some cases, and certainly when the parties' economic situation is shaky, fathers who oppose a move because it will harm their ties to the child may feel threatened by a compensation mechanism and be deterred from objecting. If the case is one in which such an objection should properly be made in order to protect the child and her relations with her father, deterring an objection will be harmful to the child.

How, then, do we deal with this dilemma? Is it possible to avoid, or at least diminish, the harm typically caused to women by applying the relational perspective?

166. Katherine C. Sheehan, Note, *Post-Divorce Child Custody and Family Relocation*, 9 HARV. WOMEN'S L.J. 135, 139 (1986).

167. See LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL & ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 362 (1985) (suggesting an increased likelihood that women are economically disadvantaged by divorce); Richard R. Peterson, *A Re-Evaluation of the Economic Consequences of Divorce*, 61 AM. SOC. REV. 528, 532 (1996) (indicating that the average increase in the income-to-need ratio is positive ten percent for a man following a divorce, whereas it is minus twenty-seven percent for a woman).

168. See Glennon, *Still Partners?*, *supra* note 31, at 139 (proposing that courts have explicit authority to consider an economic remedy when they deny relocation).

169. See *id.* at 138-39 (concluding that the compensation should be the cost of the denial).

170. See *id.* at 140 (contending that the model will provide parents economic autonomy and thus reduce the economic hardship they may face).

First, it should be clear that the gender dilemma is blunted by the factual circumstances that tend to characterize families following divorce and by the characteristics of the arrangements proposed here. Experience shows that when the mother is the dominant caregiver, the father's place in the lives of the children is often narrowed.¹⁷¹ Many fathers absent themselves from their children's lives or maintain only minimal connections with them. If that is the case, no real dilemma will arise: relocation will almost certainly be allowed, for the move will cause little harm to the child's rights to maintain meaningful relationship with her father and whatever harm does ensue can be dealt with by a visitation plan. In these circumstances, commitment to the relational model, which calls for protection of meaningful relationships, will dictate the preservation of relationships with those who maintain them, namely, the mothers.¹⁷² Denying relocation will be much more harmful than allowing it, and the objection interposed by the father, if any, will be rejected.

In cases where the father plays a more significant role in the child's life but the court positively determines that the mother's parental qualifications are clearly superior, it will likewise be difficult for the court to deny a request to relocate, for the effect of this denial may be to transfer custody to the father. When the mother's skills as a parent are significantly greater than the father's, a presumption will attach in support of continuing her caregiving role, even if in a different geographic location.

Similarly, the court probably will not decline the relocation petition when violence against the woman is involved. Where the mother has suffered (and certainly if she is still suffering) violence at the hands of her former partner, priority must be given to protecting her safety—not only because of its indirect effects on her child's wellbeing, but also because of its direct protection of the mother's overall interests.¹⁷³

171. See Seth J. Schwartz & Gordon E. Finley, *Mothering, Fathering, and Divorce: The Influence of Divorce on Reports of and Desires for Maternal and Paternal Involvement*, 47 FAM. CT. REV. 506, 507 (2009) (explaining that divorce may undermine the father's role in his child's life to a greater extent than it undermines the mother's role).

172. Mary Becker, *Caring for Children and Caretakers*, 76 CHI. KENT. L. REV. 1495, 1514 (2001) [hereinafter Becker, *Caring for Children*] (asserting that even in equal parenting, feminist-oriented households, "fathers and mothers do not play comparable roles in their children's lives"); Mary Becker, *Feminist Theoretical Approaches to Child Custody and Same-Sex Relationships*, 23 STETSON L. REV. 701, 717 (1994) (noting that in our current society the majority of primary caretakers in families are women).

173. In those cases where the move is meant to protect the wellbeing or even the lives of the mother and/or the child, they will be exempt, of course, from any requirement that they provide notice of the anticipated move. See, in that context, the suggestion of the MODEL RELOCATION ACT: AN ACT RELATING TO THE RELOCATION OF THE PRINCIPAL RESIDENCE OF A CHILD § 205 (Am. Acad. Matrimonial Lawyers, Proposed 1998), which highlights the importance of non-disclosure where personal information would expose a party or the child to risk. *But see* Janet M. Bowermaster,

Of course, there will be cases in which there is neither a history of violence against the woman nor any difference in the parenting qualifications of the father and mother. In these cases, where the non-custodial father has a meaningful relationship with the child, the proposed model could add to the burden borne by the custodial mother who wishes to change residency. It is in these cases that women will pay the "price" entailed in application of the relational model. That outcome creates a dilemma that resembles the theoretical dilemma associated with cultural feminism overall, a dilemma grounded in the tension between commitment to women's autonomy on the one hand and, on the other, to the communitarian approach.¹⁷⁴

A solution that instructs the court to take account of the child's relationships with various family members and her relations to her community comes, in a sense, at the cost of the mother's autonomy. This perspective applies not only to the context of relocation, but to every aspect of custody and parental care. And while the bottom line is that recognizing these relationships will impose burdens on women's liberties, it is important to clarify that the result is not one that favors men over women. As explained throughout the article, the emphasis is not on enhancement of the father's position; it is, rather, on placing the child, her needs, and her rights at the center of the discussion.

The proposed model is one that considers, as part of a person's rights and liberties, the significance of interpersonal and family relations. It thus reflects the real lives and moral standing of women, and human in general, more accurately than do other models. But it is clear that adhering to this model will likely come at a personal price to women.¹⁷⁵ When all is said

Relocation Custody Disputes Involving Domestic Violence, 46 U. KAN. L. REV. 433, 433 (1998) (explaining that laws designed to protect non-custodial parents' access to children after a divorce can limit the custodial parent from escaping an abusive situation).

174. See Thomas, *supra* note 163, at 646 (explaining that if too much emphasis is placed on the community as a factor for custody proceedings, a mother's autonomy will be sacrificed).

175. Some believe this outcome warrants absolute rejection of the ideas implicit in the ethics of care and of the cultural feminism that grew out of them, for it leads to an "ideology of domesticity." See, e.g., Lacey, *supra* note 103, at 33 (arguing that cultural feminism, like relational models, force women to continue traditional roles as caregivers); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 802-13, 840-43 (1989) (stating that the assumption that women are focused on relationships is simply a cementation of traditional gender roles). The concern among critics is that the rhetoric of responsibility and care for others may be used manipulatively, as a mechanism for subjugating women. The critique heard from radical feminist quarters suggests that cultural feminism is part of the various forms of oppression directed against women. This dispute is beyond the scope of this article and need not be resolved here. For a response to the critique, see Rachel Ariss, *The Ethic of Care in the Final Report of the Royal Commission on New Reproductive Technologies*, 22 QUEEN'S L. J. 1 (1996), and Alisa L. Carse & Hilde Lindemann Nelson, *Rehabilitating Care*, 6 KENNEDY INST. ETHICS J. 19 (1996).

and done, one can only hope that occasionally limiting the ability of women to shape the lives of their children following a parental separation, which by its nature affects the women themselves, will bring about an improvement in women's status and wellbeing in the long run. Adopting the model proposed here, even if it constrains women's control over their lives today, will augment the father's role in the lives of their children, ease the burden borne by women as primary (and sometime sole) caregivers, and thereby improve the condition of women in generations to come. As we know, women's situations within the domestic sphere and the extent to which they are shackled to caring for the family have a substantive effect on their social standing and economic capabilities.¹⁷⁶

VII. CONCLUSION

The dispute between Léa and John is among the most painful and complex known to family law. Each of them is a good and devoted parent, each is a central figure in the lives of their children, and each wants to maintain a close parental relationship—a desire shared by the children as well. Whichever way the decision goes, it will upend the family and radically change the children's lives.

In this article, I have examined this dilemma from the relational perspective and proposed standards for inquiry and decision in the hope of reaching sounder, more consistent relocation outcomes with better clarity. The relational model is optimally suited for application in the family context. For one, applying the classical-liberal rights model in that context is problematic and may even cause harm, while the standards inherent in the proposed discourse seem almost perfectly cast to fit this arena. Given the characteristics of the family, there is a good reason to expect that the model can be successfully imported into its framework. The appropriate legal approach to matters concerning family relationships, particularly the parent-child relationship, calls for a blending of the considerations of justice and care. A model committed to concern, mutual reliance, responsibility, and care thus seems best suited for the family context. After all, the very idea of a family rests on intimacy and a degree of selflessness, and until a dispute arises, family members behave as if guided by principles attuned to both justice and care.¹⁷⁷ It follows that such principles should govern the relationships in cases of disputes.

This article advocates for the reconceptualization of children's rights—an emerging concept in international law and scholarly work—as

176. See, e.g., Becker, *Caring for Children*, *supra* note 172, at 1500.

177. See generally ROBIN WEST, *CARING FOR JUSTICE* 35 (1997); SEVENHUIJSEN, *supra* note 93, at 6 (identifying the ethics of care issues within families in everyday life).

relational. Understanding the rights of the child as relational rights allows us to realize the advantages of approaching children as rights holders: rights represent moral agency, and children are moral agents, even if they have not fully realized their potential as such. Granting children rights also serves as a means to social empowerment. At the same time, the relational dimension neutralizes the difficulties that may be expected to flow from the classical liberal rights model—first and foremost, the concern about damaging the unique tapestry of the family and the relationships between the child and her parents. The concept of children's rights as relational rights places the child at the center of any legal determination and mandates consideration, as part of the child's array of rights, of her relationships with the central figures in her life—parents, extended family members, and friends from the various social circles in which she is immersed. Within this model, it is necessary to consider the child's communal identity and her cultural characteristics. Although the relational model assigns preference to ensuring the child's rights and wellbeing, it does not *a priori* annul the rights of the parents. Those rights endure, but they are realized in tandem with responsibility both toward the child and toward other players.¹⁷⁸ This includes the rights of the non-custodial parent—who is, after all, the former partner with whom the choice to bring a child into the world was made.

The principles which the relational model is based on will dictate an appropriate application of the rights with a commitment to the standard of responsibility. Responsible recognition of a right means not only avoiding an application that would seriously or disproportionately harm another, but also applying it in a way that is sensitive to the existence and importance of a whole array of relationships. Clearly, responsible enforcement of rights sometimes extracts a cost—a more limited range of choice to the individual, in this case, the parent seeking to relocate, in most cases mothers.¹⁷⁹

178. See Carmody, *supra* note 65, at 228 (noting that a parent's obligations to a child restrict that parent's individual rights).

179. See *id.* at 228 (asserting that parents enjoy only as much freedom as is consonant with the obligations they have in relation to their children).

