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NOTE PRÉLIMINAIRE SUR LE DÉMÉNAGEMENT FAMILIAL INTERNATIONAL

établie par le Bureau Permanent

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PRELIMINARY NOTE ON INTERNATIONAL FAMILY RELOCATION

drawn up by the Permanent Bureau

Document préliminaire No 11 de janvier 2012 à l'intention de la Commission spéciale de janvier 2012 sur le fonctionnement pratique de la Convention Enlèvement d'enfants de 1980 et de la Convention Protection des enfants de 1996

Preliminary Document No 11 of January 2012 for the attention of the Special Commission of January 2012 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention

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I. INTRODUCTION[1]

1. In this era of globalisation, the world's population has become increasingly mobile. There are many reasons why people decide to move to another country on a long-term basis, be it for career opportunities or lifestyle changes.

2. The breakdown of a relationship may also be the main reason for a desire to relocate internationally, in order, for example, to return to a country of origin, or to follow a new partner, or for economic reasons. In this context, the international relocation of one parent with his or her child may seriously impact the relationship of the child with the other parent. In this respect, the United Nations *Convention on the Rights of the Child* ("UNCRC")[2] provides in Article 10, paragraph 2, for the right of a child whose parents reside in different States to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents.

3. The growing trend in many countries towards separated parents having joint parental responsibilities places an emphasis on the importance of an active involvement of both parents in a child's life even after the dissolution of a relationship. Therefore, when one parent does not agree to the other's plan for international relocation with the child, and the issue is submitted to the court, a judge may face the dilemma of having to decide between the conflicting legitimate interests of both parents, while remaining child-focused.

4. International relocation disputes raise many challenges for judges. In some jurisdictions there may be the additional handicap of a lack of legislative or case law guidance concerning the factors to take into consideration in such cases. Granting permission to relocate also raises the issue of recognition and enforcement of the new contact arrangements in the country of relocation as well as the practical implications of the relocation, such as costs and travel arrangements. The preliminary research presented in this Note demonstrates that States have taken many different approaches to the issue of international family relocation.

5. In light of these issues, there is increasing interest in finding common principles to apply to international family relocation cases. A recent example of this is the International Judicial Conference on Cross-Border Family Relocation, held in Washington, DC in March 2010, which issued a common declaration of 13 principles applicable to international family relocation, as discussed in more detail below (hereinafter "the Washington Conference").[3]

II. SCOPE OF THIS NOTE AND DEFINITIONS

6. The focus of this Note is to consider the approaches taken in resolving international family relocation disputes between separated parents by courts in various jurisdictions around the world.

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[1] The Permanent Bureau would like to thank Joëlle Küng, Legal Officer at the Permanent Bureau, for carrying out the principal research and drafting of this Note. The Permanent Bureau would also like to thank and acknowledge the work of the following persons in providing assistance in carrying out research and identifying case law for this paper (see section V, *infra*): Judge Jung Hoon (Korea), Kim Pham, former Intern (Australia), Nicolas Sauvage, former Legal Officer (France) and Caroline Cotta (intern). See generally Caroline Cotta, "Is an International Consensus Possible with regard to Child Relocation?", LLM Dissertation, University of Dundee (United Kingdom), 2011, unpublished.

[2] The United Nations *Convention on the Rights of the Child*, New York, 20 November 1989.

[3] The conference was co-organised by the Hague Conference on Private International Law and the International Centre for Missing and Exploited Children (ICMEC). The contributions made by speakers at the meeting were included in Special Edition No 1 of *The Judges's Newsletter on International Child Protection* (2010), available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "The Judges' Newsletter on International Child Protection".

7. International family relocation is not a well-defined legal notion. Only a few States have legal provisions dealing with international relocation applications.[4] For the purposes of this Note, international family relocation is understood as the long-term move (*i.e.*, a change of habitual residence) to another country by a parent with his or her child.

8. The scope of this Note is limited to international relocation cases. However, whereas some States apply different principles to moves within their country and moves from their country to another country,[5] other States have a common approach for both national and international relocation cases.[6] While in some States any move would constitute a relocation that requires the consent of the other parent and / or the competent court, other States consider only moves of a certain distance to be "relocation".[7] Relocation can also be defined not according to distances, travel time or borders but rather according to the impact of the proposed move on the child's primary relationships.[8]

9. This Note presents an initial and non-exhaustive study of some regional and international law sources, as well as social science and other research in the area that may be helpful or relevant in the discussion of the topic. The present Note also seeks to provide a limited view of judicial practice in the area of international family relocation, through an analysis of a sample of national case law from different jurisdictions.

10. This Note uses the term "parental responsibilities"[9] in the sense of the general rights and responsibilities of parents in relation to their child (which usually include making decisions on important areas of the child's life such as education, religion and medical care). The term "care"[10] is used specifically to refer to the day-to-day care of the child. The expression "caregiver" will be used to designate a parent providing day-to-day care of the child. The expression "primary caregiver" or "primary caregiving parent" will be used to designate the parent with whom the child resides the majority of time, as opposed to the "non-primary caregiver". The "relocating parent" will refer to the parent planning to relocate to another country whereas the "remaining parent" will refer to the other parent.

11. The case law analysed in this Note is not exhaustive and seeks only to present a descriptive "snap-shot" of a number of issues and judicial responses which arise in cases of international family relocation disputes. The analysis contained in this Note is intended to be a starting point from which further research may be considered, and should be used as a basis for discussion rather than as a definitive statement of past or present judicial practice within any one jurisdiction or globally.

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[4] Such as Section 30-3-160-160.10 of the Alabama Code of 1975 or Section 13 of the England and Wales Children Act of 1989; relocation applications are called "leave to remove" applications in England and Wales.
[5] For example, the United Kingdom (England and Wales).
[6] For example, Australia, Canada, France; therefore some of the case law presented or referenced in this paper might concern national relocations, but the principles applied are the same as those used for international relocation cases.
[7] For example, the following states of the United States of America: Arizona Revised Statutes § 25-408 (more than 100 miles); Florida Statutes § 61-13001 (more than 50 miles); Utah Code §30-3-37 (more than 150 miles).
[8] For example, France, Civil Code Art. 373-2(3); New Zealand, Care of Children Act 2004, Section 16(2)(b); in the province of British Columbia, Canada, see the "White Paper on *Family Relations Act* Reform, Proposals for a new Family Law Act, July 2010" (p. 72) of the Ministry of Attorney General's Justice Services Branch, Civil Policy and Legislation Office; see also the American Bar Association's Model Relocation of Children Act and its definition of relocation in Section 2.
[9] The terms "parental authority", "legal custody" and "guardianship" are also being used by States with a similar meaning.
[10] The terms "physical custody" and "parenting time" are also being used by States with a similar meaning.

III. BACKGROUND WORK OF THE HAGUE CONFERENCE ON INTERNATIONAL FAMILY RELOCATION

12. The Hague Conference's work in the last decade reflects the increasing importance of the topic of international family relocation and the ongoing effort to achieve greater international consistency in the approach to cross-border relocation disputes.

13. The topic was first and most frequently addressed within the context of conflicts concerning transfrontier contact and preventive measures to protect children from abduction, both under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter "the 1980 Convention") and the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (hereinafter "the 1996 Convention"). In May 2000, the Special Commission on General Affairs and Policy of the Conference mandated that the Permanent Bureau prepare:

> "a report on the desirability and potential usefulness of a protocol to the [1980] Convention that would, in a more satisfactory and detailed manner than Article 21 of that Convention, provide for the effective exercise of access / contact between children and their custodial and non-custodial parents in the context of international child abductions and parent relocations, and as an alternative to return requests".[11]

14. In Preliminary Document No 4 for the 2001 Special Commission to review the operation of the 1980 Convention,[12] a connection was noted between the phenomenon of abduction and the situation where a parent who is the primary caregiver obtains permission from a court to relocate to another jurisdiction with the child, but contact orders made in that context are not respected in the country to which the parent and child have relocated. This situation could affect the willingness of judges to allow relocation, which may in turn encourage abductions by primary caregivers.[13]

15. The 2006 Special Commission to review the operation of the 1980 Convention and the practical implementation of the 1996 Convention adopted further Conclusions and Recommendations after discussion of transfrontier access / contact:

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[11] See "Conclusions of the Special Commission of May 2000 on General Affairs and Policy of the Conference", available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "General Affairs", p. 34, para. D.

[12] "Transfrontier Access / Contact and the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. A Preliminary Report", drawn up by William Duncan, Deputy Secretary General, Prel. Doc. No 4 of February 2001 for the attention of the 2001 Special Commission to review the operation of the 1980 Convention, available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Special Commission meetings on the practical operation of the Convention" and "Preliminary Documents".

[13] In its Conclusions and Recommendations, the Fourth Meeting of the Special Commission noted that "Courts take significantly different approaches to relocation cases, which are occurring with a frequency not contemplated in 1980 when the Convention was drafted. It is recognised that a highly restrictive approach to relocation applications may have an adverse effect on the operation of the 1980 Convention", see "Conclusions and Recommendations of the Fourth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (22–28 March 2001)", available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Special Commission meetings on the practical operation of the Convention", at p. 14; however, this argument (the link between a restrictive approach to relocation and international child abduction) has been criticised as overly simplistic by M. Freeman, in "Relocation: The reunite research", Research Report (Research Unit of the reunite International Child Abduction Centre, July 2009), p. 21.

"*Relocation*

1.7.4 The Special Commission concludes that parents, before they move with their children from one country to another, should be encouraged not to take unilateral action by unlawfully removing a child but to make appropriate arrangements for access and contact preferably by agreement, particularly where one parent intends to remain behind after the move.

1.7.5 The Special Commission encourages all attempts to seek to resolve differences among the legal systems so as to arrive as far as possible at a common approach and common standards as regards relocation."[14]

16. International family relocation was more specifically addressed in both the Guide to Good Practice on Preventive Measures (2005), and the Guide to Good Practice on Transfrontier Contact (2008).[15] Both Guides underlined the importance of ensuring the recognition and enforcement in the country of relocation of contact orders made within the context of international family relocation.

17. In March 2010, the Hague Conference on Private International Law and the International Centre for Missing and Exploited Children (ICMEC) co-organised the Washington Conference,[16] which took place in Washington DC, United States of America, and brought together more than 50 judges and other experts from 14 countries to discuss cross-border family relocation. At the end of the conference, the delegates issued and adopted a document called the "Washington Declaration on International Family Relocation".[17] This Declaration gives 13 recommendations, including a list of 13 Principles which are to guide a judge confronted with a relocation dispute. The Declaration puts forth that the best interests of the child should always be the paramount consideration, without any presumptions for or against relocation. Reasonable notice should be given of the relocating parent's intention to the parent left behind in the move. The Washington Declaration also emphasises the goal of achieving the voluntary settlement of relocation disputes through mediation and similar facilities as well as the importance of having mechanisms in place ensuring the enforcement of the orders for relocation and access regulations in the State of destination.[18]

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[14] See "Conclusions and Recommendations of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the practical implementation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (30 October – 9 November 2006)", available on the Hague Conference website *ibid.*, at p. 11; see also Prel. Doc. No 4 (*op. cit.* note 12), Chapter 6, "Relocation and contact".

[15] *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part III – Preventive Measures* (Jordan Publishing, 2005), Sections 2.2 and 2.3; *Transfrontier Contact Concerning Children – General Principles and Guide to Good Practice* (Jordan Publishing, 2008), Sections 8.2-8.4; both Guides are available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Guides to Good Practice".

[16] See *supra* note 3.

[17] Hereinafter "the Washington Declaration"; the full text of the Washington Declaration can be found as an annex to this Note.

[18] From 30 June to 2 July 2010, the Centre for Family Law and Practice of the London Metropolitan University held its Inaugural Conference on International Child Abduction, Forced Marriage and Relocation in London, England. The Conclusions and Resolutions of that Conference endorsed the Washington Declaration on International Family Relocation of March 2010. They are available at < http://www.londonmet.ac.uk/depts/lgir/research-centres/centre-for-family-law-and-practice/inaugural-conference-2010/inaugural-conference_home.cfm > (last consulted 1 December 2011).

18. In light of these developments, it was decided to include some questions[19] about international family relocation in the "Questionnaire on the desirability and feasibility of a protocol to the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*" (hereinafter "Questionnaire II")[20] which was sent out to Contracting States and Members of the Hague Conference in preparation for the Sixth Meeting of the Special Commission, Part I of which was held in June 2011.

19. Although Part II of the Special Commission (25-31 January 2012) will not focus primarily on developing a protocol to the 1980 Convention but more broadly consider any future work related to both the 1980 and 1996 Conventions,[21] the answers provided by States[22] to Questionnaire II provide valuable information on how States view the importance of addressing the topic of international family relocation. However, it must be kept in mind that the answers limited themselves to the question of the desirability and feasibility of a protocol and did not consider any other option, such as soft-law tools, including common principles or a guide to good practice.

20. As to the issue of addressing the circumstances in which one parent may lawfully remove a child to live in a new country,[23] several responses expressed the value of addressing this in a possible protocol,[24] especially as a matter of preventing abduction.[25]

21. However, more than half of the responses[26] considered protocol provisions on international relocation inappropriate or unnecessary, most of them emphasising the role of domestic law in determining the lawfulness of the relocation of the child.[27] One State was undecided,[28] while approximately a third of the responses saw this matter as inappropriate for a protocol to the 1980 Convention.[29] According to at least one State, this issue fell outside the scope of the 1980 Convention and should be dealt with under the 1996 Convention.[30] Another State considered that such provisions would not be

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[19] The questions were the following: "Could provisions (*i.e.*, possible components of a protocol) on the matter of international relocation of a child serve a useful purpose and how high a priority would you attach to the development of provisions on this matter?
– 10.1 Addressing the circumstances in which one parent may lawfully remove a child to live in a new country
– 10.2 Promoting agreement between parents in respect of relocation
– 10.3 Others".

[20] Drawn up by the Permanent Bureau, Prel. Doc. No 2 of December 2010 for the attention of the Special Commission of June 2011 on the practical operation of the 1980 Convention and the 1996 Convention, available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "Child Abduction", as well as the answers from States (see *infra* note 22).

[21] See "Guide to Part II of the Sixth Meeting of the Special Commission and consideration of the desirability and feasibility of further work in connection with the 1980 and 1996 Conventions", drawn up by the Permanent Bureau, Prel. Doc. No 13 of December 2011 for the attention of the Special Commission of January 2012 on the practical operation of the 1980 Convention and 1996 Convention, available on the Hague Conference website *ibid*.

[22] Please note: Questionnaire II was circulated to all National and Contact Organs of Members of the Hague Conference on Private International Law, as well as to non-Member Contracting States to the 1980 Convention. The reference to "States" in the context of Questionnaire II responses will therefore include, where relevant, Member Contracting States to the 1980 Convention, non-Member Contracting States to the 1980 Convention and the European Union.

[23] Question 10.1 of Questionnaire II; the following entities have not responded to or expressed views on this particular question: China, European Union.

[24] Burkina Faso, China (Hong Kong SAR), Colombia, El Salvador, Montenegro, Zimbabwe.

[25] Chile.

[26] Argentina, Australia, Canada, Dominican Republic, Israel, Mexico, New Zealand, Norway, Panama, Switzerland, Ukraine, United States of America,.

[27] Argentina, Australia, Canada, Israel, Norway, Panama, Ukraine. Similarly also Bahamas, although undecided on the question of protocol rules with regard to relocation.

[28] Bahamas.

[29] Australia, Dominican Republic, Mexico, New Zealand, Norway, Ukraine.

[30] New Zealand.

necessary if the concept of "rights of custody" was clear.[31] In its response to the "Questionnaire concerning the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*" (hereinafter "Questionnaire I"),[32] one State[33] also suggested that the principles adopted in the Washington Declaration[34] be dealt with by a protocol.[35]

22. As to the issue of promoting agreement between parents in respect of international relocation,[36] approximately half of the responses considered it appropriate for a possible protocol to promote agreement between parents.[37] Agreement between parents was indeed supported by the 2006 Special Commission[38] and would be faster, easier and more child-friendly than judicial proceedings or other mechanisms.[39] In this context, mediation has a significant preventive role to play.[40] More than one third of the responses saw the promotion of agreements between parents in respect of relocation as inappropriate in a protocol.[41] While desiring to promote amicable solutions, some States considered that such a provision would go beyond the scope of the 1980 Convention[42] and that this was rather a matter of domestic law.[43] One State considered that the matter would be better dealt with under the 1996 Convention.[44] Another State indicated that the encouragement of amicable agreements in relocation cases should rather be dealt with in the Guide to Good Practice on Mediation under the 1980 Convention.[45] One State was undecided, and emphasised the role of domestic law.[46]

IV. UNDERLYING THEMES RELEVANT TO THE RELOCATION DEBATE

23. The debate on international family relocation cannot be separated from several other underlying themes that influence the way States approach the issue of international relocation. These will be explored further in the following sections.

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[31] Switzerland.
[32] Drawn up by the Permanent Bureau, Prel. Doc. No 1 of November 2010 for the attention of the Special Commission of June 2011 (Part I), available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "Child Abduction", as well as answers from 47 States.
[33] Please note: Questionnaire I was circulated to all National and Contact Organs of Members of the Hague Conference on Private International Law, as well as to non-Member Contracting States to the 1980 and 1996 Conventions. The reference to "States" in the context of Prel. Doc. No 1 responses will therefore include, where relevant, Member Contracting States to the 1980 and / or 1996 Conventions, non-Member Contracting States to the 1980 and / or 1996 Conventions and the European Union. (It may also, on occasion, include reference to Member *non*-Contracting States, principally in relation to questions concerning the 1996 Convention where Members which are Contracting States to the 1980 Convention may have provided comments.)
[34] *Supra*, para. 17.
[35] See response from Switzerland to Question 19.4 of Questionnaire I.
[36] Question 10.2 of Questionnaire II; the following entities have not responded to or expressed views on this particular question: China, El Salvador, European Union, Norway.
[37] Armenia, Australia, Burkina Faso, Chile, China (Hong Kong SAR), El Salvador, Montenegro, Panama, Switzerland.
[38] See Conclusions and Recommendations of the 2006 Special Commission (*op. cit.* note 14), Conclusion and Recommendation No 1.7.4.
[39] Chile.
[40] Australia.
[41] Argentina, Canada, Dominican Republic, Israel, Mexico, New Zealand, Ukraine, United States of America.
[42] Israel, New Zealand.
[43] Argentina, Ukraine.
[44] New Zealand.
[45] Canada, referring to "Draft Guide to Good Practice under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Part V – Mediation", drawn up by the Permanent Bureau, Prel. Doc. No 5 of May 2011 for the attention of the Special Commission of June 2011 (Part I), available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "Child Abduction".
[46] Bahamas.

A. The growing trend towards joint parental responsibilities after separation

24. In the past decades, many countries have moved away from awarding parental responsibilities to one parent only (mostly the mother) after the dissolution of a marriage or relationship.[47] In a first step, several countries started introducing the possibility of providing for joint parental responsibilities after divorce.[48] Some countries introduced a presumption in favour of joint parental responsibilities, irrespective of the marital and relationship status of the parents.[49] A few States have gone even further by promoting not only joint parental responsibility but also joint care (or equal shared care) for separated parents, for example in the form of alternating residence of the child with each parent.[50]

25. The ideology of co-parenting which is behind these legislative changes favours an active role of both parents in the life of their child, no matter the status of their relationship.[51] The language used regarding post-separation parenting has also evolved, moving away from the traditional "custody" and "access" terms to "parental responsibility" and "residence and contact orders"[52] or "parenting plans" and "parenting time",[53] highlighting the message that both parents should have a meaningful and continuing involvement in their child's life.[54]

26. In France, for example, the Civil Code was amended in 1993 and further in 2002[55] to abolish the concepts of "custody"[56] and "access" and to replace them with "parental authority".[57] According to the new Article 372 of the French Civil Code, the parents exercise parental responsibility jointly. Article 373-2(1) states that the separation of the parents has no consequence on the application of the rules concerning the allocation of parental authority. Each parent shall maintain personal relations with the child and respect the bonds of the child with the other parent (Art. 373-2(2)). The legislation enacted in 2002 also provides for the option of alternating residence (which supposes that the child will spend equal amounts of time with each parent in an alternating manner).

27. This growing trend towards joint parental responsibilities and shared care could lead to a more restrictive approach to relocation applications in those jurisdictions where relocation is subject to court approval, as it emphasises the importance of each parent's

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[47] P. Parkinson, "Family Law and the Indissolubility of Parenthood", *Family Law Quarterly*, Vol. 40, No 2, Summer 2006, p. 244; T. Glennon, "Still Partners? Examining the Consequences of Post-dissolution Parenting", *Family Law Quarterly*, Vol. 41, No 1, Spring 2007, pp. 114-115; K. Boele-Woelki, "What comparative family law should entail", *Utrecht Law Review*, Vol. 4, Issue 2 (June) 2008, p. 17.

[48] In the United States of America, California led the way in 1979 in passing a joint custody statute; all US states now permit joint custody or its equivalent as an option (for a complete overview see J. Atkinson, *Modern Child Custody Practice – Second Edition*, LexisNexis 2009); Sweden introduced the possibility of joint parental responsibility after divorce in 1976, and through an amendment in 1998 allowed courts to impose joint custody against the will of one parent, see A. Singer, "Active parenting or Solomon's justice? Alternating residence in Sweden for children with separated parents", *Utrecht Law Review*, Vol. 4, Issue 2 (June) 2008, p. 35; for England and Wales see the Children Act 1989; for Switzerland, see the Civil Code as modified in 2000, Art. 133; for Canada, see the Divorce Act of 1985, Section 16.

[49] For example, South Africa Children's Act of 2008, Sections 19 and 20.

[50] See for example, Spain, Civil Code as amended in 2005, Art. 92CC; Australia, Family Law Act 1975 as amended in 2006, § 60B and 61DA; the US state Iowa, Iowa Code Annotated § 598.41; Belgium, Civil Code as amended in 2006, Art. 374; Sweden, where alternating residence can be imposed by the judge against the will of one parent (but not both), if it is in the best interests of the child, Government Bill 1997/98:7, p. 49, see also A. Singer (*op. cit.* note 48).

[51] P. Parkinson (*op. cit.* note 47), p. 251; Glennon (*op. cit.* note 47), p. 113.

[52] See for example, England and Wales, Children Act 1989.

[53] See for example, Australia, Family Law Act 1975, as amended in 2006, §65DAA; New Zealand, Care of Children Act 2004.

[54] See Australia, Family Law Act 1975, as amended in 2006, §60B.

[55] Act of 4 March 2002 on Parental Authority amending the French Civil Code.

[56] In French, "*la garde*".

[57] F. Granet, "Alternating residence and relocation – A view from France", *Utrecht Law Review*, Vol. 4, Issue 2 (June) 2008, p. 48.

active involvement in their child's life.[58] This might specially be the case when both parents have been caring for their child equally, thus giving the non-relocating parent a strong argument to oppose the relocating parent's proposed move.

B. Gender issues

28. Even though there is a growing trend to allocate joint parental responsibilities and joint care to parents after the dissolution of their relationship, the fact remains that mothers in general have been, and still are, the majority of the primary caregivers.[59] The issue of relocation, therefore, appears inevitably gendered, meaning that either a restrictive or a liberal approach to relocation applications may be argued to be discriminatory, not in regard to the child but in respect to one of the parents.[60]

29. Taking into consideration the fact that parents relocating with their child are mostly women,[61] a restrictive approach to relocation mostly affects their freedom to move away after a relationship breakdown and possibly ensure their socioeconomic well-being.[62] A liberal approach to relocation, however, affects the rights of the remaining parents, mostly fathers, to participate actively and have a meaningful relationship with their child. The distance and added financial burden of maintaining contact with the child might impact negatively on the relationship between the child and the remaining parent and might even lead to a complete cessation of contact.

30. Some academics deplore the fact that the non-relocating parent's mobility is rarely a factor taken into account when analysing a relocation application.[63] One academic argues that the inclusion of this factor "is necessary if relocation law is to treat men and

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[58] T. Glennon, "Divided parents, shared children – Conflicting approaches to relocation disputes in the USA", *Utrecht Law Review"*, Vol. 4, Issue 2 (June) 2008, p. 66; M. Henaghan noted that in New Zealand the success rate of relocation applications trended downwards as the idea of shared care emerged in the New Zealand Family Court, in "Relocation cases – the rhetoric and the reality of a child's best interests – a view from the bottom of the world", *Child and Family Law Quarterly*, Vol. 23, No 2, 2011, p. 238.

[59] P. Parkinson (*op. cit.* note 47), pp. 256-257; T. Glennon (*op. cit.* note 47) reviewed 602 case decisions regarding relocation disputes available on Westlaw for the time period from 1 June 2001 to 1 June 2006, and found that 90% of relocating parents were women, p. 118; a 2008 study from the French national institute of statistics (INSEE) stated that mothers constitute 85% of the single parent families in France, see < www.insee.fr >; numbers from the US Census Bureau show that the percentage of children living in single-parent families has grown from 12% in 1970 to 27% in 2010, of which 87% of the parents are mothers (in 1970 it was 91%), see < www.census.gov/population/sociodemo/hh-fam.html > (last consulted 1 December 2011), Table CH-1.

[60] P. Parkinson (*op. cit.* note 47), p. 257; in two decisions from South Africa, the courts took into account the gender dimension in relocation cases, *B v. M* 2006 3 All SA 109 (W) para. 162 and *F v. F* 2006 3 SA 42 (SCA) para. 12.

[61] See *supra* note 59.

[62] J. Behrens regards the mother's socioeconomic circumstances as directly relevant to the well-being of the child and states that "restrictions on relocation operate unfairly against the person who is likely to be providing the majority of care to a child. In doing so, they compound the social and economic disadvantages that accompany the provision of care, particularly where the caregiver is a woman", in "U v. U: The High Court on Relocation", *Melbourne University Law Review*, Vol. 27, No 2, 2003, p. 584; A. B. LaFrance studies the issue from the perspective of the protected constitutional rights to autonomy, privacy, family and marriage of women wishing to relocate and argues strongly against any interference with the rights of the custodial parent to relocate, in "Child Custody and Relocation: A Constitutional Perspective", *University of Louisville Journal of Family Law*, Vol. 34, 1995-1996, pp. 1-81.

[63] See M.H. Weiner, "Inertia and Inequality: Reconceptualizing Disputes Over Parental Relocation", 40(5) *University of California Davis Law Review*, Vol. 40, 2006-2007, p. 1797; P. Parkinson (*op. cit.* note 47), p. 263; M. Freeman, "Relocation Research: Where are we now?", *International Family Law*, June 2011, p. 138.

women equally".[64] A few jurisdictions do consider the non-relocating parent's mobility as a factor.[65] Others have gone further by addressing the question of restricting the mobility of any parent having parental responsibilities for the child, even the non-primary caregiver.[66] The primary issue of the child's best interests should not be lost in discussion of concerns about treatment of gender issues concerning the parents.

C. Recent socio-legal research on relocation

31. International child relocation is a complex issue, encompassing more than the legal sphere. Social science arguments influence the legal debate in connection with the definition of the child's best interests. Appellate and supreme courts, as well as policy makers, have often turned to social science to help them determine which criteria should be taken into account in regard to the child's welfare in relocation cases.[67] Social science experts have largely addressed the relocation issue by extending their findings from studies on the adjustment of children after a divorce. Only a few studies have directly examined the impact of relocation on children from separated families, and the results have been described as ambiguous and inconclusive.[68]

32. Among the research evidence, one can distinguish two opposite trends. On the one hand, certain experts argue that after a divorce, the child's well-being depends primarily on the quality of his relationship with the primary caregiver.[69] Therefore, this relationship should be protected by allowing the primary caregiving parent to move, provided that the proposed move is genuine and reasonable. The ensuing alienation between the child and the non-primary caregiving parent is not considered as a sufficient reason to prevent the move, the role of the latter in the child's adjustment being considered as secondary. On the other hand, this position is vigorously contested by some experts who believe that a

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[64] M.H. Weiner (*op. cit.* note 63), p. 1783.

[65] M.H. Weiner (*ibid.*) cites the following US states: New York, Texas, Louisiana, Washington, Florida and New Jersey, p. 1763; the state of Washington's statute for example directs that the court consider "the alternatives to relocation and whether it is feasible and desirable for the other party to relocate also", Washington Code § 26.09.520(9) (2009); see also the High Court of Australia, case *U v. U* (2002) 211 CLR 238, where Judge Hayne, in the majority, wrote that it would ordinarily be expected that the other parent's reasons not to move "would be explored in evidence and the validity of any assumption that the other parent will not move would be examined".

[66] See for example T. Glennon (*op. cit.* note 58), noting that "while a court will prevent a custodial parent from relocating in order to better protect the child's relationship with the non-custodial parent, it will not prevent relocation by a non-custodial parent in order to better protect that same relationship", p. 69; in the United States of America, the Code of Alabama, Sections 30-3-164 and 30-3-165, imposes a notice-of-move to the parent with visitation rights; in Canada, the Ministry of Attorney General of the Province of British Columbia published in July 2010 the White Paper on *Family Relations Act* Reform (*op. cit.* note 8), where it proposes to impose a mandatory 60-day notice-of-move for any move that can "reasonably be expected to have a significant impact on the child's relationship with a guardian of the child", this requirement applying to both primary and non-primary caregivers (available on < http://www.ag.gov.bc.ca/legislation/family-relations-act/pdf/Family-Law-White-Paper.pdf> (last consulted 1 December 2011)); in Switzerland, the latest proposal of the government to the parliament for legislation on parental responsibilities sets out that any parent holding joint parental responsibilities (which will be the general rule) wishing to relocate (with or without the child) will need the other parent's consent (Art. 301a of the proposed revision to the Civil Code, available under < http://www.bj.admin.ch/content/dam/data/gesellschaft/gesetzgebung/elterlichesorge/entw-f.pdf > (last consulted 1 December 2011)).

[67] One example is the way that Dr J. Wallerstein's *amica curiae* has influenced the decision of the California Supreme Court in *In re the Marriage of Burgess*. The Court overturned its position and adopted a more liberal approach regarding child relocation. See J.S. Wallerstein, "Amica Curiae Brief of Dr Judith S. Wallerstein, PhD", filed in Cause No. S046116, *In re Marriage of Burgess*, Supreme Court of the state of California, (Dec. 7, 1995) and *In Re Marriage of Burgess*, 913 P.2d 473 (California 1996).

[68] See for example the conclusions of Braver *et al*. on their own study as well as the comments of Glennon on the same study: S.L. Braver, I.M. Ellman and W.V. Fabricius, "Relocation of Children After Divorce and Children's Best Interests: New Evidence and Legal Considerations", *Journal of Family Psychology,* Vol. 17(2), 2003, p. 215; T. Glennon (*op. cit.* note 58), p. 65.

[69] J.S. Wallerstein and T.J. Tanke, "To move or not to move: Psychological and legal considerations in the relocation of children following divorce", *Family Law Quarterly,* Vol. 30(2), 1996, pp. 305-332.

child needs to maintain a close and meaningful relationship with both parents.[70] These experts consider that the solution of allowing the non-primary caregiving parent to see the child less often but for longer periods, typically school holidays, is not as satisfactory because it leads to "a decline in the depth and richness of the relationship"[71] and it threatens the involvement of the non-primary caregiving parent in the child's life on a long-term basis. As a consequence, they disapprove of the use of a presumption favouring the primary caregiver in relocation cases.[72]

33. Thus, the absence of consensus between social science experts on how to remedy the harmful effects of divorce on children is reflected in the debate on child relocation. Accordingly, the need for more empirical research into the effects of relocation on children has been acknowledged as a priority to help move the debate forward.[73]

34. Four recent socio-legal studies have focused on parents' and children's experiences in relocation disputes in the context of the family law system. These studies were conducted in Australia (Behrens, Smyth and Kaspiew;[74] as well as a study by Parkinson, Cashmore, Chisholm and Single[75] which is still ongoing), England (Freeman / reunite[76]) and New Zealand (Taylor, Gollop and Henaghan[77]). Among the themes addressed by the studies, three findings seem to be of particular importance.[78]

35. First, legal costs have been identified as a heavy burden on parents. For example, one study in Australia found that the median legal cost borne by the interviewed litigants was 42,000 Australian dollars.[79] Some parents in this study had to sell their house or go into severe debt to meet the expenses of the trial. This financial deterioration is worrisome, especially when considering that the child's welfare depends substantially on his parents' resources. As one researcher noted, "the judge may be determining the case on the basis of what he or she considers is in the best interests of the child, but the process of so doing may itself cause great damage to children's well-being".[80]

36. Second, these studies have shown that compliance with contact agreements is one of the most problematic dimensions of relocation disputes. One study underlined the difficulties and expenses that remaining parents may face to enforce a contact order in a foreign jurisdiction.[81] Considering the fact that relocation disputes often involve highly

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[70] See L. Trinder and M. Lamb, "Measuring up? The Relationship Between Correlates of Children's Adjustment and Both Family Law and Policy in England", *Louisiana Law Review*, Vol. 65, 2004-2005, p. 1522.
[71] See R. A. Warshak, "Social Science and Children's Best Interests in Relocation Cases: *Burgess* Revisited", *Family Law Quarterly,* Vol. 34, No 1, Spring 2000, p. 93.
[72] For more details about these two opposite views, see three of the most cited articles: J.S. Wallerstein and T.J. Tanke (*op. cit.* note 69), R.A. Warshak (*op. cit.* note 71), and L. Trinder and M. Lamb (*op. cit.* note 70).
[73] See for example M. Freeman (*op. cit.* note 13), p. 18 or P. Parkinson, J. Cashmore and J. Single, "The need for reality testing in relocation cases", *Family Law Quarterly*, Vol. 44, No 1, 2010, p. 4 or L.D. Elrod, "National and International Momentum Builds for more Child Focus in Relocation Disputes", *Family Law Quarterly*, Vol. 44, No 3*,* 2010, p. 365.
[74] J. Behrens, B. Smyth and R. Kaspiew, "Court decisions about relocation in Australia: An empirical study focusing on parents' experiences", Paper presented at the International Child Abduction, Forced Marriage and Relocation Conference, 30 June – 2 July 2010, Centre for Family Law and Practice, London Metropolitan University, England.
[75] P. Parkinson, J. Cashmore and J. Single (*op. cit.* note 73).
[76] M. Freeman (*op. cit.* note 13).
[77] N.J. Taylor, M. Gollop and R.M. Henaghan, "Relocation following parental separation: The welfare and best interests of children", Research Report to the New Zealand Law Foundation (University of Otago, Dunedin: Centre for Research on Children and Families and Faculty of Law, 2010).
[78] An overview of the four studies is provided by M. Freeman (*op. cit.* note 63), pp. 131-142.
[79] P. Parkinson, J. Cashmore and J. Single (*op. cit.* note 73), p. 22.
[80] *Ibid.*, p. 24.
[81] See M. Freeman (*op. cit.* note 13), pp. 14-16.

conflictual inter-parental relationships,[82] the need to enforce contact agreements arises frequently. Contact may also fail for practical reasons, such as the significant travel expenses that certain parents can simply not afford.[83] Thus, as satisfactory as a solution may appear,[84] contact arrangements can simply be unworkable in the long term. That is why some researchers have called for "reality-testing" the relocation and contact orders (for example looking at the technical and financial practicality of the proposed contact arrangements) when deciding on relocation disputes.[85]

37. Finally, encouraging the use of mediation has also been discussed in the framework of these studies. According to findings in one study, relocation disputes in Australia are characterised by a low settlement rate compared to other family law disputes.[86] This study indicated that the result reflected the polarised nature of relocation conflicts.[87] Another researcher conceded that such a solution could not be systematically applied but insisted that it should not be completely abandoned,[88] drawing a parallel with international child abduction cases for which mediation is strongly recommended[89] and has proven to be a successful technique to limit legal costs and reach satisfactory agreements for both parents.[90]

D. The concept of the "child's best interests"

38. The UNCRC has as one of its core principles that the best interests of the child are a primary consideration in all actions concerning children (Art. 3).[91] This principle has now been widely implemented in national legislation and is considered a primary factor in both custody and relocation disputes.[92] Both the 1980 and 1996 Conventions protect the best interests of children generally.[93]

39. There is, however, no commonly accepted definition of the concept of a "child's best interests", be it on an international or even national level. Legal provisions or case law

[82] See J. Behrens and B. Smyth, "Australian Family Law Court Decisions About Relocation: Parents' Experiences And Some Implications For Law And Policy", *Federal Law Review*, Vol. 38, No 1, 2010, pp. 7-11.
[83] P. Parkinson, J. Cashmore and J. Single (*op. cit.* note 73), pp. 27-30.
[84] Taylor *et al.* found that the children interviewed had generally adjusted to their separation from the non-custodial parent and to long travels during contact periods, see N.J. Taylor, M. Gollop and R.M. Henaghan, "Relocation following parental separation: The welfare and best interests of children". Research Report to the New Zealand Law Foundation (University of Otago, Dunedin: Centre for Research on Children and Families and Faculty of Law, 2010), p. 33.
[85] See P. Parkinson, J. Cashmore and J. Single (*op. cit.* note 73), p. 27 and N.J. Taylor, M. Gollop and R.M. Henaghan (*op. cit.* note 84).
[86] *Ibid.*, p. 14.
[87] *Ibid.*, p. 18.
[88] M. Freeman (*op. cit.* note 13), p. 24; see also L. Elrod (*op. cit.* note 73), who supports the same view, p. 367.
[89] See Art. 7 of the 1980 Convention as well as the Draft Guide to Good Practice under the 1980 Convention on Mediation (*op. cit.* note 45).
[90] See for example the reunite mediation model (< www.reunite.org >) or the German Mikk Services (< http://www.mikk-ev.de/english/englisch >).
[91] The UNCRC also recognises the right of a child "to know and be cared for by his or her parents" (Art. 7(1)), and the right of a child "who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests" (Art. 9(3)). It further states that "a child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents" (Art. 10(2)).
[92] See for example South Africa's Constitution (Section 28 of Bill of Rights) as well as the Children's Act 2008, Section 9; England and Wales Children Act 1989, Section 1; New Zealand, Care of Children Act 2004, Section 4; Canada, Divorce Act of 1985, Section 16(8); in France, Art. 3 UNCRC is directly applicable, see the decision of the *Cour de cassation civile* of 13 March 2007, No 06-17869; in Argentina, see the Law 23849 on the Comprehensive Protection of the Rights of Children and Adolescents, 26 October 2005, *Boletin Official* 26 Oct. 2005, Arts 1-3.
[93] The Washington Declaration includes in Principle 3 that "[i]n all applications concerning international relocation the best interests of the child should be the paramount (primary) consideration".

may list factors to take into consideration when assessing the child's best interests,[94] and even add weight to some factors,[95] but the matter is mostly left to the discretion of the judge. The decision of what is in the child's best interests in a specific case may also be influenced by the various debates mentioned above on the ideology of co-parenting, gender issues and the results of social research.[96]

V. COMPARATIVE OVERVIEW AND CASE LAW ANALYSIS

40. This section seeks to give an overview of the way in which the issue of relocation is currently being handled in various jurisdictions. The legal provisions and case law discussed below are mainly taken from a limited sample of countries, representing various legal traditions, on which preliminary research has been carried out: Argentina, Australia, Canada, France, Germany, Korea, New Zealand, South Africa, Switzerland, United Kingdom (England and Wales), and the United States of America.[97] The answers provided by States to Questionnaire I also provided valuable information.[98]

A. Parental responsibilities and the right to decide the child's residence

41. A parent wishing to relocate internationally with his or her child may need the consent of the other parent. If such consent cannot be obtained, the dispute might need to be brought in front of a court. Whether the consent of the other parent and / or the court is required depends on each State's definition of parental responsibilities and the way such responsibilities are allocated, in particular concerning the right of one parent to decide the residence of the child.

42. Restrictions on the right of one parent solely to decide the residence of his or her child may result from the exercise of joint parental responsibilities (either by law,[99] by court order or by agreement), from a court order restricting the right of the primary caregiver to move freely (a so-called "*ne exeat*" order) or from a general statutory provision.

43. Usually a parent with sole parental responsibilities will have the right to decide freely on the residence of his or her child[100] even in cases of international relocation. However, the other parent might still have the possibility to apply for an order preventing this move (if he / she has notice of the proposed move) or even a change of custody in order to prevent the move.

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[94] For example New Zealand Care of Children Act 2004, Section 5; England and Wales Children Act 1989, Section 1; California Family Code § 3011.

[95] For example Australia, Family Law Act 1975 as amended in 2006, Section 60CC sets out two primary considerations (the benefit of the child having a meaningful relationship with both of the child's parents, and the need to protect the child from physical or psychological harm).

[96] See also T. Glennon (*op. cit.* note 58), p. 61.

[97] See *supra* note 1.

[98] Questions 19.1 to 19.4 in particular focused on the topic of international family relocation, seeking information from States on their domestic law and case law concerning international family relocation as well as seeking their views on the Washington Declaration.

[99] See *supra* section IV.A. on joint parental responsibilities and notes 48 and 49 for examples.

[100] See for example the answers to Questionnaire I of Austria, Germany, Israel and Romania; another example is Korea, where in most cases after divorce the family courts award both parental responsibilities and care of the child to one parent only, which means that this parent will not need the other parent's consent or the court's permission to relocate internationally, and the only way to prevent this is for the other parent to apply for sole parental responsibilities and care of the child. Therefore the topic of international family relocation is not much a subject of debate (yet?).

B. Specific legislation and procedures for international family relocation

44. Only a few States have specific and detailed legislation on national or international family relocation[101] as opposed to simply setting out in legislation the principle that an (international) family relocation requires the permission of the other parent or of the court, such as stating that a parent holding joint parental responsibilities may not permanently leave the country with his or her child without the consent of the other parent.[102] Other States do not specifically mention the issue of relocation in their legislation.[103] For countries with common law systems, in addition to possible legal provisions, case law may often provide guidance on how a judge is to decide on relocation disputes.[104]

45. The answers to Questionnaire I show that a majority of States do not have a specific procedure for international family relocation applications.[105] From the States surveyed, only New Zealand, the United Kingdom (England and Wales) and some states in the United States of America have specific procedures in this area which allow the relocating parent to apply for an authorisation to relocate (or "leave to remove").[106]

46. Many countries, however, approach the issue of international family relocation as an aspect of child custody determination or modification,[107] sometimes based on the finding that the relocation amounts to a substantial change in circumstances, allowing the court to modify the existing custody arrangements.[108] Therefore, it is often the general principles applying to custody disputes which will also apply to relocation cases.

47. Some legislation requires the relocating parent to give notice of the intention to move to the other parent.[109] In those states in the United States of America with such a requirement, the time for giving notice ranges from 30 to 90 days prior to the proposed move.[110] Issues of safety and domestic violence may provide a basis for courts to waive

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[101] See for example in the United States of America, the Alabama Code, § 30-3-160 to 30-3-169.10 and the Florida Statutes § 61.13.

[102] See South Africa, Section 18(3)(c)(iii) and (iv) of the Children's Act 2008; England and Wales, Section 13 of the Children Act 1989; France, Art. 373-2(3) of the Civil Code; Argentina, Art. 264 quarter of the Civil Code; New Zealand, Section 16 Care of Children Act.

[103] For example Australia, Germany, Korea, Switzerland; in Canada, Section 16(7) of the Divorce Act 1985 solely mentions the possibility for the court to include in an order a term requiring any person who has custody of a child of the marriage and who plans to relocate to notify any person who is granted access to that child.

[104] The leading cases in the following jurisdictions are: Australia, *U v. U* (2002) 191 ALR 289; South Africa, *Jackson v. Jackson* 2002 SA 303 (SCA); Canada, *Gordon v. Goertz* [1996] 2 SCR 27; New Zealand, *Kacem v. Bashir* [2010] NZSC 112, [2010] NZFLR 884; England and Wales, *Payne v. Payne* [2001] 1 FLR 1052.

[105] States indicating that they have a special procedure include Bulgaria, Chile, Cyprus, Denmark, Spain and the United Kingdom (Scotland).

[106] In New Zealand, however, relocation cases can be contested as guardianship disputes under Section 47 of the Care of Children Act 2004, but commonly come to court as an application for a parenting order, see M. Henaghan (*op. cit.* note 58), p. 240.

[107] For example Argentina, Australia, France, Germany, Korea, Switzerland.

[108] For example Canada, *Gordon v. Goertz* [1996] 2 SCR 27; New Zealand, Care of Children Act 2004, Section 16 (2), which states that important matters affecting the child, and for which the agreement of both guardians is required, include changes to the child's place of residence that may affect the child's relationship with his or her parents and guardians; for an overview in the United States of America, see L. Elrod (*op. cit.* note 73), pp. 353-354 (citing Kansas, Oregon and Idaho) and T. Glennon (*op. cit.* note 58), pp. 59-60 (citing South Carolina, Maine, Alaska and Kentucky).

[109] France, Civil Code Art. 373-2(3); 25 of the 37 states in the United States of America with relocation statutes have notice-of-move requirements, see J. Atkinson, "The Law of Relocation of Children", *Behavioral Sciences and the Law*, 2010.

[110] For a complete overview see the following document from the American Bar Association, < http://www.americanbar.org/content/dam/aba/publishing/family_advocate/family_advocate_2804Relocation Chart.authcheckdam.pdf > (last consulted 1 December 2011); see also P.J. Messitte and J.L. Kreeger, "Relocation of Children: Law and Practice in the United States", paper presented at the International Child Abduction, Forced Marriage and Relocation Conference, 30 June – 2 July 2010, Centre for Family Law and Practice, London Metropolitan University, England, pp. 3-4; in France, the Civil Code does not set a specific timeframe for the notice to be given.

or modify notification requirements.[111] The Washington Declaration provides in Principle 2 that the relocating parent should provide "reasonable notice of his or her intention before commencing proceedings or, where proceedings are unnecessary, before relocation occurs".[112]

C. Burden of proof and presumption

48. The way the burden of proof is allocated in relocation cases might impact the outcome of the case. Courts will tend to have a restrictive approach to relocation where the burden of proof is on the parent seeking relocation to prove that the move would substantially improve the child's quality of life.[113] On the other hand, a burden of proof placed on the parent opposing the move may lead to a more liberal approach to relocation.[114] Another option is to use shifting burdens, where the parent seeking to relocate must first prove that the proposed move is in the best interests of the child, and then the parent opposing the move must show how the relocation would not be in the child's best interests.[115] Some jurisdictions also take into account how parental responsibilities and care of the child are divided between parents, treating cases where parents have joint care of the child differently.[116] The burden of proof could for example generally be placed on the remaining parent, except when both parents have joint care of the child, in which case they would share the burden of proof equally.[117]

49. In many States, as mentioned above, the procedural principles applicable to general custody disputes will also apply to relocation cases, including any allocation of the burden of proof (for example on the petitioner, regardless of whether the relocating parent or not).[118] In some States, the general inquisitorial maxim[119] applicable to all child custody disputes will also apply to relocation cases.[120]

50. In States where relocation is being handled as a custody modification of existing orders allocating parental responsibilities, the parent seeking the modification will first have to prove that the proposed move amounts to a material change in the parental

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[111] See J. Atkinson (*op. cit.* note 109); in the United States of America, the Code of Alabama Section 30-3-167 provides for specific consideration in cases of domestic violence or abuse with regard to the notice of move requirement; see also the American Bar Association's draft Relocation of Children Act, Section 5(b).
[112] See *supra* para. 17 and note 17.
[113] See for example the US state of Louisiana, La. Rev. Stat. Ann. § 9:355.13, placing the entire burden on the parent seeking relocation to prove that the proposed relocation must be made in good faith and that it is in the child's best interests; see the comment on this restrictive approach by L. Caviness Cocus, "Louisiana's Restrictive Relocation Laws: Jeopardizing Stability in Custodial Arrangements for the Sake of Geographical Proximity between Divorced Parents", *Loyola Law Review*, Vol. 53, 2007, p. 79.
[114] See for example the US state of Wyoming, *Testerman v. Testerman*, 193 P.3d 1141 (2008).
[115] For an overview of the US states, see L. Elrod (*op. cit.* note 73).
[116] See example from T. Glennon (*op. cit.* note 58), p. 59, from West Virginia; in 2002, the American Law Institute issued "Principles of the Law of Family Dissolution: Analysis and Recommendations" (hereinafter "ALI Principles"), which dealt with the topic of international family relocation in its Section 2.17. The ALI Principles establish a presumption in favour of the relocation of the primary caretaker parent, stating that "the court should allow a parent who has been exercising the clear majority of custodial responsibility to relocate with the child if that parent shows that the relocation is for a valid purpose, in good faith, and to a location that is reasonable in light of the purpose".
[117] See example from T. Glennon (*ibid.*), p. 59, from New Jersey.
[118] For example Argentina, Art. 377 of the National Code of Civil and Commercial Procedure.
[119] In such States, the judge is not strictly bound by the arguments and evidence presented to court by the parties and he or she may also order further reports and investigations, as opposed to an adversarial system.
[120] For example Australia, England and Wales, Germany and Switzerland.

responsibilities arrangements.[121] The court will then decide whether to modify or adapt the order on parental responsibilities and care of the child.

51. Some legal systems have gone further and enacted explicit presumptions in favour of or against relocation in their legal provisions, as seen mainly in the United States of America.[122] Scholars and professionals have, however, noted a general movement away from presumptions to a neutral, child-centric approach to international relocation cases.[123]

52. The Washington Declaration, as well as a Draft Model Law currently developed by the American Bar Association,[124] clearly illustrate this trend. Both documents place the emphasis on the fact that no presumption should be applied and that the child's best interests are the paramount consideration.

D. Factors to guide decision-makers

53. Although many countries do not have explicit presumptions applying to relocation cases, some scholars have tried to classify them according to the way their courts resolve relocation cases, dividing them for example between "pro-relocation", "anti-relocation" and "neutral" countries.[125] It is, however, difficult to make such categorisations, as the factors used by courts and the weight given to any of them influence the outcome of international relocation applications, even though the legal provisions of case law guidance on this topic might be formulated without any explicit presumption.

54. Various factors have been developed by case law and / or enacted in legal provisions in order to guide the courts when considering international family relocation cases. The factors used and the weight given to each of them reflect the values of the decision-maker so that a similar list of factors applied by two different judges might

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[121] For example Australia, Canada, France, Germany and Switzerland; some US states, see *supra* note 108; for Canada, see *Gordon v. Goertz* [1996] 2 SCR 27: "Once the applicant has discharged the burden of showing a material change in circumstances, both parents should bear the evidentiary burden of demonstrating where the best interests of the child lie."

[122] For a complete overview see J. Atkinson (*op. cit.* note 109); several private bodies in the United States of America have worked on recommendations and model acts in order to promote a uniform approach to solving relocation disputes in their country, for example in 1997 the American Academy of Matrimonial Lawyers (AAML) promulgated a Model Relocation Act which proposed a mandatory notice of a proposed relocation, proposed three alternatives regarding presumptions and the burden of proof, and listed eight factors to be considered when reaching a decision regarding a proposed relocation.

[123] L. Elrod (*op. cit.* note 73), p. 345; T. Glennon (*op. cit.* note 58), p. 57; M. Henaghan (*op. cit.* note 58), p. 227; the Washington Declaration (*supra* para. 17); the American Bar Association Draft Model Relocation of Children Act, *infra* note 124; for example the California Supreme Court changed the law regarding relocation in California in 2004 in *In re Marriage of La Musga* 32 Cal 4th 1072 (Ca 2004), shifting the approach from a presumption in favour of the relocating parent to a neutral and case-by-case analysis of the particular circumstances of each case; however, it is interesting to note that in the Canadian province of British Columbia, the White Paper on *Family Relations Act* Reform, drawn up by the Ministry of Attorney General (*op. cit.* note 8) proposes to introduce presumptions to guide the judge (distinguishing between the situation when day-to-day care of the child is equally divided between parents and when it is not), in order to "introduce certainty" and to reduce the need for litigation, p. 71.

[124] The American Bar Association (ABA) is currently drafting a Model Relocation of Children Act, based on previous work by the Uniform Law Commission. The draft Model Relocation of Children Act mandates a notice of a move, lists 10 factors to be considered by judges, and provides remedies. The draft act directs in Section 8 that there will be no presumption in favour of or against relocation and that the child's best interests are the paramount consideration. The comment to Section 8 further states that: "Although the burden of proof regarding whether relocation is in the best interests of the child is placed equally on both parents, the parent who has filed the action has the burden of going forward (sometimes referred to as the burden of production)." The court would then decide the issue by a preponderance of the evidence.

[125] T. Foley, *International Child Relocation – Varying Approaches among Member States to the 1980 Hague Convention on Child Abduction*, Research Project, October 2006; see also R.H. George, "Practitioners' views on children's welfare in relocation disputes: comparing approaches in England and New Zealand", *Child and Family Law Quarterly*, Vol. 23, No 2, 2011, p. 179.

result in different outcomes for the same case.[126] In many countries, the same principles and factors apply not just to relocation but to all kinds of disputes concerning parental responsibilities and care of children.[127]

(i) The best interests of the child as a guiding criterion

55. Many States have adopted the child's best interests as the guiding criterion.[128] For example, the Supreme Court of Canada stated in its leading relocation case *Gordon v. Goertz*[129] that once it has been demonstrated that the relocation amounts to a material change in the circumstances affecting the child,

> "the judge on the application must embark on a fresh inquiry into the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them. The focus of the inquiry is not the interests and rights of the parents. Each case turns on its own unique circumstances and the only issue is the best interest of the child in the particular circumstances of the case. […] The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?"

56. The French Supreme Court (*Cour de Cassation*) also underlined that the welfare of the child is of paramount importance in determining the residence of the child, in accordance with Article 3(1) of the UNCRC and Article 372-2 of the French Civil Code.[130]

57. Consistent with this approach, the parents' rights and interests are often not the court's primary concern.[131] This is, however, not always the case. For example, in the United States of America, the state of Washington has shifted judicial analysis from the best interests of the child to a shared focus on the child's and the parents' interests.[132] Some States take the parents' rights and interests into account indirectly, finding that the child's best interests are interwoven with the primary caregiver's interests.[133] This is the case in South Africa for example, where the Supreme Court of Appeal held in *Jackson v. Jackson* that

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[126] T. Glennon (*op. cit.* note 58) summarises the problematic as follows: "Crucial to courts' analyses of these many factors relating to children's best interests, however, appears an underlying legislative or judicial policy determination favoring either the maintenance of the child's relationship with the non-custodial parent or the view that the child's custodial family takes precedence over the child's relationship with the non-custodial parent", p. 61.

[127] For example Argentina, Australia, France, Germany, Korea, New Zealand and Switzerland.

[128] See South Africa, Children's Act 2008, Section 9 and *Jackson v. Jackson* 2002 2 SA 303 (SCA); Switzerland, Art. 133(2) Civil Code and Supreme Court (*Bundesgericht)* decision 5A_375/2008 (11.08.2008); Australia Family Law Act 1975, Sections 60CA and 65AA and the High Court's decision *MRR v. GR* [2010] HCA 4, para. 7; T. Glennon (*op. cit.* note 58) notes that in the United States of America the varied state approaches have in common an emphasis on the best interests of the child, see for example *Tropea v. Tropea*, 665 N.E.2d 145 (New York 1996), p. 57; see also the Washington Declaration (*supra* para. 17), para. 3, which states that "the best interests of the child should be the paramount consideration in all applications concerning international family relocation", and then lists several factors, including the views of the child and the right of the child to maintain personal relations and direct contact with both parents on a regular basis, whereas the reasons for seeking or opposing the move are only listed as a factor to be considered "where relevant to the determination of the outcome".

[129] *Gordon v. Goertz* [1996] 2 S.C.R. 27.

[130] *Cour de Cassation*, *Chambre civile* 1, 13 March 2007, 06-17.869, *publié au bulletin*.

[131] For example see the decision of the Supreme Court of Switzerland (*Bundesgericht*) 5A_375/2008 (11.08.2008) stating that the child's best interests are the decisive factor and the parents' interests therefore have to move to the background; see also the Supreme Court of Canada decision *Gordon v. Goertz* [1996] 2 S.C.R. 27, where it is noted that "[t]he focus of the inquiry is not the interests and rights of the parents" and that the inquiry does not begin with a legal presumption in favour of the custodial parent, although "the custodial parent's view are entitled to great respect", and noting further that the custodial parent's reason for moving is only to be considered a factor "where it is relevant to that parent's ability to meet the needs of the child".

[132] Washington Re. Code § 26.09.520 (2008) and T. Glennon (*op. cit.* note 58), p. 61.

[133] For example the US state of New Jersey, *MacKinnon v. MacKinnon*, 191 N.J. 240, 922 A.2d 1252; New Zealand, *RMB v. ARZB* FR Dunedin FAM-2010-017-000023, 2 November 2010, where the mother's depression was "afforded significant weight" as she was the child's primary caregiver, and the Court held that the child's "best interests are inextricably linked into his mother being psychologically well, and that will only occur if he is allowed to relocate".

> "a Court will not lightly refuse leave for the children to be taken out of the country if the decision of the custodian parents is shown to be bona fide and reasonable. But this is not because of the so-called rights of the custodian parent; it is because, in most cases, even if the access by the non-custodian parent would be materially affected, it would not be in the interest of the children that the custodian parent be thwarted in his or her endeavor to emigrate in pursuance of a decision reasonably and genuinely taken."[134]

58. In Germany, where child relocation is dealt with as parental responsibilities modification proceedings, the Federal Court of Justice (*Bundesgerichtshof*) noted that, in addition to the child welfare aspects, the parents' parental rights, which are constitutionally protected,[135] are to be considered. The Federal Court also stated that the constitutionally protected general freedom of movement of the relocating parent[136] is only indirectly concerned, thus marking a change from lower court decisions, which had tended to weigh the parental right of the remaining parent against the right to free movement of the relocating parent. Respecting the parent's right to free movement, the courts generally base their decision on the assumption that the parent will indeed leave the country and will therefore consider whether the child's welfare is better protected if the child leaves the country with the relocating parent or if the child remains in Germany to live with the other parent.[137]

(ii) Relevant factors

59. Apart from the child's best interests, which are usually the overall guiding criterion, many other factors are being used by courts in international family relocation cases. The factors identified in the Washington Declaration provide a good overview of some of the main elements listed by national legal provisions or case law when dealing with international family relocation cases. These factors are listed below with references to cases applying them:[138]

i) the right of the child separated from one parent to maintain personal relations and direct contact with both parents on a regular basis in a manner consistent with the child's development, except if the contact is contrary to the child's best interest;[139]

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[134] *Jackson v. Jackson* 2002 2 SA 303 (SCA).
[135] Art. 6(2) of the German Constitution.
[136] Art. 2(1) of the German Constitution.
[137] Decision of the *Bundesgerichtshof,* XII ZB 81/09, 28.04.2010.
[138] Another list recently developed in the United States of America in an effort to harmonise the varied approaches of the states is the one found in the American Bar Association's Model Law, which includes the following: 1) the quality of relationship and frequency of contact between the child and each parent; 2) the likelihood of improving or diminishing the quality of life for the child, including the impact on the child's educational, physical, and emotional development; 3) the views of the child, having regard to the child's age and maturity; 4) the child's ties to the current and proposed community and to extended family members; 5) the parents' reasons for seeking or opposing relocation and whether either parent is acting in bad faith; 6) a history of or threat of domestic violence, child abuse, or child neglect; 7) the willingness and ability of each parent to respect and appreciate the bond between the child and the other parent and to allow for a continuing relationship between the child and the other parent, unless the court finds that the other parent has sexually assaulted or engaged in domestic violence against the parent or the child, and that a continuing relationship with the other parent will endanger the health or safety of either the parent or the child; 8) the degree to which one or both parents have relied on a prior agreement or order of the court regarding relocation; 9) the degree to which the parties' proposals for contact after relocation are feasible, having particular regard to the cost to the family and the burden to the child; and 10) any other relevant factor affecting the best interests of the child.
[139] Canada, *Gordon v. Goertz* [1996] 2 S.C.R. 27; Australia, Family Law Act 1975, Section 60CC(2); New Zealand, *K v. L* HC Auckland CIV-2009-404-4457 17.08.2010.

ii) the views of the child having regard to the child's age and maturity;[140]

iii) the parties' proposals for the practical arrangements for relocation, including accommodation, schooling and employment;[141]

iv) where relevant to the determination of the outcome, the reasons for seeking or opposing the relocation;[142]

v) any history of family violence or abuse, whether physical or psychological;[143]

vi) the history of the family and particularly the continuity and quality of past and current care and contact arrangements;[144]

vii) pre-existing custody and access determinations;

viii) the impact of grant or refusal on the child, in the context of his or her extended family, education and social life, and on the parties;[145]

ix) the nature of the inter-parental relationship and the commitment of the applicant to support and facilitate the relationship between the child and the respondent after the relocation;[146]

x) whether the parties' proposals for contact after relocation are realistic, having particular regard to the cost to the family and the burden to the child;[147]

xi) the enforceability of contact provisions ordered as a condition of relocation in the State of destination;[148]

xii) issues of mobility for family members; and

xiii) any other circumstances deemed to be relevant by the judge.

60. Other examples of factors used by courts include: the parents' ability and willingness to bring up and care for the child;[149] the impact on the child (in the sense of quality of life and impact on the child's educational, physical and emotional development);[150] the principles of continuity and stability in the child's life;[151] the fact that the State to which the parent wishes to relocate is or is not a Contracting State to the 1980 Convention;[152] the child's nationality and knowledge of the language and

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[140] See also for Canada, *Gordon v. Goertz* [1996] 2 S.C.R. 27; France, *Cour de Cassation, Chambre civile* 1, decision of 18.05.2005, 02-20.613, *publié au bulletin*; Germany, *Bundesgerichtshof,* BGH XII ZB 81/09 28.4.2010; Australia, Family Law Act 1975, Section 60CC(3); Argentina, *Cámara Nacional de Apelaciones en lo Civil*, Sala *K, C., E.F. y otro c. M., P.L.*, 30.03.2010.

[141] South Africa, *Ford v. Ford* [2005] ZASCA 123.

[142] England and Wales, *Payne v. Payne* [2001] 1 Fam. 473; Canada, *Gordon v. Goertz* [1996] 2 S.C.R. 27; New York, *Tropea v. Tropea* 87 NY 2d 727.

[143] See also for example Australia, Family Law Act 1975, Section 60CC(2) and (3); New Zealand, Care of Children Act 2004 s 5(e); in the United States of America, Alabama Code § 30-3-169.3(a)(16) (2009) and Washington Code § 26.09.520(4) (2009); England and Wales, Children Act 1989 s. 1(3)(e); South Africa, Children's Act 2008 s. 7(l) and (m); see also on the topic of relocation and domestic violence, T. Glennon (*op. cit.* note 58), p. 70 and J.M. Bowermaster, "Relocation Custody Disputes Involving Domestic Violence", *Kansas Law Review,* Vol. 46, 1997-1998, pp. 433-463.

[144] See Germany, *Bundesgerichtshof*, BGH XII ZB 81/09 28.4.2010; Switzerland, *Bundesgericht* 5A_375/2008 11.08.2008; Canada, *Gordon v. Goertz* [1996] 2 S.C.R. 27; New Zealand, Care of Children Act 2004 Sections 5(b) and (c).

[145] See Canada, *Gordon v. Goertz* [1996] 2 S.C.R. 27; Australia, Family Law Act 1975, Section 60CC(3).

[146] See also France, *Cour de Cassation*, *Chambre civile* 1, decision of 16.04.2008 (07-13.232, *inédit*) and decision of 27.03.2008 (07-14.301); Switzerland, *Bundesgericht* 5A_375/2008 11.08.2008; Australia, Family Law Act 1975, Section 60CC(3).

[147] See South Africa, Children's Act 2008, Section 7(e).

[148] US state of New Jersey, *MacKinnon v. MacKinnon*, 191 N.J. 240, 922 A.2d 1252.

[149] Germany, *Bundesgerichtshof,* BGH XII ZB 81/09 28.4.2010; Switzerland, *Bundesgericht* 5A_375/2008 11.08.2008.

[150] France, *Cour de Cassation*, *Chambre civile* 1, decision of 16.04.2008 (07-13.232, *inédit*).

[151] Germany, *Bundesgerichtshof*, BGH XII ZB 81/09 28.4.2010; Switzerland, *Bundesgericht* 5A_375/2008 11.08.2008; Canada, Québec Province, *K.J. c. N.P.*, 2006 QCCA 1054.

[152] New Jersey, *MacKinnon v. MacKinnon*, 191 N.J. 240, 922 A.2d 1252.

culture of the new country;[153] and the gendered nature of the role of primary caregiver after separation.[154]

61. The list of factors presented in this section is by no means exhaustive and more extensive research would be needed to provide an accurate overview and to assess which factors are used more frequently or given more weight.

(iii) Priority between factors

62. As stated above, the outcome of a relocation application might depend on the weight given to one or more factor(s). For example, the Washington Declaration takes the approach that the factors listed are "in no order of priority" and that "the weight to be given to any one factor will vary from case to case", thus leaving the delicate task of weighing the factors in determining the child's interests fully to the exercise of judicial discretion.[155] In one state in the United States of America, New York, the Court of Appeals follows a similar approach in its leading case *Tropea v. Tropea*[156] where it stated that "in all cases, the courts should be free to consider and give appropriate weight to all of the factors that may be relevant to the determination".[157]

63. In some States, the balance between factors is, however, not always left to the full discretion of the judge, as the following examples from Australia, New Zealand, Switzerland and the United Kingdom (England and Wales) demonstrate.

64. The Australian Family Law Act 1975, as amended by the Family Law Amendment (Shared Parental Responsibility) Act 2006, differentiates between "primary" and "additional" considerations to be considered by courts when determining what is in the child's best interests.[158] The primary considerations are (a) the benefit to the child of having a meaningful relationship with both parents, and (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence. However, in the High Court's only decision to date considering the new legislative scheme, the Court emphasised the importance of also considering the reasonable practicality of the parents' situation when making a decision on a parenting order for equal shared time (or substantial and significant time).[159]

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[153] Germany, OLG Zweibrücken 5 UF 47/07 13.07.2004.

[154] South Africa, *B v. M* 2006 3 All SA 109 (W) para. 162, where it was noted that primary caregivers are most frequently mothers, and a restrictive approach to relocation would therefore impact more significantly women than men.

[155] See Washington Declaration, point 4.

[156] New York Court of Appeals, *Tropea v. Tropea* 87 NY 2d 727.

[157] The Court went on to state that "These factors include, but are certainly not limited to each parent's reasons for seeking or opposing the move, the quality of the relationships between the child and the custodial and noncustodial parents, the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent, the degree to which the custodial parent's and child's life may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the noncustodial parent and child through suitable visitation arrangements. In the end, it is for the court to determine, based on all of the proof, whether it has been established by a preponderance of the evidence that a proposed relocation would serve the child's best interests", *ibid.* See also for Germany the decision of the *Bundesgerichtshof,* XII ZB 81/09, 28.04.2010, where the court held that Art. 1626 (3) of the German Civil Code (*Bürgerliches Gesetzbuch*), which emphasises the importance of contact with both parents, is simply a clarification of the importance of one aspect to be considered in regard to the welfare of the child and does not give priority to this aspect over similarly important aspects.

[158] Section 60CC; the general principles applied to allocating parental responsibilities after divorce / separation are the ones used in relocation cases.

[159] High Court of Australia, *MRR v. GR* [2010] HCA 4, where it was not considered reasonably practical to impose equal shared time on parents (and thus refusing the mother's application for relocation) given the circumstances (mother living in caravan-style accommodation and no other affordable accommodation available; limited employment prospects, compared with full-time opportunities and flexible working hours if relocation would occur; depression from living isolated with no family support and in such circumstances).

65. In New Zealand, although the Supreme Court stated that there is no presumptive weight to be given to any of the principles set out in the Care of Children Act 2004,[160] it also noted that "if, on examination of the particular facts of a relocation case, it is found that the present arrangements for the children are settled and working well, that factor will obviously carry weight in the evaluative exercise".[161] One scholar commented that the principles of Section 5 of the Care of Children Act, as applied to relocation cases through this recent Supreme Court case, are leading to a more restrictive approach to relocation.[162]

66. In England and Wales, courts apply the principle of the paramountcy of the child's welfare under Section 1(1) of the Children Act 1989. Further, when considering what order to make in the child's best interests, a court has a statutory duty to consider the "welfare checklist", listing factors to which the court shall have regard.[163] Although there is no presumption or decisive factor to be applied, the Court of Appeal set a "discipline" for courts to adopt when considering relocation applications.[164] A court must first ask itself whether the primary caregiver's (in this case the mother's) application is genuine (and not motivated by a desire to exclude the other parent from the child's life) and realistic. If these tests are met, the other parent's opposition must be carefully appraised (is it motivated by genuine consideration for the child's life? What would be the extent of the detriment to him and his future relationship in case of a relocation? To what extent would that be offset by extension of the child's relationships with the maternal family and homeland?). The court should then also assess the impact on the primary caregiver of a denial of the relocation application. Finally, the outcome of the second and third appraisals must then be brought into an overriding review of the child's welfare as the paramount consideration, directed by the statutory checklist in so far as appropriate. The Court of Appeal noted that by suggesting this discipline it did not wish to be thought to have diminished the importance that it had consistently attached to the emotional and psychological well-being of the primary caregiver. Thus, great weight must be given to this factor in any evaluation of the welfare of the child as the paramount consideration. The most recent decision of the Court of Appeal,[165] however, noted that the *Payne v. Payne* line "was posited on the premise that the applicant for permission to relocation was the primary carer", and that "where each parent was providing a more or less equal proportion of care and one sought to relocate externally, the judge should rather exercise his discretion to grant or refuse the application by applying the statutory checklist in Section 1(3) of the Children Act 1989".[166]

67. In Switzerland, where the general principles applied to allocating parental responsibilities after divorce are used in relocation cases, the Supreme Court (*Bundesgericht*) held that the child's needs must be taken into consideration according to his age, affinities and his right to parental care and education.[167] In this regard, decisive factors are: the personal relationship between child and parent; the parent's educational capacity; and the parent's willingness and possibility to care for the child in person as

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[160] New Zealand, Care of Children Act 2004, Section 5 (Principles relevant to child's welfare and best interests).
[161] Decision of the Supreme Court of New Zealand *Kacem v. Bashir* [2010] NZSC 112, para. 24.
[162] M. Henaghan (*op. cit.* note 58), pp. 239-241 and P. Boshier, "Judicial Approach to Relocation in New Zealand", *The Judges' Newsletter*, Special Edition No 1, 2010 (*op. cit.* note 3), p. 47.
[163] The factors are the following: a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding), b) his physical, emotional and educational needs, c) the likely effect on him of any change in his circumstances, d) his age, sex, background and any characteristics of his which the court considers relevant, e) any harm which he has suffered or is at risk of suffering f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs, and g) the range of powers available to the court under this Act in the proceedings in question.
[164] *Payne v. Payne* [2001] 1 Fam. 473.
[165] *MK v. CK* [2011] EWCA Civ 793.
[166] *Ibid.*
[167] Decision of the *Bundesgericht* 5A_375/2008 (11.08.2008).

much as possible. Another factor considered is the child's need to have a stable environment and circumstances, which is necessary for a harmonious development (physical, mental and emotional). This last factor has more weight in situations where both parents seem to have similar educational capacities and possibilities to care for the child.

VI. EXISTING INTERNATIONAL AND REGIONAL INSTRUMENTS RELEVANT TO INTERNATIONAL FAMILY RELOCATION

68. Several existing international and regional instruments in the area of international child protection and international child abduction are relevant to the topic of international family relocation.[168]

69. The **1996 Convention** provides some assistance in relation to relocation cases. First, it establishes common jurisdiction and applicable law rules in order to avoid conflicts between legal systems in this regard. These rules give the primary responsibility to the authorities of the country where the child has his or her habitual residence (Art. 5) and the law applicable under the 1996 Convention is, as a general principle, the law of that State. Jurisdiction follows the child's habitual residence, which means that if the child's habitual residence changes to another Contracting State, the authorities of that State will then have jurisdiction. An exception is made in cases of a wrongful removal or retention.[169] This does not mean, however, that the order that has been made by the relocating judge would lose any effect following the change of habitual residence of the child. The 1996 Convention provides for the recognition (by operation of law) and enforcement of measures taken in one Contracting State in all other Contracting States.[170] The measures, including the provisions concerning relocation, will remain in force even if the habitual residence changes, and will remain enforceable[171] until modified, replaced or terminated by an authority in the child's new habitual residence.[172] Thus in the absence of a further application to the court by the relocating parent, those original conditions of relocation remain in force.[173] Measures taken in one Contracting State and declared enforceable in another Contracting State are to be enforced as if they had been taken by the authorities of that State.[174]

70. In the context of a relocation application, this means that under the 1996 Convention the relocation order made in one Contracting State is entitled to be treated as if it were an order made in the Contracting State to which the relocation is planned.[175] In addition, Article 24 allows for advance recognition of the relocation order, which may be of use before the relocation takes place in order to ensure that the relocation order and its conditions will be respected in the State of destination.[176] Article 8, which provides a mechanism for a possible transfer of jurisdiction, might also be of use in some situations.[177]

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[168] For a more detailed analysis of the relevance of the 1980 and 1996 Hague Conventions to international family relocation, see W. Duncan, "Relocation and the 1980 and 1996 Hague Conventions", *The Judges' Newsletter*, Special Edition No 1, 2010 (*op. cit.* note 3), pp. 76-77; see also "Consultations on the desirability and feasibility of a protocol to the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* – A preliminary report", drawn up by the Permanent Bureau, Prel. Doc. No 7 of May 2011 for the attention of the Special Commission of June 2011 (Part I), pp. 26-27.
[169] Arts 5 and 7; Art. 7 employs in this regard the same terminology as the 1980 Convention.
[170] Art. 23, para. 1.
[171] Art. 26.
[172] Art. 14; W. Duncan (*op. cit.* note 168), p. 77.
[173] *Ibid*.
[174] Art. 28.
[175] W. Duncan (*op. cit.* note 168), p. 77.
[176] See "Revised draft Practical Handbook on the operation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*", drawn up by the Permanent Bureau, Prel. Doc. No 4 of May 2011 for the attention of the Special Commission of June 2011 (Part I), available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "Child Abduction", paras 10.7-10.11.
[177] *Ibid.*, Chapter 33, pp. 33-40.

71. The 1996 Convention also provides for further co-operation mechanisms regarding "the effective exercise of rights of access". Article 35, paragraph 1, allows the competent authorities of a Contracting State to request the authorities of another Contracting State to assist in the implementation of measures of protection, especially in securing "the effective exercise of rights of access" and "the right to maintain direct contacts on a regular basis". Paragraph 2 provides for the possibility of the authorities in which the child is not habitually resident, upon request of the parent living in that State, to gather information and make a finding on his or her suitability to exercise access. The authority in the State of relocation shall then admit and consider such information, evidence and finding made by the other State before reaching a decision.

72. The 2008 Guide to Good Practice on Transfrontier Contact contains a more detailed explanation of the operation of the 1996 Convention in the context of relocation.[178] The draft Practical Handbook on the operation of the 1996 Convention also offers further assistance in explaining the practical application of the provisions of the 1996 Convention.[179]

73. Within the European Union, the Member States (except Denmark) apply Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (hereinafter "the **Brussels IIa Regulation**"). The Brussels IIa Regulation provides for common rules of jurisdiction and consequent recognition and enforcement of judgments and is in many ways similar to the 1996 Convention. However it also uses some novel approaches which are relevant to relocation issues. The Brussels IIa Regulation applies not only to court orders but also to agreements. It preserves the court of origin's jurisdiction to modify access orders for three months following a lawful move to another jurisdiction and the acquisition of a habitual residence there. It also provides for the enforcement of rights of access granted in an enforceable judgment, without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin.[180]

74. The **1980 Convention** provides in its Article 21 for applications for organising or securing the effective exercise of rights of access. However, Article 21 does not provide directly for the recognition or enforcement of foreign contact or access orders. This shortcoming of Article 21 was recognised and discussed at previous Special Commission meetings.[181]

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[178] *Op. cit.* (note 15). See in particular Section 8.5.
[179] *Op. cit.* (note 176).
[180] For a more detailed analysis of the relevance of the Brussels IIa Regulation to international family relocation, see N. Lowe, "The Impact of the Revised Brussels II Regulation on Cross-Border Relocation", *The Judges' Newsletter*, Special Edition No 1, 2010 (*op. cit.* note 3), pp. 69-73.
[181] See "Report and Conclusions of the Special Commission concerning the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (27 September – 1 October 2002)", para. 2; Conclusions and Recommendations of the 2006 Special Commission (*op. cit.* note 14), paras 1.7.1-1.7.3; see also "Conclusions and Recommendations of the Sixth Meeting of the Special Commission on the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (1-10 June 2011)", paras 17-20; all available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Special Commission meetings on the practical operation of the Convention".

75. The 1980 Convention is also relevant to international family relocation as it provides the primary remedy at the international level to address the wrongful removal of a child from his or her habitual residence, and that remedy is the order for the return of the child. The applicability of the 1980 Convention will depend on the accepted definition of "rights of custody" in each Contracting State: the more limited the definition, the more limited the range of relocation or unlawful relocation cases that the 1980 Convention can cover.[182]

76. The **1989 Inter-American Convention** on the International Return of Children[183] has the same purpose as the 1980 Convention, namely securing the prompt return of children to their State of habitual residence, as well as that of securing the enforcement of visitation and custody rights of parties entitled to them. Its relevance to the topic of international family relocation is therefore similar to that of the 1980 Convention.

77. Finally, the **Council of Europe** has set up a Committee of Experts on Family Law with the task to draft one or more legal instruments on the rights and legal status of children and parental responsibility (hereinafter the "CJ-FA"). In its fifth and last meeting in May 2011, the CJ-FA approved the final text of the draft Recommendation on the Rights and Legal Status of Children and Parental Responsibilities.[184] Principle 31 of the draft Recommendation deals with the topic of "Residence and relocation" and sets out the following:

> "1. In cases where holders of parental responsibilities are living apart, they should agree upon with whom the child resides.
>
> 2. If a holder of parental responsibilities wishes to change the child's residence, he or she should seek to obtain the agreement of any other holder of parental responsibilities thereof in advance and states are encouraged to provide appropriate mechanisms, such as mediation, to facilitate agreements.
>
> 3 In the absence of an agreement between the holders of parental responsibilities, the child's place of residence should not be changed without a decision of the competent authority, unless, in cases of relocation within the state, national law provides otherwise. In the latter case there should be the possibility of bringing disputes before the competent authority.
>
> 4. In resolving such a dispute, the best interests of the child should be a primary consideration, and due weight should be given to all relevant factors."

VII. CONCLUSION AND TENTATIVE RECOMMENDATION FOR FUTURE WORK

78. The overview provided in this Note shows that the approach to international family relocation disputes varies widely in the States and legal systems surveyed. A general trend appears to be emerging of adopting a neutral approach to international family relocation with the best interests of the child as guiding criterion. The outcome of a

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[182] W. Duncan (*op. cit.* note 168), p. 76.

[183] *Inter-American Convention on the International Return of Children*, adopted in Montevideo, Uruguay, at the fourth meeting of the Inter-American Specialized Conference on Private International Law, 15 July 1989. The Convention is in force in 14 countries and according to its Art. 34 it should prevail over the 1980 Convention in cases where the States involved are Parties to both Conventions.

[184] The draft Recommendation was then approved by the European Committee on Legal Co-operation (CDCJ) at its 86th plenary meeting from 12 to 14 October 2011; it will be submitted to the Committee of Ministers with a view to its adoption at the 1130th meeting of the Ministers' Deputies on 18 January 2012.

specific relocation application, however, may often depend on the explicit or implicit assumptions of decision-makers about various themes underlying the relocation debate, such as the co-parenting ideology, gender issues or social science evidence. The weight given to the different factors may also influence the outcome of the case.

79. This preliminary Note covers only a small number of States and addresses only a limited number of issues linked to international family relocation. In order to get a clearer picture of international family relocation, further discussion and study of a number of areas might be relevant, including the following: relocation and abduction; relocation and domestic violence; relocation and mediation; relocation and the freedom of movement rights of parents; enforcement of contact rights after an international relocation; mediation and relocation; and the role of the child's voice.

80. Current instruments or tools provided by the Hague Conference may already assist judges and parents facing a (possible) international family relocation. For example, as mentioned above, the 1996 Convention is of great relevance as it provides provisions to ensure the recognition and enforcement of contact orders in the State to which the child has relocated. A wider ratification of the 1996 Convention should therefore be actively encouraged and promoted. The transfrontier contact mechanisms established in the 1996 and 1980 Conventions are of similar importance and might be further reinforced.

81. There is an increasing use of mediation and similar processes facilitating the resolution of disputes in family law in many countries. For example, the 1996 Convention explicitly mentions and encourages the use of mediation. The draft Guide to Good Practice on mediation under the 1980 Convention[185] is currently being finalised and may be of assistance also for international family relocation. The topic of cross-border recognition and enforcement of agreements resulting from mediation is on the agenda for Part II of the Special Commission, and a possible new instrument in this area might also provide significant help in international family relocation cases.

82. Several of the past meetings of the Special Commission have also consistently promoted the use of direct judicial communications under the 1980 Convention.[186] Direct judicial communications may be of relevance in international family relocation disputes, for example, if the judge having to decide a relocation case needs information from the State to which the relocation is planned. The additional support provided by direct judicial communications[187] may prove essential.

83. In light of this, the Permanent Bureau suggests that the Special Commission consider recommending that further research be carried out in the area of international family relocation. Consideration might also be given to the establishment of a group of experts, including relevant State actors in the area of child protection, as well as members of the judiciary and Central Authority experts, to assist the Permanent Bureau in developing principles or some kind of soft-law tool such as a guide to good practice, or to explore the possibility at some later point of a binding instrument addressing the area of international family relocation.

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[185] *Op. cit.* (note 45).

[186] See Conclusions and Recommendations of the 2001 Special Commission (*op. cit.* note 13), paras 5.5 and 6.5; Conclusions and Recommendations of the 2006 Special Commission (*op. cit.* note 14), para. 1.6.2; and Conclusions and Recommendations of the 2011 Special Commission (Part I) (*op. cit.* note 181), para. 66.

[187] For more information on direct judicial communications as well as the International Hague Network of Judges, see the "Report on judicial communications in relation to international child protection", drawn up by Philippe Lortie, First Secretary, Prel. Doc. No 3 B of April 2011 for the attention of the Special Commission of June 2011 (Part I), available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "Child Abduction".

ANNEXE / ANNEX

INTERNATIONAL JUDICIAL CONFERENCE ON CROSS-BORDER FAMILY RELOCATION

WASHINGTON, D.C., UNITED STATES OF AMERICA
23-25 MARCH 2010

co-organised by
Hague Conference on Private International Law
International Centre for Missing and Exploited Children

with the support of
United States Department of State

WASHINGTON DECLARATION ON INTERNATIONAL FAMILY RELOCATION

On 23-25 March 2010, more than 50 judges and other experts from Argentina, Australia, Brazil, Canada, France, Egypt, Germany, India, Mexico, New Zealand, Pakistan, Spain, United Kingdom and the United States of America, including experts from the Hague Conference on Private International Law and the International Centre for Missing and Exploited Children, met in Washington, D.C. to discuss cross-border family relocation. They agreed on the following:

Availability of Legal Procedures Concerning International Relocation

1. States should ensure that legal procedures are available to apply to the competent authority for the right to relocate with the child. Parties should be strongly encouraged to use the legal procedures and not to act unilaterally.

Reasonable Notice of International Relocation

2. The person who intends to apply for international relocation with the child should, in the best interests of the child, provide reasonable notice of his or her intention before commencing proceedings or, where proceedings are unnecessary, before relocation occurs.

Factors Relevant to Decisions on International Relocation

3. In all applications concerning international relocation the best interests of the child should be the paramount (primary) consideration. Therefore, determinations should be made without any presumptions for or against relocation.

4. In order to identify more clearly cases in which relocation should be granted or refused, and to promote a more uniform approach internationally, the exercise of judicial discretion should be guided in particular, but not exclusively, by the following factors listed in no order of priority. The weight to be given to any one factor will vary from case to case:

   i) the right of the child separated from one parent to maintain personal relations and direct contact with both parents on a regular basis in a manner consistent with the child's development, except if the contact is contrary to the child's best interest;

   ii) the views of the child having regard to the child's age and maturity;

   iii) the parties' proposals for the practical arrangements for relocation, including accommodation, schooling and employment;

   iv) where relevant to the determination of the outcome, the reasons for seeking or opposing the relocation;

   v) any history of family violence or abuse, whether physical or psychological;

   vi) the history of the family and particularly the continuity and quality of past and current care and contact arrangements;

   vii) pre-existing custody and access determinations;

   viii) the impact of grant or refusal on the child, in the context of his or her extended family, education and social life, and on the parties;

   ix) the nature of the inter-parental relationship and the commitment of the applicant to support and facilitate the relationship between the child and the respondent after the relocation;

   x) whether the parties' proposals for contact after relocation are realistic, having particular regard to the cost to the family and the burden to the child;

   xi) the enforceability of contact provisions ordered as a condition of relocation in the State of destination;

   xii) issues of mobility for family members; and

   xiii) any other circumstances deemed to be relevant by the judge.

5. While these factors may have application to domestic relocation they are primarily directed to international relocation and thus generally involve considerations of international family law.

6. The factors reflect research findings concerning children's needs and development in the context of relocation.

The Hague Conventions of 1980 on International Child Abduction and 1996 on International Child Protection

7. It is recognised that the Hague Conventions of 1980 and 1996 provide a global framework for international co-operation in respect of cross-border family relocations. The 1980 Convention provides the principal remedy (the order for the return of the child) for unlawful relocations. The 1996 Convention allows for the establishment and (advance) recognition and enforcement of relocation orders and the conditions attached to them. It facilitates direct co-operation between administrative and judicial authorities between the two States concerned, as well as the exchange of information relevant to the child's protection. With due regard to the domestic laws of the States, this framework should be seen as an integral part of the global system for the protection of children's rights. States that have not already done so are urged to join these Conventions.

Promoting Agreement

8. The voluntary settlement of relocation disputes between parents should be a major goal. Mediation and similar facilities to encourage agreement between the parents should be promoted and made available both outside and in the context of court proceedings. The views of the child should be considered, having regard to the child's age and maturity, within the various processes.

Enforcement of Relocation Orders

9. Orders for relocation and the conditions attached to them should be able to be enforced in the State of destination. Accordingly States of destination should consider making orders that reflect those made in the State of origin. Where such authority does not exist, States should consider the desirability of introducing appropriate enabling provisions in their domestic law to allow for the making of orders that reflect those made in the State of origin.

Modification of Contact Provisions

10. Authorities in the State of destination should not terminate or reduce the left behind parent's contact unless substantial changes affecting the best interests of the child have occurred.

Direct Judicial Communications

11. Direct judicial communications between judges in the affected jurisdictions are encouraged to help establish, recognise and enforce, replicate and modify, where necessary, relocation orders.

Research

12. It is recognised that additional research in the area of relocation is necessary to analyse trends and outcomes in relocation cases.

Further Development and Promotion of Principles

13. The Hague Conference on Private International Law, in co-operation with the International Centre for Missing and Exploited Children, is encouraged to pursue the further development of the principles set out in this Declaration and to consider the feasibility of embodying all or some of these principles in an international instrument. To this end, they are encouraged to promote international awareness of these principles, for example through judicial training and other capacity building programmes.