Child Removal after Divorce in Minnesota: A Time to Re-examine What is in the Best Interests of the Child

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NOTES

CHILD REMOVAL AFTER DIVORCE IN MINNESOTA: A TIME TO RE-EXAMINE WHAT IS IN THE BEST INTERESTS OF THE CHILD

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INTRODUCTION

The last twenty years have witnessed a “revolution” in family law. It is a revolution that reflects changing societal values and assumptions about the family. Nowhere is this change more evident than in the area of child custody.1 The changes that have taken place in the law of child custody reveal new parental expectations and postdivorce family patterns. These changes have been described as a “second wave,” coming on the heels of the no-fault movement of the 1970s.2

Sole custody has emerged as a casualty of this “second wave.” The traditional sole custody arrangement is no longer the only option a court may exercise in the face of divorce.3 The great majority

1. The amount of legal and sociological literature in the area of child custody is monumental. Among the more important works are M. ROMAN & W. HADDAD, THE DISPOSABLE PARENT: THE CASE FOR JOINT CUSTODY (1978); D. LUEPNITZ, CHILD CUSTODY: A STUDY OF FAMILIES AFTER DIVORCE (1982); and J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE (1980).
3. Generally in a sole custody arrangement, the legal and physical custody of the child is given to one parent. Legal custody usually refers to the right of the custodial parent to make the major decisions that affect the child’s upbringing. See, e.g., MINN. STAT. § 518.003, subd. 3 (a)(1988) (legal custody defined as “the right to determine the child’s upbringing, including education, health care, and religious training”). Physical custody usually refers to the residence of the child with the custodial parent and the right of the custodial parent to make the routine day to day decisions

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of states today have passed some kind of joint custody legislation. The growing trend towards awarding joint custody reflects the courts' belief that joint custody is usually in the best interests of the child.

While the courts tend to agree that joint custody is often in the best interests of the child, there is less agreement on how to address a parent's request to move with a child out of state. Some jurisdictions have taken a liberal approach to removal, while others have been nothing less than hostile to such a request. Jurisdictions that recognize a custodial parent's right to move with the child have tended to identify the best interests of the child with the best interests of the custodial parent. Thus, a request for removal will generally be granted unless the noncustodial parent can show that the move is not in the best interests of the child or specific harm will come to the child if removal is granted.

Jurisdictions that take a more conservative approach to removal

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4. Joint custody can either be joint legal custody or joint physical custody. In a joint legal custody arrangement, both divorced parents equally share in the major decisions that affect the child's upbringing. See, e.g., Minn. Stat. § 518.003 (b) (1988) (joint legal custody defined as both parents having "equal rights and responsibilities including the right to participate in major decisions determining the child's upbringing including education, health care, and religious training"). Joint physical custody generally refers to the shared residence of the child with both parents and their right to share equally in making the ordinary day to day decisions that affect the child. See, e.g., Minn. Stat. § 518.003 (d) (1988) ("joint physical custody means that the routine daily care and control and the residence of the child is structured between the parties").

5. This trend results from recognition by social scientists that children in joint custody arrangements are better adjusted than those in sole custody settings. See generally Wallerstein, supra note 1, at 344-56.

6. In Illinois, for example, a custodial parent need only show that the move would not harm the child. See, e.g., In Re Marriage of Burgham, 86 Ill. App. 3d 341, 346, 408 N.E.2d 37, 40 (1980).


8. See, e.g., Bernick v. Bernick, 31 Colo. App. 485, 487-88, 505 P.2d 14, 15-16 (1972) ("[I]n the absence of a clear showing to the contrary, decisions of the custodial parent reasonably made in a good faith attempt to fulfill the responsibility imposed by the award of custody, should be presumed to be made in the best interests of the children"); Auge v. Auge, 334 N.W.2d 393, 398-99 (Minn. 1983) (there is a presumption that permission to remove should be granted where there is no showing that the move is not in the best interests of the child).

hold that the best interests of the child are not necessarily identified with the best interests of the custodial parent. This judicial perspective requires that the burden of proof be placed on the parent choosing to remove the child to show that the move is in the best interests of the child. In either case, courts have justified their decisions under the rubric of the "best interests" of the child.

Minnesota has adopted a "liberal" right to move position. In 1983, the Minnesota Supreme Court, in Auge v. Auge, established a presumption that a custodial parent’s request to move with a child out of state is in the best interests of the child where sole custody has been awarded. This presumption was extended by the court later that year, in Gordon v. Gordon, to include joint custody arrangements.

The burden of proof is on the parent opposing removal to show that removal would endanger the child’s physical or emotional health and that it is “not in the child’s best interests.” The parent opposing removal must make a prima facie showing to support a decision not to grant removal. Only after such a showing will an evidentiary hearing be held to determine if the move will endanger the child.

The court’s decisions in Auge and Gordon raise serious questions as to whether the best interests of the child are truly protected by the court in a removal setting. They also raise questions as to whether the Minnesota Legislature’s statutory purposes for awarding joint custody have any meaning when the custodial parent decides to move.

Minnesota’s statutory scheme for awarding joint custody is based on the fundamental premise that a child in a family setting develops attachments to both parents and that it is in the best interests of the child for those attachments to remain following divorce. This is also the basic premise for granting visitation. The child has an interest in maintaining a close emotional and psychological support relationship with both the custodial and noncustodial parent.

(Ch. Div. 1976) (noncustodial parent has burden of showing harm to the child as a result of removal).

11. Id. at 59, 135 N.W.2d at 839.
12. 334 N.W.2d 399 (Minn. 1983).
13. Id. at 399.
14. 339 N.W.2d 269 (Minn. 1983).
15. Id. at 271.
16. Auge, 334 N.W.2d at 399; Gordon, 339 N.W.2d at 270.
17. Auge, 334 N.W.2d at 399; Gordon, 339 N.W.2d at 270-71.
18. Auge, 334 N.W.2d at 399; Gordon, 339 N.W.2d at 278.
19. MINN. STAT. § 518.17 (1986).
20. See generally WALLERSTEIN, supra note 1 at 544–67.
child has an interest in having a well-adjusted custodial parent who provides for the child's day-to-day needs. The child also has an interest in maintaining a stable and continued relationship with the noncustodial parent.

These two interests may conflict with one another when one parent requests to move. If the custodial parent decides to move, one parental relationship is bound to suffer. Allowing the move might affect the continuity of the relationship between the child and the noncustodial parent. If the move is denied, the child's interest in having a well-adjusted custodial parent may be impaired. The question then becomes how the best interests of the child can be protected when these interests are at odds with one another.21

In Auge and Gordon, the court answered this question by identifying the interests of the child with those of the custodial parent.22 The court, in effect, balanced the interests of the custodial parent in requesting to move with the interests of the noncustodial parent in opposing the move.23 All of this was done under the guise of the best interests of the child.24

This Note will first examine the court's trend of moving away from the sole custody arrangement and towards awarding joint custody. Second, it will examine the issues surrounding visitation and child modification in Minnesota and other jurisdictions. Third, this Note will examine how different jurisdictions have addressed the issue of child removal after divorce. Finally, it will examine the basis of the presumption established by the Minnesota Supreme Court in Auge and Gordon.

This Note concludes that it is time for the Minnesota courts to re-examine their position of liberally permitting child removal when joint custody has been awarded. The court should no longer simply identify the best interests of the child with those of the custodial par-

21. This conflict was addressed by the court in In Re Marriage of Burgham, 86 Ill. App. 3d 341, 408 N.E.2d 37 (1980). The Illinois appellate court stated, Permitting the spouse to remove the child may indirectly benefit the child by enabling that spouse to remain as custodian. It also seems that, other things being equal, granting such a request would likely indirectly benefit the child by making the custodian a happier, better adjusted parent than would be the case if the custodian's freedom of movement was more restrained. Id. at 40.

22. Auge, 334 N.W.2d at 393; Gordon, 339 N.W.2d at 271.

23. This balancing has been more readily recognized by legal scholars than by the courts. See, e.g., Pastis, Residence Restrictions on Custodial Parents: Sex-Based Discrimination?, 16 GOLDEN GATE U.L. REV. 419, 450 (1986) (arguing that balancing has been used by the courts as a basis for sex discrimination in prohibiting a custodial mother from moving the child out of state); Raines, Joint Custody and the Right to Travel: Legal and Psychological Implications, 24 J. FAM. L. 625, 633–37 (1986) (balancing leads the court to raise the interests of the parents over those of the child).

24. Auge, 334 N.W.2d at 399; Gordon, 339 N.W.2d at 271.
ent. The court should do away with the presumption that removal is in the best interests of the child. The burden of proof should be on the custodial parent to show that the move is in fact in the best interests of the child. This would raise the interests of the child above the interests of either parent. It would also serve the statutory purposes set out by the Minnesota Legislature for awarding joint custody and visitation.25

I. CHILD CUSTODY

Sociological and psychological research shows that children of divorce often suffer severe psychological, physical, and emotional harm.26 In the past, it was thought that such harm could be traced to the traumatic nature of the divorce process itself.27 However, recent scientific evidence points to the effects of parental conflict and the typical sole custody arrangement.28

The effects of parental conflict can be devastating. Children often experience a wide range of detrimental feelings in the wake of divorce. These feelings include blame, self-doubt, and conflicting loyalties.29 Such feelings often lead to strained relationships between the child and both parents.30 The effects of parental conflict become exacerbated in a sole custody arrangement.

In a typical sole custody setting, the legal and physical custody of the child is given to one parent.31 The custodial parent has the legal right and responsibility for making the major decisions that affect the child’s welfare.32 The custodial parent is also responsible for making the day-to-day decisions that affect the child.33 Contact between the child and the noncustodial parent is usually minimal. What contact there is, is usually structured by the court and permitted only to protect the noncustodial parent’s visitation rights.34

27. See WALLERSTEIN, supra note 1, at 153 (initial stages of divorce usually characterized by bitter and agitated interaction between the parents).
30. Id. at 786–88.
31. See MINN. STAT. § 518.003, subd. 3(a) (1982).
32. Id.
33. Id.
34. MINN. STAT. § 518.175 (1988).
Joint custody developed out of the dissatisfaction with sole custody and its consequences. The trend is to define joint custody in terms of shared decision making regarding the health, education, and welfare of the child.\(^{35}\) In a joint custody arrangement, neither parent has a legal advantage over the other. Neither parent can make a major decision affecting the child's upbringing without the equal participation of the other parent. The details of this shared responsibility are generally left to the parents to work out between themselves.\(^{36}\)

There is evidence today, both empirical and clinical, that joint custody works.\(^{37}\) The best interests of the child, in terms of psychological, physical, and emotional needs, are served when the child's attachments to both parents can be maintained.\(^{38}\) More than thirty states have created a statutory preference or presumption in favor of joint custody.\(^{39}\) These differing statutory approaches reflect a growing recognition that it is in the public policy interest to promote as much contact as possible between the child and both parents after divorce. Parents are encouraged to share the responsibilities and rights that go hand-in-hand with child rearing.

In 1981, the Minnesota Legislature followed the trend towards favoring the joint custody award. Minnesota's marriage dissolution statutes were amended to expressly provide the courts with the alternative of awarding joint custody upon divorce, separation, or annulment.\(^{40}\) In 1986, the Minnesota Legislature established a rebuttable

\(^{35}\) See Vitalis v. Vitalis, 363 N.W.2d 57, 59 (Minn. Ct. App. 1985) (joint legal custody held to exist where parents shared in the major decisions affecting the child although not provided for by the divorce decree).

\(^{36}\) See, e.g., Heard v. Heard, 353 N.W.2d 157, 161 (Minn. Ct. App. 1984) (joint legal custody is premised on the ability of both parents to cooperate in the rearing of their children).

\(^{37}\) See generally Wallerstein, supra note 1 at 310 (finding that it is desirable for children to continue their relationship with both parents following divorce). For a list of studies that support this contention, see Wallerstein & Kelly, Children & Divorce: A Review, 24 Soc. Work 468 (1979).

\(^{38}\) See, e.g., Abarbanel, Shared Parenting After Separation and Divorce: A Study of Joint Custody, 50 Am. J. Orthopsychiatry 320, 328 (1981) (children most comfortable were those who were able to keep strong attachments to two psychological parents); Steinman, The Experience of Children in a Joint Custody Arrangement: A Report of a Study, 51 Am. J. Orthopsychiatry 403, 408 (1980) (finding that two-thirds of children in joint custody studied did well psychologically).

There is, however, a small group of social scientists who argue that contact between the child and the noncustodial parent does little to develop the emotional well-being of the child. See, e.g., J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child 37-38 (1973) (arguing that there should be a single custodial parent with all the legal rights and responsibilities concerning the child in all cases where the parents have difficulty in communicating with one another).

\(^{39}\) For a good survey of the child custody statutes in the United States, see Freed & Walker, Family Law in the Fifty States, 18 Fam. L. Q. 369, 428-37 (1985).

\(^{40}\) Minn. Stat. § 518.17, 3 (1988).
presumption that upon the request of either or both parents, joint legal custody is in the best interests of the child.41

A number of states have passed statutes that specify factors to be considered by the courts in awarding initial custody. In Minnesota, for example, the legislature has specified ten factors that the courts must recognize in awarding initial custody.42 The Minnesota courts, in determining initial custody, must be guided by the best interests of the child.43 Furthermore, such a consideration must not prefer one parent over another solely on the basis of the sex of one parent.44 If the court considers either joint physical or joint legal custody as viable options, three additional factors must be appraised. These are (1) the ability of the parents to cooperate in raising the

41. MINN. STAT. § 518.17, subd. 2(c) (1988); see also Nies v. Nies, 407 N.W.2d 484, 486-87 (Minn. Ct. App. 1987) (joint legal custody not awarded where such an award would not be in the best interests of the child); Kennedy v. Kennedy, 403 N.W.2d 892, 898 (Minn. Ct. App. 1987) (statute establishes a rebuttable presumption that joint legal custody is in the child's best interests); Barrett v. Barrett, 394 N.W.2d 274, 278 (Minn. Ct. App. 1986) (joint legal custody awarded where there was no evidence to indicate that the parents could not cooperate in raising their children).

42. MINN. STAT. § 518.17, subd. 1 (1988). These factors are:
   (a) the wishes of the child's parent or parents as to custody;
   (b) the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference;
   (c) the interaction and interrelationship of the child with a parent or parents, siblings, and any other person who may significantly affect the child's best interests;
   (d) the child's adjustment to home, school, and community;
   (e) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;
   (f) the permanence, as a family unit, of the existing or proposed custodial home;
   (g) the mental and physical health of all individuals involved;
   (h) the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture and religion or creed, if any;
   (i) the child's cultural background; and
   (j) the effect on the child of the actions of an abuser, if related to domestic abuse, as defined in section 518B.01, that has occurred between the parents.

Id.

43. The best interests of the child means "all relevant factors to be considered and evaluated by the court." MINN. STAT. § 518.17, subd. 1 (1988). The court is thus not limited to the criteria set out by statute.

44. Id. at subd. 3. A court is not to consider the conduct of a proposed custodian that does not affect his or her relationship with the child. Id. at subd. 1. While parental mistreatment of a child will of course be considered by the court in determining custody, evidence of spousal abuse has yet to be accepted as relevant in awarding custody. For the argument that spousal abuse should establish a statutory presumption of unfitness on the part of the abuser see, Note, Domestic Violence and Custody Litigation: The Need for Statutory Reform, 13 Hofstra L. Rev. 407, 413 (1985) (arguing that the court's reluctance to give sufficient weight to evidence of wife beating is a reflection of society's tolerance of violence of husbands against wives).
child; the willingness of the parents to develop methods for resolving disputes regarding major decisions about the child; and (3) whether it would be detrimental to the child if one parent were to have exclusive control over the child. After all of the factors are considered, the court must determine whether the legal and physical custody of the child will be sole or joint. The rights and responsibilities of the parents are defined by statute.

II. Visitation

Any award of sole or joint custody usually also provides for visitation by the noncustodial parent. There seems to be little question that visitation is important to the continued psychological and emotional well-being of the child. Visitation permits the child to continue to receive the love and support of the noncustodial parent. The courts themselves recognize the importance of visitation in maintaining the psychological bond between the child and the noncustodial parent. Some courts have gone so far as to identify visitation as a "parental right that is essential to continuation and maintenance of a child-to-parent relationship between the child and noncustodial parent".

45. Minn. Stat. § 518.17, subd. 2(a) (1988).
46. Id. at subd. 2 (b).
47. Id. at subd. 2 (c).
48. Id. at subd. 3. Minnesota has not yet addressed the issue whether a court may award joint legal custody without joint physical custody where neither party requests it.

The Minnesota courts have generally not looked favorably to joint physical custody schemes. See, e.g., McDermott v. McDermott, 192 Minn. 32, 36, 255 N.W. 247, 248 (1934) (divided custody proper only in exceptional circumstances); Brauer v. Brauer, 384 N.W.2d 595, 598 (Minn. Ct. App. 1986) (divided custody is usually not in the best interests of the child and is appropriate only in exceptional circumstances).

Joint physical custody is usually exercised through some kind of rotating plan where the child spends an equal amount of time with both parents. The courts have tended to view such schemes as adverse to the emotional and psychological health of the child. Such schemes also interfere with the child's sense of continuity. See Brauer, 384 N.W.2d at 598.

50. There has been much scholarly debate over the nature and importance of visitation. Some authors have gone so far as to call for an end to visitation. See, e.g., Goldstein, supra note 38 at 37-38 (arguing that in order to protect the ongoing relationship between the custodial parent and the child, the noncustodial parent should have no legally enforceable visitation rights).

51. See, e.g., Comment, Post-Divorce Visitation: A Study in the Deprivation of Rights, 27 De Paul L. Rev. 113, 123 (1977) (the support and love of the absent noncustodial parent vital to the continued psychological well-being of the child); Note, The California Custody Decree, 13 Stan. L. Rev. 108, 114 (1960) (child's emotional development depends on continued contact with both parents after divorce).

52. See, e.g., Griffin v. Griffin, 267 N.W.2d 733, 735 (Minn. 1978) (visitation is a "parental right that is essential to continuation and maintenance of a child-to-parent relationship between the child and noncustodial parent").
tion with the best interests of the child.53

The Minnesota Legislature has recognized that it is important for the noncustodial parent to maintain a relationship with the child through visitation.54 Minnesota has raised visitation to the level of public policy in order to encourage a continuing relationship between the child and both parents.55 Thus, the Minnesota courts are given the power to go so far as to change custody when a custodial parent interferes with the visitation rights of the noncustodial parent.56 Courts may also hold the violating parent in contempt of court for violating a visitation agreement.57 There seems to be little question that the Minnesota Legislature and the courts view visitation rights to be important. Interference with visitation could affect the parent’s right to custody itself.

Minnesota and other jurisdictions, however, recognize that the noncustodial parent’s visitation rights are not absolute.58 They are to be exercised “only when in the best interests of the child and to the extent their exercise will be beneficial to the child.”59 Thus, a parent’s right to visitation is only one factor to be considered by the court in determining the best interests of the child.60 The interests of the custodial parent and the child may override the noncustodial

54. MINN. STAT. § 518.175, subd. 4 (Supp. 1989).
55. Id.
56. Id.; see also Sefkow v. Sefkow, 372 N.W.2d 37, 46–47 (Minn. Ct. App. 1985) (interference with visitation by a custodial parent a factor to be considered in determining who should have joint custody).
57. There is disagreement among the courts, however, as to who actually has the right of visitation: the custodial parent, the noncustodial parent, or the child. See, e.g., Bernick v. Bernick, 31 Colo. App. 485, 487, 505 P.2d 14, 15 (1972) (primarily a right of the child and secondarily a right of the noncustodial parent); Weiss v. Weiss, 52 N.Y.2d 170, 175, 418 N.E.2d 377, 381, 436 N.Y.S.2d 862, 865 (1981) (a joint right of the noncustodial parent and child); Application of Denberg, 34 Misc. 2d 980, 986, 229 N.Y.S.2d 831, 837 (N.Y. Sup. Ct. 1962) (right to visitation a natural right of parent).
58. See, e.g., Raymond v. Raymond, 165 Conn. 735, 739, 345 A.2d 48, 52 (1974) (privilege of visitation is not an absolute right); In Re Marriage of Lower, 269 N.W.2d 822, 827 (Iowa, 1978) (visitation rights are not absolute but derivative from the best interests of the child); Krause v. Krause, 58 Wis. 2d 499, 506, 206 N.W.2d 589, 596 (1973) (parental right of visitation is a sacred one but not necessarily an absolute one).
59. Manthei v. Manthei, 268 N.W.2d 45, 45 (Minn. 1978). See also Bernick, 31 Colo. App. at 486, 505 P.2d at 15 (visitation decisions must be based on serving the best interests of the child); Lower, 269 N.W.2d at 827 (visitation rights are subordinate to the best interests of the child); Weiss, 52 N.Y.2d at 173, 418 N.E.2d at 380, 436 N.Y.S.2d at 865 (visitation rights of parent to be protected only if the physical and emotional well-being of the child are served); Fritschler v. Fritschler, 60 Wis. 2d 283, 291, 208 N.W.2d 336, 339 (1973) (interests of the child are paramount).
60. See, e.g., Hutchins v. Hutchins, 84 Mich. App. 236, 237, 269 N.W.2d 539, 540
III. CHILD MODIFICATION

Minnesota and other jurisdictions have moved away from a "parental right" frame of reference in determining child custody and visitation. Decisions by the court must serve the best interests of the child. This same overriding concern with protecting the best interests of the child is also applied when one parent seeks to modify custody. In Minnesota, custody will not be modified unless the court finds that a change has occurred in the circumstances of the child or the child's custodial parent and modification is necessary to serve the best interests of the child. In addition, custody modification will not be granted unless the courts also find that:

(i) The custodian agrees to the modification;

(ii) The child has been integrated into the family of the petitioner with the consent of the custodian; or

(iii) The child's present environment endangers the child's physical or emotional health or impairs the child's emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.

IV. THE ISSUE OF REMOVAL

It is not surprising that when the courts are confronted with a custodial parent's desire to move a child out of state, the courts attempt to resolve the matter by offering a solution based on what it per-
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ceives to be the best interests of the child. It is the same standard used by the court in determining initial child custody, custody modification, and visitation. The best interests of the child, however, are often more difficult to identify in a removal context. This is especially true when the court, in awarding joint custody and visitation, has already recognized that it is in the best interests of the child to maintain a close relationship with both the custodial and noncustodial parent. A move out of state might threaten the ability of the noncustodial parent to keep a nurturing relationship with the child. Moreover, such a move is bound to affect the noncustodial parent’s visitation rights and ability to equally share in the major decisions that affect the welfare of the child. The question then becomes what interests may override the child’s interest in having a continued relationship with the noncustodial parent.

The courts have not agreed on how to address a custodial parent’s request to move or the efforts of a noncustodial parent to prevent a move. The custodial parent’s desire to move may be based on a number of considerations: to take advantage of a new job opportunity; to reduce postdivorce tensions; to join a new spouse whose new job would provide income to support the parent and child; to join a fiance; to take advantage of a better educational opportunity; to take advantage of new business opportunities; to further

64. The best interests standard has been criticized on the grounds that the court lacks the competence to make decisions based on this standard when removal is requested. See, e.g., Pastis, Residence Restrictions on Custodial Parents: Sex Based Discrimination? 16 Golden Gate U.L. Rev. 419 (1986).

65. This lack of consensus is also to be found among legal commentators. See, e.g., Pastis, supra note 64, at 431–32 (arguing that the court has no right or responsibility to intervene in a custodial parent’s decision to move); Note, The Judicial Role in Post-Divorce Child Relocation Controversies, 35 Stan. L. Rev. 949, 949–50 (1983) (arguing that judicial intervention is an unwarranted interference with family autonomy and the custodial parent’s freedom); Note, State Intrusion into Family Affairs, 26 Stan. L. Rev. 1383, 1394 (1974) (arguing that the courts have generally failed to advance the personal interests of the child in removal settings). But see Raines, Joint Custody And The Right To Travel: Legal and Psychological Implications, 24 J. Fam. L. 625, 656 (1986) (a custodial parent should not be allowed to remove a child unless it is clear that the move is in the child’s best interests).


68. Burich v. Burich, 314 N.W.2d 82, 87 (N.D. 1981) (custodial mother wished to join new father who will have an income to support the wife and children).


70. See, e.g., Burich, 314 N.W.2d at 87 (custodial parent wished to move to accept teaching position in another county).
the parent's personal interests;\textsuperscript{72} to live with relatives;\textsuperscript{73} to begin a job already secured;\textsuperscript{74} to search for employment in a more advantageous area;\textsuperscript{75} to fulfill obligations;\textsuperscript{76} or to support and raise the child.\textsuperscript{77}

The noncustodial parent may oppose the move for a number of reasons. The most obvious reason is that the noncustodial parent wants to keep the child close to where he or she lives. The noncustodial parent, however, may be motivated by less benevolent concerns.

Jurisdictions have taken a number of approaches when faced with opposition by the noncustodial parent to a petition for removal by the custodial parent. Many states have passed laws that require a parent to seek permission from the court before removing the child from the jurisdiction.\textsuperscript{78} Courts have written restrictive mobility clauses in the custody decrees, themselves, in order to anticipate the

\begin{itemize}
\item \textsuperscript{71} See, e.g., \textit{In Re Marriage of Gutermuth}, 246 N.W.2d 272, 275 (Iowa 1976) (custodial parent wished to move to another county to accept a teaching position); \textit{Nedrow v. Nedrow}, 48 Wash. 2d 243, 245, 292 P.2d 872, 875 (1956) (custodial parent's new husband offered regular employment in a new job out of state).
\item \textsuperscript{72} See, e.g., \textit{In Re Marriage of Burgham}, 86 Ill. App. 3d 341, 344, 408 N.E.2d 37, 40 (1980) (custodial mother wished to move for personal reasons).
\item \textsuperscript{73} See, e.g., \textit{Klein v. Klein}, 93 A.D.2d 807, 809, 460 N.Y.S.2d 607, 609 (1983) (petitioner wished to join family and friends who lived elsewhere and would provide emotional support).
\item \textsuperscript{74} See, e.g., \textit{D'Onofrio v. D'Onofrio}, 144 N.J. Super 200, 204, 365 A.2d 27, 31-32 (N.J. Ch. 1976) (petitioner found employment as a bookkeeper in another state).
\item \textsuperscript{75} See, e.g., \textit{Weiss v. Weiss}, 52 N.Y.2d 170, 172, 418 N.E.2d 377, 379, 436 N.Y.S.2d 862, 864 (1981) (custodial mother sought to move out of state where she would be able to find suitable employment).
\item \textsuperscript{76} See, e.g., \textit{Tanttila v. Tanttila}, 152 Colo. 446, 447, 382 P.2d 798, 800 (1963) (where petitioner sought to move out of state in order to better raise the children, carry out custodial responsibilities under less economic stress and mental tension); \textit{Gottschall v. Gottschall}, 210 Neb. 679, 680, 316 N.W.2d 610, 611 (1982) (petitioner sought to move to care for her children and be near her fiance); \textit{Groh v. Groh}, 110 Wis. 2d 117, 118, 327 N.W.2d 655, 656 (1983) (custodial mother sought to move where there was a better environment and where she could live more cheaply).
\item \textsuperscript{77} See, e.g., \textit{Groh} at 118, 327 N.W.2d at 656 (petitioner wished to move to better able support the children).
\item \textsuperscript{78} See, e.g., \textit{Minn. Stat.} § 518.175, subd. 3 (1988); \textit{see also S.D. Codified Laws Ann.} § 25-5-13 (1984) ("A parent entitled to the custody of a child has the right to change his residence subject to the power of the circuit court to restrain a removal which would prejudice the rights or welfare of the child"); \textit{N.J. Stat. Ann.} § 9:2-2 (West 1976) (minors not to be removed out of state "without the consent of both parents, unless the court upon cause shown, shall otherwise order").
\end{itemize}

Such statutes were probably passed so the court would not lose its jurisdictional authority to enforce divorce decrees if the custodial parent moved out of state with the child. \textit{See, e.g., Auge v. Auge}, 334 N.W.2d 393, 399 (Minn. 1983) ("In the past, removal was commonly denied because of the potential loss of jurisdiction over custody issues"). This concern was alleviated by the adoption in most states of the Uni-
problems that might arise later when removal is at issue. Such clauses often prohibit a parent from removing the child from the jurisdiction for a set period of time.

In the face of such restrictions, a custodial parent seeking to move out of state must ask permission from either the noncustodial parent or the court. Failure to do so may result in the custodial parent being held in contempt. In such circumstances, courts have gone so far as to change maintenance or child support payments or require the surrender of custody. Even when the custodial parent is not restricted by either statute or divorce decree, the noncustodial parent may attempt to block the move. The noncustodial parent may claim that the move amounts to a change of circumstances that adversely affects either visitation rights or the child's best interests.

It is clear that there exists a lack of judicial consensus on the issue of removal. Jurisdictions can be divided between those who generally recognize a custodial parent's right to move and those who do not. Jurisdictions that do not recognize a custodial parent's right to move have held that contact with both parents remains essential to the healthy emotional and psychological development of the child. This is the overriding concern of the court when removal is requested. The burden of proof is on the parent requesting the move to show that it is in the best interests of the child. In Whitman v. Whitman, the court reasoned that:


79. See, e.g., Carney v. Carney, 1 Kan. App. 2d 544, 545, 571 P.2d 56, 57 (1977) (custodial parent required to obtain court approval before removing children from the state for more than 30 days).

80. Id.

81. See, e.g., Pattison v. Pattison, 208 So. 2d 395, 396 (La. Ct. App. 1968) (issue was whether custodial parent could be held in contempt for removing children absent a court order).

82. See, e.g., Ryan v. Ryan, 300 Minn. 244, 249, 219 N.W.2d 912, 916 (1974) (maintenance payments suspended when child removed); Fish v. Fish, 280 Minn. 316, 323-25, 159 N.W.2d 271, 276-77 (1968) (child support payments stopped when parent left jurisdiction).

83. See, e.g., Brandon v. Faulk, 326 So. 2d 76, 79 (Fla. Dist. Ct. App.), cert. denied, 336 So. 2d 104 (Fla. 1976) (custody of child transferred to grandparents where it was unreasonable for custodial parent to move with the child out of the jurisdiction); In Re Marriage of Meier, 286 Or. 437, 437, 595 P.2d 474, 476 (1979) (trial court ordered that if custodial parent moved with the child out of state, child custody would be modified in favor of the noncustodial parent); Fritschler v. Fritschler, 60 Wis. 2d 283, 284, 208 N.W.2d 336, 337 (1973) (court ordered custody transferred to noncustodial parent where custodial parent moved with the child out of state in violation of court order).

84. See cases cited infra notes 88-96.

85. See supra notes 37-38 and accompanying text.

86. 28 Wis. 2d 50, 135 N.W.2d 835 (1965).
[a] divorced man or woman is free to move about and pursue his or her life and living without restraint from his former spouse; as divorced parents of minor children they may be required to curtail these liberties or forfeit some of their rights to custody or visitation, as the case may be consistent with the best interests of the child and the rights of the other parent.87

Jurisdictions that recognize a custodial parent's right to move have tended to identify the best interests of the child with the best interests of the custodial parent.88 Thus, a request for removal will be granted unless it can be shown that such a move is not in the best interests of the child or that specific harm will come to the child if removal is granted.89 This more liberal perspective views judicial intervention in a removal setting as unwarranted.90 Generally, if the custodial parent has a good reason for moving, removal will be granted.91 The more objective the reason, the more likely removal will be permitted.92 The burden of proof is on the parent opposing the move to show that the move is not in the best interests of the child.93

V. The Auge Presumption

In 1983, Minnesota joined the ranks of those states that liberally permit a custodial parent to move out of state with a child. In Auge v. Auge,94 the custodial mother had sole legal custody while the father had been given visitation rights.95 The mother petitioned the court

87. Id. at 58, 135 N.W.2d at 839.
89. See, e.g., In Re Marriage of Siklossy, 51 Ill. App. 3d 44, 47, 409 N.E.2d 29, 32 (Ill. Ct. App. 1980) (court should not oppose removal unless there is a specific showing that the move would be adverse to the child's best interests).
90. See, e.g., Meier v. Meier, 36 Or. App. 685, 688, 585 P.2d 713, 716 (Or. Ct. App. 1978) (“judicial discretion should not be exercised to regulate decisions such as choice of residence which are normally parental not judicial decisions unless due to exceptional circumstances there is a clear danger to the child's well being”).
91. See, e.g., Hutchins v. Hutchins, 84 Mich. App. 236, 237, 269 N.W.2d 539, 540 (Mich. Ct. App. 1978) (Beasley, J., concurring) (there should be no presumption that raising a child in one state is superior to bringing up a child in another state).
92. See, e.g., Jafari v. Jafari, 284 N.W.2d 554, 555 (Neb. 1979) (court permitting the custodial parent to move with the child as long as the reasons for the move are legitimate and in the best interests of the child).
93. See, e.g., Bernick v. Bernick, 31 Colo. App. 321, 322 505 P.2d 14, 15-16 (Colo. Ct. App. 1972) (decisions of custodial parent made in good faith should be presumed to have been made in the best interests of the child).
94. 334 N.W.2d 393 (Minn. 1983).
to move with the child from Minnesota to Hawaii.\textsuperscript{96} The lower court denied her permission to do so without an evidentiary hearing.\textsuperscript{97} The Minnesota Supreme Court reversed and held that a full evidentiary hearing was required.\textsuperscript{98} The court also set forth the following rule to be applied when removing the child to another state: “Motions for removal brought by the custodial parent may not be denied without an evidentiary hearing, where denial would effect a modification of custody. Unless the party opposing the motion for removal makes a \textit{prima facie} showing against removal, permission may be granted without an evidentiary hearing.”\textsuperscript{99}

The \textit{Auge} court further held that the court must defer to the custodial parent's decisions concerning health, religion or education unless it determines after an evidentiary hearing that the move would endanger the child's health or development.\textsuperscript{100} The court took the position that:

Motions by the custodial parent to permit removal to another state shall be granted unless the party opposing the motion establishes by a preponderance of the evidence that the move is not in the best interests of the child. Minn. Stat. § 518.18(d) (1982). If denial of the motion will likely result in a modification of custody, the trial court must consider the negative effects of separating the child and the custodial parent. \textit{Id.}\textsuperscript{101}

The \textit{Auge} court relied heavily on \textit{D’Onofrio v. D’Onofrio}.\textsuperscript{102} In \textit{D’Onofrio}, the Superior Court of New Jersey examined the anti-removal provisions of its statutes in the context of a removal petition.\textsuperscript{103} The court focused on the new family unit created after divorce. This family unit consisted solely of the custodial parent and the child.\textsuperscript{104} The court concluded that the best interests of the child is to be assessed in the context of what is in the best interests of the new postdivorce custodial family.\textsuperscript{105} The court reasoned that “[t]he new family unit consists only of the children and the custodial parent, and what is advantageous to that unit as a whole, to each of its

96. \textit{Auge}, 334 N.W.2d at 395.
97. \textit{Id.}
98. \textit{Id.} at 395. In determining when a hearing is required pursuant to Minnesota Statute section 518.176, subdivision 1 (1982), the court noted that “questions of the child’s health and development are unlikely to be adequately resolved by mere arguments of counsel.” \textit{Id.} at 397. Thus, affidavits and other documentary evidence must be presented by the party wishing to interfere with the custodial parent's decisions. \textit{Id.} at 399 (citations omitted).
99. \textit{Id.} at 399-400.
100. \textit{Id.} at 399.
101. \textit{Id.} at 399.
104. \textit{Id.} at 29-30.
members individually and the way they relate to each other and function together is obviously in the best interests of the children."  

The Auge court adopted the D'Onofrio concept that with divorce a new family unit is created by divorce, consisting only of the custodial parent and child. However, the Auge court went further and adopted the presumption that permission to remove should be granted where there is no showing that the move is against the child’s interests, placing the burden on the noncustodial parent. The court set out four reasons for adopting this presumption: (1) it eliminates any need to re-determine which parent is best suited to have child custody; (2) it reduces judicial interference with the new family unit and maintains the child in the family in which he or she currently belongs; (3) it is consistent with Minnesota's statutory scheme; and (4) it places the decision with the custodial parent, who is in the best position to determine the best interests of the child.

The Auge court went on to address the limits dictated by Minnesota's child custody modification statutes when a custodial parent requests the court's permission to remove a child to another state. Minnesota statute provides that removal is to be denied if the purpose of the move is to interfere with the visitation rights of the noncustodial parent. The Auge court held that when removal is permitted the court can modify the visitation order as necessary to maintain a good relationship between the noncustodial parent and the child. It may also make appropriate adjustments in child support to spread the cost of visitation in an equitable manner, provided that such adjustments are not against the best interest of the child.

The Auge court established a presumption that a parent having sole legal and physical custody of a child is entitled to move the child to another state. Auge did not involve a joint custody arrangement. Moreover, none of the cases cited by the Auge court in support of its presumption involved a joint legal custody situation. The issue remained whether the Auge presumption was justified in a setting where joint legal custody of a child was shared by a noncustodial parent. The Minnesota Supreme Court answered this question in Gordon v. Gordon.

106. Id. at 29–30.
107. Auge, 334 N.W.2d at 398.
108. Id. at 398–99.
109. Auge, 334 N.W.2d at 399.
110. Id. at 399–400.
111. MINN. STAT. § 518.175, subd. 3 (1982).
112. Auge, 334 N.W.2d at 400.
113. 339 N.W.2d 269 (Minn. 1983).
VI. The Gordon Presumption

The marriage of Sandra and Stephen Gordon was legally dissolved in July 1982. The divorce decree awarded joint legal custody of their three minor children to both parents while sole physical custody was given to Sandra subject to Stephen’s exercise of reasonable and liberal visitation. In October 1982, Sandra asked the county court for an order permitting her to move with the children to Illinois. She had obtained employment in Illinois and asserted that the relocation would be in the best interests of the children because they would remain in the physical custody of their primary caretaker and parent.\(^{114}\)

Stephen opposed the motion and moved to modify the custody arrangement in order to obtain sole physical custody of the children. The county court held a full evidentiary hearing at Stephen’s request. It concluded that while the relocation would not further the best interests of the children, it would have serious adverse effects. Accordingly, the court ordered that Sandra be allowed to remove the children to Illinois and denied Stephen’s motion for a change of custody.\(^{115}\)

Stephen appealed the decision to a three-judge district court panel. The panel concluded that removal was not in the best interests of the children and reversed the county court decision.\(^{116}\)

The Minnesota Supreme Court was now confronted with three distinct issues on appeal. The first issue was tied with the court’s earlier decision in *Auge v. Auge*, where the court held that if a parent has sole legal and physical custody, a presumption exists that a parent’s decision to move out of state is in the best interests of the child.\(^{117}\) The presumption is subject to a showing by the noncustodial parent that the move is not in the best interests of the child.\(^{118}\) However, *Gordon* involved a joint legal custody situation.\(^{119}\) Thus, the court was presented with the issue of whether the presumption established by the court in *Auge* extended to joint legal custody cases.\(^{120}\)

The court answered this question in the affirmative. It reasoned that the county court had already determined in the initial dissolution decree that physical custody be given to Sandra.\(^{121}\) This was deemed to be in the best interests of the children.\(^{122}\) Sandra, as the

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114. *Id.* at 270.
115. *Id.*
116. *Id.*
118. *Id.* at 399.
119. *Gordon*, 339 N.W.2d at 270.
120. *Id.* at 271.
121. *Id.*
122. *Id.*
custodial parent and primary caregiver, was in the best position to determine where the children should live while with her.123 Therefore, the presumption in favor of the custodial parent’s decision to move extended to joint legal custody cases.124

The second issue was whether Stephen overcame this presumption and established by a preponderance of the evidence that the move would not be in the best interests of the children.125 The court summarily concluded, without further investigation, that Stephen did not meet his burden of proof.126

The third issue was whether removal would interfere with Stephen’s ability to continue to share in the major education, religious, or health-care decisions that would affect the children or with his visitation rights.127 The court held that there was no evidence to show such interference.128

Therefore, the court reversed the district panel’s decision and remanded the case to the Dakota County Court.129 The court was instructed to reinstate the original county court decision and permit Sandra to move with the children to Illinois.130

Justice Peterson wrote for three dissenters.131 He argued that the extension of Auge to joint legal custody cases undercut the importance of awarding both parents equal rights and responsibilities: “Once the child is removed from the state, the noncustodial parent’s right to participate in the major decisions regarding the child’s upbringing may be substantially diminished.”132

Justice Peterson further argued that any examination of the best interests of the children should be done without presumptions where joint legal custody has been awarded.133 The court’s extension of Auge to joint custody cases misdirects the court’s attention away from the best interests of the child. Justice Peterson concluded that Auge

123. Id. Minnesota’s statute provides that the custodial parent has physical custody and thereby may determine where the child will live. MINN. STAT. § 518.003, subd. 3(e) (1988).
124. Gordon, 339 N.W.2d at 271.
125. Id.
126. Id. The court stated that the father had merely introduced evidence that the proposed move would not be in his own best interests. Id. The dissent claimed that the trial court failed to make an adequate inquiry as to whether the best interests of the children would be served by the move. Id. at 273–74 (Peterson, J., dissenting).
127. Id. at 272.
128. Id. The majority implied that while the move would make visitation more difficult, accommodations could be made given Stephen’s annual income of approximately $130,000. Id. at 271, n.1.
129. Id. at 272.
130. Id.
131. Id. Also dissenting were Justices Scott and Yetka.
132. Id. at 272.
133. Id. at 273.
should not be precedent in joint legal custody cases.134

VII. A TIME FOR RE-ASSESSMENT

The presumption established by the court in *Auge* is based on sound legal and public policy foundations. However, the extension of this presumption by the court in *Gordon* to joint legal custody cases is unjustified. It is in fundamental conflict with the statutory purposes set out by the Minnesota Legislature for awarding joint legal custody and visitation.135

The *Auge* decision is consistent with the statutory purposes of sole legal custody. When the traditional family unit has broken down, the court awards custody to the parent it believes is best qualified to protect the best interests of the child.136 The custodial parent is given ultimate legal control over the child.137 The noncustodial parent is excluded from decisions affecting the child. It can be presumed that the custodial parent who exercises unilateral decision-making authority over the child is in the best position to make the major decisions that affect the child's upbringing. This includes the decision to move with the child out of state. There is no reason for the court to question the custodial parent's reasons for moving or whether the move is in the best interests of the child. The court has already determined that it is in the best interests of the child that he or she remain with the custodial parent when it made the initial custody award.

The argument that a new family unit consisting solely of the custodial parent and child is best made in a sole custody arrangement. The custody award requires the custodial parent to assume rights and responsibilities with regard to the upbringing of the child that had been shared by both parents.138 The custodial parent must now solely support and care for the child. In a real sense the custodial parent is head of a new postdivorce family.

The principle of family autonomy should prevent the courts from interfering with the custodial parent's request to move with the child. The court has no interest in a family unit that is functioning properly and is intact. In a sole legal custody setting, the custodial parent is in the best position to determine what is in the best interests of the new family unit consisting of the custodial parent and child. The court has no reason to second-guess a custodial parent's decision to move.

The *Auge* decision is also consistent with the purposes of visitation

134. *Id.* at 272.
135. MINN. STAT. §§ 518.003, 518.175, subd. 3 (1988).
137. *See, MINN. STAT.* § 518.176 subd. 1 (1988) (at the time of the custody order, the custodian may determine the child's upbringing).
138. *Id.*
when sole legal custody has been awarded. The purpose of visitation when sole legal custody has been awarded is not necessarily to further the interests of the child by fostering the relationship between the child and the noncustodial parent. The purpose of visitation is to protect the "parental rights" of the noncustodial parent to see the child.\footnote{139} The visitation right itself is thus limited given the limited purposes of sole legal custody. Visitations does not extend to decisions that affect the child’s welfare in the new postdivorce family unit. This position was summed up by the New Jersey Supreme Court in \textit{D’Onofrio}:\footnote{140}

\begin{quote}
[A] noncustodial parent is perfectly free to remove himself from this jurisdiction despite the continued residency here of his children in order to seek opportunities for a better or different life style. . . . And if he does choose to do so, the custodial parent could hardly hope to restrain him from leaving this State on the ground that his removal will either deprive the children of the paternal relationship or depreciate its quality. The custodial parent, who bears the essential burden and responsibility for the children, is clearly entitled to seek a better life for herself and the children, particularly where the exercise of that option appears to be truly advantageous to their interests and provided that the paternal interest can continue to be accommodated, even if by a different visitation agreement than theretofore.\footnote{141}
\end{quote}

The presumption established by the court in \textit{Auge} is consistent with Minnesota’s statutory scheme for awarding sole legal custody. The \textit{Auge} presumption, however, is inconsistent with the statutory purposes for awarding joint legal custody and visitation.

In Minnesota, joint legal custody means that “both parents have equal rights and responsibilities, including the right to participate in major decisions determining the child’s upbringing, including education, health care and religious training.”\footnote{142} The decision to move a child out of state is a major decision affecting the child’s upbringing. It will have a significant impact on the child’s life affecting the child’s home life, school, and friendships. A move out of state will also have a significant impact on the child’s relationship with the noncustodial parent.

The \textit{Gordon} court ignored these concerns by narrowly construing Minnesota’s joint legal custody statute. The court defined joint legal custody as granting to “both the parents equal rights and responsibilities in making major decisions involving the education, religion

\begin{footnotes}
\item[139] See Minn. Stat. § 518.175, subd. 3 (1988).
\item[141] Id. at 207-08, 365 A.2d at 30.
\item[142] Minn. Stat. § 518.003, subd. 3(b) (1988).
\end{footnotes}
and health care of the children.” However, the statute’s definition
is broader: “Joint legal custody means that both parents have equal
rights and responsibilities, including the right to participate in major
decisions determining the child’s upbringing, including education,
health care, and religious training.”

The Minnesota Legislature clearly intended that both parents
equally share the rights and responsibilities in all important deci-
sions affecting the child’s upbringing. Moreover, while such impor-
tant parental decisions may include education, health care, and
religious training, these kinds of decisions are not exclusive. For ex-
ample, a custodial parent’s decision to move with a child out of state
should be considered a decision affecting the child’s upbringing.

The court’s decision in Gordon amounts to a modification of Min-
nesota’s joint legal custody statute. The result is that the custodial
parent’s decision-making authority is increased while the noncus-
todial parent’s is decreased. This contravenes the language of the
statute by excluding the noncustodial parent from participating in
those “major decisions determining the child’s upbringing” that do
not directly involve education, health care or religious training.

Furthermore, the Gordon decision is not justified in terms of a new
postdivorce family unit. When joint legal custody is awarded, a new
family unit consisting of only the custodial parent and the child is not
created. The noncustodial parent continues to share in the major
decisions that affect the child. When a custodial parent moves with a
child out of state, that parent’s decision greatly affects the ability of
the noncustodial parent to equally share in the major decisions af-
fecting the child’s welfare. More importantly perhaps, the move in
many cases will undermine the emotional and psychological relations
between the child and the noncustodial parent. Generally, the
purpose of awarding joint legal custody in the first place is to foster
the bonds between the child and both parents.

The presumption that a custodial parent has a right to move also
undermines the statutory purposes of visitation when joint legal cus-
tody has been awarded. Minnesota statute provides that the court
shall “grant such rights of visitation as will enable the child and the
noncustodial parent to maintain a child to parent relationship that
will be in the best interests of the child.” Moreover, “the court
shall not restrict a parent’s visitation rights unless it finds that the
visitation is likely to endanger the child’s physical or emotional

144. Minn. Stat. § 518.003, subd. 3(b) (1988).
145. Id.
146. Wallerstein, supra note 1, at 344-56.
147. Minn. Stat. § 518.175, subd. 1 (1988).
health or impair his emotional development.” 148

In awarding joint legal custody, the court has already determined that it is in the best interests of the child to have as much contact with the noncustodial parent as possible. The primary purpose of visitation in a joint custody context is to foster the relationship between the child and the noncustodial parent. This purpose, however, is frustrated when the Auge presumption is applied in joint legal custody cases. The court has failed to distinguish between the purpose of visitation when joint legal custody has been awarded and when sole legal custody has been ordered.

The court has also failed to recognize that the principle of family autonomy is not impaired when the court intervenes to determine the best interests of the child in a situation where joint custody has been awarded. In a joint custody arrangement, the postdivorce family unit consists of the custodial parent, the noncustodial parent, and the child. If the parents disagree over removal, the family unit is impaired and judicial intervention is therefore justified to protect the child’s best interests.

**CONCLUSION**

The *Gordon* court, in effect, established a balancing test. The interests of the custodial and noncustodial parents are weighed against one another when removal is requested. Of course, there is no reason to exclude the parents’ interests from the court’s considerations. The child’s best interests cannot be separated from those of the parents. Moreover, the child’s interests cannot be assessed in a vacuum or in the abstract. However, such a balancing test focuses attention on the parents rather than on the child, placing more importance on parental rights than the interests of the child.

When joint custody has been awarded and the custodial parent insists on moving, the best option in terms of the child’s psychological and emotional development is generally to deny the move. This permits the child to remain near the noncustodial parent. Psychological research clearly shows that a joint custody arrangement promoting the child’s maximum contact with both parents is usually in the child’s best interests. 149 The possibility of maintaining and sustaining such an arrangement is severely impaired or even destroyed if one parent decides to move out of state with the child.

It is important to note that it may of course be in the child’s best interests, both psychologically and nonpsychologically, to permit the move. In either case, the focus of the court should be on the child.

The Minnesota Legislature requires that when joint legal custody

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148. *Id.* at subd. 5 (1988).
149. *See supra* note 37 and accompanying text.
is awarded, both parents share equal rights and responsibilities in making major decisions determining the child’s upbringing.\textsuperscript{150} The \textit{Auge} presumption does not permit equal participation by both parents when the custodial parent decides to move with the child out of state. Therefore, the court has no basis to believe that such a move is necessarily in the best interests of the child. Moreover, there is no reason to believe that the custodial parent’s decision to move serves the best interests of the child simply because the noncustodial parent cannot overcome the presumption.

The Minnesota court should end the presumption that a custodial parent’s request to move is always in the best interests of the child when joint legal custody has been awarded. The burden of proof should be on the custodial parent to show that the move is in fact in the best interests of the child.

The court, by placing the burden on the custodial parent attempting to move, assures that the parent’s reasons for moving are consistent with the child’s best interests. Such an inquiry should look beyond any superficial reasons that might be given by a parent for moving. A court should analyze the parent’s decision making process and investigate what options, other than moving, may be available. It may be, for example, that while a parent may seem to have a “legitimate” reason for moving, the parent’s decision was really motivated by a desire to increase geographic distance from the noncustodial parent.

In determining the best interests of the child, the court must examine all of the factors that may affect the child’s welfare. A move may be advantageous to the custodial parent. Yet it is rarely in the child’s best interests to change locations following divorce.\textsuperscript{151} The child must not only deal with the loss of the remaining parent, but also significant environmental changes that can prove to be traumatic and stressful on the child.\textsuperscript{152} At the same time, the noncustodial parent suffers the loss of every day contact with the child which may result in a loss of parental self-esteem.\textsuperscript{153} Courts must consider the impact of the move on both the child and the remaining parent, not simply what advantages one parent may gain from the move at the possible expense of all other postdivorce family members. Such an inquiry will place the focus of the court where it belongs—on the best interests of the child.

\textit{Hersch Izek}

\textsuperscript{150} See Minn. Stat. § 518.003, subd. 3(b) (1988).
\textsuperscript{151} Wallerstein, supra note 1, at 271-81.
\textsuperscript{152} See supra note 38 and accompanying text.
\textsuperscript{153} Wallerstein, supra note 1, at 221.