

INTERNATIONAL CHILD RELOCATION

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I. Introduction

We live in times in which long-distance travel has become increasingly common. A myriad of reasons make it easier for people to relocate to other countries in order to take different advantages. These may include better educational, employment, health or other opportunities. In such circumstances it is not uncommon that people relatively often relocate in order to take such opportunities.

Besides those already mentioned, one of the most common reasons for parental relocation is the dissolution of an international marriage or breakup of internationally characterized cohabitation. It is very difficult to give a universal conclusion on incentives for relocation, but it is possible to enumerate the most common ones. These are: return to the homeland where it is easier to get assistance from relatives and friends,¹ escape from family violence, relocation due to a new marriage,² relocation due to cultural or ethnical reasons, etc.³

A problem arises when a person considering relocation is a custodian parent. As stated in *Tropea v. Tropea*, “relocation cases ... present some of the knottiest and most disturbing problems that our courts are called upon to resolve ... the court must weigh the paramount interests of the child, which may or may not be in irreconcilable conflict with those of one or both of the parents”.⁴ Why is it so? For a child, being the pawn between two parents is highly traumatic. If relocation includes a significant distance from the other parent, the child’s

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1 See more in: N.J. Taylor and M. Freeman, ‘International Research Evidence on Relocation: Past, Present and Future’ 44 *Fam L. Q.* (2010) pp. 226-227.

2 M. Freeman, ‘The Reunite Research (Research Unit of the Reunite International Child Abduction Centre’ (July 2009) at www.reunite.org/edit/files/library%20-%20reunite%20PublicationsRelocation%20Report.pdf (12th June 2015).

3 Considering that, as a rule, parental responsibility is given to mothers, the right to relocation is sometimes viewed as a gender question. See more in: R. Zafran, ‘Children’s Rights as Relational Rights: The Case of Relocation’ 18 *American Journal of Gender, Social Policy and the Law* (2010) pp. 163, 212-216. See also: K. Herma Hill, ‘No-Fault Divorce and Child Custody: Chilling out the Gender Wars’ 36 *Fam. L.Q.* (2007) p. 27.

4 *Tropea v. Tropea*, 665 N.E.2d 145, 148 (N.Y. 1996) (allowing the mother to relocate two hours from the father).

relationship with that other parent is most likely endangered. In any case it will change, not only in quantity, but also in quality.⁵ Additionally, the child must move and leave all his or her social contacts, he or she loses stability and continuity, must overcome the language barrier, etc. Even though (especially younger) children are very adaptable, expectations like the one that relocation will not make a great disturbance in their life are not realistic.

On the other hand, for a left behind parent, the news of the custodial parent's intention to relocate can also be devastating, especially if he or she has been closely involved in parenting. The left behind parent is suddenly faced with the reality of not being a significant part of the child's life, not being able to see his or her child so often as before, and the question of financing the child's life and particularly the travel expenses connected with maintaining contact with the left behind parent often comes to the fore. So, generally speaking, most often the left behind parent views the move as an infringement of his or her visitation rights and a threat to the parent-child relationship.⁶

It is obvious that these kind of situations create enormous tensions for parents and their children and burden the legal system and the judges who have to decide them. A potential relocation can generate conflict in cases where there had been none before, reopen the old wounds in others, or exacerbate an already highly-conflicted situation.⁷ Therefore, it is very important to develop certain standards in relation with parental relocation to encourage settlement and dissuade litigation.

II. Relocation law

Relocation law is part of national law and is applied with the aim of ascertaining, on the merits of a particular case, whether to allow a parent to change the

5 However, it does not have to be the case. Some social science studies show that in cases of domestic violence or other similar problems distance might be beneficial for saving the relationship between the child and that parent. Some other studies show that although fathers' participation has been correlated to children's academic performance and participation in extracurricular activities, *the amount* of visitation with the noncustodial parent is not consistently related to the child's adjustment post-divorce. In contrast, *the quality* of the relationship with the noncustodial parent is very important. See: J.S. Wallerstein and T.J.Tanke, 'To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce' 30 *Fam. L.Q.* (1996) p. 312., F.F. Furstenberg Jr., et al., 'Parental Participation and Children's Well-being After Marital Dissolution' 52 *Am. Soc. Rev.* (1987) pp. 659-701.

6 J.L. Richards, 'Children's Rights v. Parent's Rights: A Proposed Solution to the Custodial Relocation Conundrum' 29 *N. M. L. Rev.* (1999) p. 246.

7 L.D. Elrod, 'National and International Momentum Builds for More Child Focus in Relocation Disputes' 44 *Fam. L.Q.* (2010-2011) p. 342.

child's place or country of residence. Relocation law is only relevant where the relocating parent needs the consent of the other parent to change the child's country of residence.⁸ Since joint legal custody is quite common nowadays, custodial parent has no right to independently remove the child from the jurisdiction. So, the legal regulation of parental relocation must accommodate contradicting ideals or legal principles, such as the free movement of persons and more equal parenting.⁹

Until today, only some states in Europe have enacted special legislative provisions governing relocation disputes.¹⁰ It is so because in most of the countries relocation is still treated as an aspect of child custody determinations (or modification) and is decided in accordance with the law governing custody disputes.

Regardless of the *situs* of the relocation provisions, closer inspection of the provisions of different legislatures shows that France and Spain could be described as "pro-relocation", Germany could be described as "neutral" and Sweden could be described as "anti-relocation".¹¹ Also, in connection with parameters considered important for adjudication there seems to be only a partial consensus. More precisely, there is a consensus with respect to the main factors which are relevant to a relocation determination, but there is no consensus on the precise content of these factors.¹² The main factors are: the best interests of the child, the autonomous interest of the relocating parent to choose where to live and the interests of the left behind parent to maintain an active and meaningful relationship with children. As has already been said, the abovementioned factors are weighted differently in different jurisdictions.

8 R. Schuz, *The Hague Child Abduction Convention, A Critical Analysis* (Hart Publishing, Oxford and Portland, Oregon, 2013) p. 72.

9 C.G. Jeppesen de Boer, 'Parental relocation, Free movement rights and joint parenting' 4 *Utrecht L. Rev.* (2008) p. 82.

10 In Europe, these are: Switzerland (Article 301 § 3 of Swiss Civil Code, entered into force 1 January 1978), United Kingdom (Section 13(2) of the Children Act 1989, enacted 14 October 1991), Norway (Sections 37 and 40 of the Norwegian Children Act, implemented on 1 January 1998), France (Article 373-2 of the French Civil Code, in the Act of 4 March 2002 on Parental Authority), Spain (Article 158 of the Spanish Civil Code) and Denmark (Article 3(1) and Article 17(1) of the Act of Parental Responsibility, entered into force on 1 October 2007).

11 See more in: A Report to the Attorney-General prepared by the Family Law Council, May 2006, at www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Relocation_report.pdf pp. 57-58. (12 June 2015)

12 See more in: Schuz, *op. cit.* n. 8, p. 73.

On the contrary, the US relocation law¹³ is quite developed, as well as the Canadian,¹⁴ New Zealand and Australian relocation laws.¹⁵ It implies not only detailed statutory provisions, but also a rich and publicly available case law. An insight into this material shows some similarities, but also many differences.

To begin with, the understanding of the contents of the term “relocation” may vary from state to state, with respect to time and geographic limitations. *A propos* time limitations, they refer to situations where a change of residence that falls within given time period does not fall within the scope of relocation law. For example, the custodial parent is free to move with the child if the relocation does not exceed a certain number of days.¹⁶ For relocations exceeding the referred number of days, relocation statute applies. Geographic limitations refer to situations where a change of residence happens within a certain geographic limit, in which case the relocation does not fall within the scope of relocation provisions.¹⁷ Some of the relocation law explicitly stipulates that it applies to movements out of the state, within the state or both within and out of state.¹⁸

There are also some other approaches, e.g. in Australian law. According to the Subdivision 4 of the Family Law Act 1975, “changes to the child’s living arrangements that make it significantly more difficult for the child to spend time with a parent” can be labelled as child relocation.

There are also differences with respect to notice. Most state laws include specific time spans in which the relocating party must give notice of the planned relocation to the other person with custodial responsibilities or visitation rights,¹⁹ but also the time spans for the left behind person to oppose the proposed relocation.

With regard to notification, the legislative solutions vary, prescribing a reasonable time to give notice or only that the notice must be given in advance

13 See more in: Y.M. Béréños, ‘Time to Move On? The International State of Affairs with Respect to Child Relocation Law’ 8 *Utrecht L. Rev.* (2012) pp. 3-5.

14 *Ibid*, p. 5.

15 *Ibid*, pp. 6-7.

16 As already mentioned, time limitations vary from state to state, e.g. from 30 days in California to 90 days in Kansas and Missouri or even 150 days in New Hampshire.

17 Geographic limitations also vary from state to state, e.g. from 50 miles within the old home in Florida to 150 miles within the old home in Iowa and Louisiana.

18 See: Béréños, *op. cit.* n. 13, p. 4.

19 Béréños, *op. cit.* n. 13, p. 4.

to fixing the time limit.²⁰ The form, contents and manner of notice vary, too.²¹ There are also some states whose law does not address notification.

With regard to objection, most of the states do not have objection periods, i.e. the period within which the left behind parent must object to a proposed relocation. Only a minority of the states have this period fixed.²²

In any case, the party which opposes the proposed relocation has to raise an objection. If the left behind party does not object, relocation is permitted. However, some states require the relocating parent to first obtain permission of either the left behind party or the court before carrying out the plan to relocate.²³

Since the US relocation law is much more developed, including a very rich case law, it provides a good platform for drawing some conclusions with respect to possible legislative approaches. All the states start with the general rule that the best interests of the child are paramount, but it is possible to speak of four different legal approaches to the relocation issue:

1. Presumption in favour of relocation – where relocation is generally permitted except in case where the left behind parent rebuts the presumption by showing that relocation will be harmful to the child. Such an approach has adopted an attitude that the right of the parent to relocate must always be respected, unless a competent court concludes that relocation is in collision with the best interests of the child. It is based on the belief that the custodial parent's (prospective) mental and emotional stability guarantees the welfare of his or her dependent child.²⁴
2. Presumption against relocation – which requires from the relocating parent to prove to the court that the reason for relocation is legitimate and that relocation is in the best interests of the child. Specifically, it means that the relocating parent has to prove to the court “an assess-

20 These time limits may vary from 30 to 90 days depending on the country.

21 Many states require that the notice be sent by certified mail and include:

- 1) the intended date of relocation,
- 2) the address of the intended new residence, if known,
- 3) the specific reasons for the intended relocation, and
- 4) a proposal of how custodial responsibility should be modified, if necessary, in light of the intended move.

See: Elrod, *op. cit.* n. 7, p. 352.

22 E.g. Wisconsin - 15 days; Alabama, Arizona, Florida, etc. - 30 days; Indiana - 60 days and New Jersey - 90 days.

23 E.g. Nevada; New Jersey, North Dakota. More about it see in: Richards, *op. cit.* n. 6, p. 246.

24 This approach is taken by the courts of England and Wales, Israel, US State of Wyoming, etc.

ment as to the likely influence on the child of the proposed move and of the ways in which the child will maintain contact with other parent”.²⁵ Some laws may even be more demanding, in the sense that the relocating parent has to prove that relocation will bring positive benefits to the child.²⁶

3. Intermediate approach – which comprises two types, the first less frequent and the second more common.

The first type is one in which the burden of proof shifts from one to another party, meaning that the relocating parent first has to prove that his or her motives are *bona fide* and that the wish for relocation is not inspired by seeking to cut off the child from the other parent. If he or she manages to prove this, relocation will be approved, unless the other parent successfully shows that it will be harmful to the child.

The second type is one which does not include the burden of proof. The basis for adjudication is the best interests of the child, meaning that each party has to try to persuade the court that his or her position supports the best interests of the child. Even though there are some factors that are always taken into account,²⁷ this approach is quite inadequate because of its subjectivity. Namely, the outcome of the proceedings depends in great measure on the judge’s perceptions of the importance of some factors.

Despite the existing legislature, predicting the results of relocation disputes still remains difficult because they are so intensely fact-driven.²⁸ Apart from the statutory requirements, the court is obliged to take into account the type of parenting agreement that currently exists (joint and shared custody), rights of parents, rights of the child, reasons for relocation, best interests of the child, etc.

The 1996 New York breakthrough pushes this uncertainty yet a step further. In *Tropea v. Tropea*, the court paved the way toward abolishing presumptions for or against a parent’s relocation, saying: “It serves neither the interests of

25 Schuz, *op. cit.* n. 8, p. 75.

26 E.g. law of US State of Louisiana.

27 Such as:

1. the suitability of the child’s living conditions in the foreign country,
2. the ease with which the child is likely to integrate into the new country,
3. the adequacy of the arrangements made for reserving contact with the remaining parent, and
4. the views of a sufficiently mature child.

See: Schuz, *op. cit.* n. 8, p. 75.

28 Elrod, *op. cit.* n. 7, p. 342.

the children nor the ends of justice to view relocation cases through prisms of presumptions and threshold tests that artificially skew the analysis in favour of one outcome or another. Courts should be free to consider and give appropriate weight to all of the factors that may be relevant...’’²⁹

This started the trend all over the United States of abandoning presumptions in favour of the “best interests of the child” test. Even though this test, with its flexibility and adaptability to each child’s particular circumstances, puts the child and his or her welfare in the focus of the relocation analysis, some are of the opinion that decades of its use have not helped in making it less vague and less vulnerable to judges using their own values to make the decisions.³⁰ Ultimately, it means that the (relocation) decision may well depend on personal experience and beliefs of the judge, especially if lacking support from different kinds of specialists.³¹

III. International harmonisation initiatives

1. Attempts on regional level

The growing number of national and international relocation cases, as well as the myriad of different legislative arrangements, has led to a heightened awareness of problems with the existing lack of uniformity and to an interest in developing appropriate relocation standards.³² Even more so having in mind that relocation to a foreign country involves added difficulties.³³

It is possible to distinguish several attempts from different organisations on developing standards for assessing relocation issues. In Europe, it is the CEFL;³⁴ in the United States, it is the American Academy of Matrimonial Lawyers, but also the American Law Institute and the Uniform Law Commission; in Australia, it is the Australian Family Law Council, and on a global level, it is the Hague Conference on Private International Law.

29 See: L.R. Greenberg, D.J. Gould-Saltman, R. Hon. Schnider, ‘The Problem with Presumptions – A Review and Commentary’, 3 *J. Child Custody* (2006) p.146.

30 See: J.B. Kelly, ‘The Best Interests of the Child: A Concept in Search of Meaning’ 35 *Fam. & Concil. Cts. Rev.* (1997) p. 384.

31 E.g. an attorney for the child, mental health specialists, social workers, etc.

32 Elrod, *op. cit.* n. 7, p. 345.

33 Meaning that courts have to take into account custodial parents’ right to travel, possible jurisdictional conflicts, added difficulties with realization of left behind parents’ visitation rights, the child’s right not to be compelled to leave the homeland, etc. See more in: J. Grayson, ‘International Relocation, the Right to Travel, and the Hague Convention: Additional Requirements for Custodial Parents’ 28 *Fam. L.Q.* (1994-1995) p. 531.

34 European Commission on Family Law.

The initiative started within North America. In 1997, the American Academy of Matrimonial Lawyers³⁵ promulgated the Model Act on Relocation,³⁶ designed to serve as a template for jurisdictions desiring a statutory solution.³⁷ The Act addresses: the content of the term “relocation”, duty to give written notice, the objection to relocation, factors for the court to consider and the issue of assigning the burden of proof.

According to this Act, “relocation is a change in the principal residence of a child for a period of 60 days or more, but does not include a temporary absence from the principal residence”.³⁸ *A propos* geographical limitations, residence changes within a state or a relatively short distance can also be classified as relocation. With regard to notice, the Act requires all parties entitled to residential custody or visitation to give written notice 60 days prior to relocation, except in cases of domestic violence.³⁹ If the left behind person does not object, i.e. does not file a proceedings to prevent relocation within 30 days after receiving the notice, relocation is permitted by default.⁴⁰ As far as the factors for the court to consider are concerned, in making its determination the court must take into account the following factors:

1. The nature, quality, extent of involvement and duration of relationship of the child with each parent;
2. The age, developmental stage, needs of the child, and the likely impact the relocation will have on the child’s physical, educational and emotional development;
3. The feasibility of preserving the child’s relationship with the non-custodial parent;
4. The child’s preference, considering age and maturity level;
5. Whether there is an established pattern of the person seeking relocation either to promote or thwart the child’s relation with the other parent;

35 Established in 1962, with the goal “to provide leadership that promotes the highest degree of professionalism and excellence in the practice of family law”, at <http://www.aaml.org/about-aaml> (12 June 2015).

36 See: Richards, *op. cit.* n. 6, pp. 277-278.; Béréños, *op. cit.* n. 13, pp. 13-14.; Elrod, *op. cit.* n. 7, pp. 357-359.

37 American Academy of Matrimonial Lawyers: Proposed Model Relocation Act: An Act relating to the relocation of the principal residence of a child, 1998 *Journal of the American Academy of Matrimonial Lawyers* 15, No. 1, Introductory Comment.

38 Article 1(101(5)) of the Model Relocation Act.

39 Article 2(205) of the Model Relocation Act.

40 Article 3(301) of the Model Relocation Act.

6. Whether the relocation of the child will enhance the general quality of life for both the party seeking the relocation and the child, including but not limited to financial or emotional benefit or educational opportunity;
7. The reasons each person seeks or opposes the relocation; and
8. Any other factor affecting the best interests of the child.

Since there was no consensus in respect of the burden of proof, the Act proposes three alternatives: the relocating person has the burden of proof, the left behind person has the burden of proof and the burden of proof shifts from the relocating person (if the burden is met) to the left behind person. The Act applies to cases when either a left behind person or the child relocates.⁴¹ It does not contain express stipulation on whether it applies to national and/or international relocation cases.

In 2000 the American Law Institute⁴² promulgated the Principles of the Law of Family Dissolution.⁴³ The ALI Principles differ greatly from the AAML Act. First and foremost they adopt a presumption in favour of relocation, subject to some limitations. Those are: it has to be the parent who exercises a significant majority of the custodial responsibility, relocation decision has to be made in good faith and for legitimate purpose and to a location that is reasonable⁴⁴ in light of the purpose.⁴⁵ So, the burden of proof is on the relocating party. According to the Principles, the following reasons should be considered as valid reasons for relocation:

1. To be close to significant family or other sources of support;
2. To address significant health problems;
3. To protect the safety of the child or another member of the child's household from a significant risk of harm;
4. To pursue a significant employment or educational opportunity;
5. To be with one's spouse or domestic partner who lives in, or is pursuing a significant opportunity in the new location; and

41 Comment on Article 1(101) of the Model Relocation Act.

42 Established in 1923, after a study conducted by the committee on the establishment of a permanent organisation for the improvement of the law, which consisted of American judges, lawyers and teachers; at <http://www.ali.org> (12 June 2015).

43 See: Richards, *op. cit.* n. 6, pp. 278-285; Béréños, *op. cit.* n. 13, 2012, pp. 14-15.; Elrod, *op. cit.* n. 7, pp. 359-360.

44 Generally speaking, relocation will be considered reasonable if there is no way to achieve the legitimate purpose without moving.

45 ALI Principles, Section 2 § 2.20(4)(a).

6. To significantly improve the family's quality of life.⁴⁶

If the relocation does not significantly impair either parent's ability to exercise his or her responsibility, it does not constitute a substantial change of circumstances, meaning that the court will not interfere. In case where neither of the persons is currently exercising a significant majority of custodial responsibility or the relocating party fails to demonstrate that the relocation is valid, the court shall apply a best interests test without a presumption favouring relocation. This test is based on factors set out in Principles,⁴⁷ some of which are:

1. The prospective advantage of the move for directly or indirectly improving the general quality of life for the child;
2. The extent to which parental rights and responsibilities have been allowed and exercised by the non-relocating parent;
3. Whether the relocation will allow a realistic opportunity for intervals of time with each parent;
4. The extent to which allowing or prohibiting relocation will affect the emotional, physical or developmental needs of the child;
5. Whether the primary custodial parent, once out of the jurisdiction, is likely to comply with any revised parenting plan;
6. The love, affection and emotional ties between the parents and child;
7. The capacity and disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent has been the primary caregiver;
8. The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;
9. The stability of the family unit of the parents;
10. The mental and physical health of the parents;
11. The home, school and community record of the child;
12. The reasonable preference of the child if twelve years of age or older. The court may hear the preference of a younger child at request; etc.⁴⁸

With regard to notice, the relocating parent has to give notice at least 60 days before the planned relocation.⁴⁹ There are also some issues that the Principles

46 ALI Principles, Section 2 § 2.17(4)(a)(ii).

47 ALI Principles, Section 2 § 2.09-2.10.

48 See more in: Richards, *op. cit.* n. 6, pp. 283-284.

49 ALI Principles, Section 2 § 2.17.

do not address, like: the effect of domestic violence, a situation in which the primary psychological parent is not the primary custodial parent, international relocations, etc.⁵⁰

In 2005 the Joint Editorial Board on Uniform Family Laws of the Uniform Law Commission⁵¹ started to draft a Uniform Relocation Act. Due to budgetary reasons this project ended in February 2009, after one draft. Fortunately, in 2010 the American Bar Association Family Law Section appointed a committee to continue the work. The latest version of the Draft defines relocation as “a change of residence”, where the change of residence will be: out of the state, outside the geographic restriction set forth in the existing court order, more than 50 driving miles from the residence of the other parent or will substantially affect the nature and quality of the parent-child relationship.⁵² The relocating parent has to give notice to other persons with parental responsibility towards the child at least 60 days prior to planned relocation. The contents of the notice are also specified. The non-relocating party has 30 days after receipt of the notice to either start the court proceeding to prevent relocation or to initiate some alternative dispute resolution. The draft also proposes the factors for the competent court to consider when adjudicating. So, when making any determination the court must consider the best interests of the child and:

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 parent’s reasons for seeking or opposing the relocation or whether either parent is acting in bad faith;
6. A history or threat of domestic violence, child abuse or child neglect;
7. The willingness and the ability of each parent to respect and

50 For a much more detailed overview of the ALI Principles see: J.L. Richards, ‘ALI Family Dissolution Principles: Are Children Better Protected?’ 2001 *BYU L. Rev.* (2001) p. 1105.

51 The Uniform Law Commission was founded in 1892 with the objective to study and review the law of the states, to determine which areas of law should be uniform and draft and propose specific statutes in areas of the law where uniformity between states is desirable; at <http://www.nccusl.org> (12 June 2015).

52 ABA Draft, Section 2 § 2.10.

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 sexually assaulted or engaged in domestic violence against the parent or a 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.⁵³

In 2006 the Australian Family Law Council published a report regarding relocation to advise the Attorney-General. The Report emphasises that the Family Law Act is not very helpful when it comes to relocation and suggests appropriate amendments. The Report brings four recommendations. The first one is in relation to whether or not the existing Family Law Act needs changes and if the answer is positive, how extensive. The Council suggested only inserting some amendments in relation to relocation. The second recommendation was to consider relocation cases as a special category of cases with special reference to indigenous children and to insert the amendments into the Family Law Act. The third recommendation suggested against any presumptions with respect to relocation, because "a presumption is not an appropriate way for the law to deal with relocation cases. A presumption would be a very blunt legal instrument for dealing with the complexities involved in such cases."⁵⁴ The fourth recommendation concerned the best interests of the child and factors for the court to consider when adjudicating on relocation. The Report suggested insertion of a new detailed provision into the Family Law Act with respect to the relevant factors to consider. The intention of this provision is to ensure that the court gets the extra information it needs.⁵⁵ Some of the factors are:

1. The relationship of the child with both parents;
2. The impact on the child;

53 ABA Draft, Section 9.

54 A Report to the Attorney-General prepared by the Family Law Council, May, 2006, p. 64, at www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Relocation_report.pdf (12 June 2015).

55 A.-G. Report, pp. 67-73.

3. Reasons for relocation, but also
4. What are the alternatives to the proposed relocation;
5. Whether it is reasonable and practicable for the person opposing the application to move to be closer to the child if the relocation is to be permitted; and
6. Whether the person who is opposing the relocation is willing and able to assume primary caring responsibility for the child if the person proposing to relocate chooses to do so without taking the child;
7. Whether, given the age and the developmental level of the child, the child's relocation would interfere with the child's ability to form strong attachments to both parents, etc.

Besides the abovementioned, when making the relocation decision the court should consider the freedom of movement of persons between the states of Australia. However, parents' rights are subordinate to the best interests of the child.⁵⁶ The Report did not include: a definition of child relocation, notice requirements nor a burden of proof.

In 2007 the CEFL⁵⁷ published the Principles of European Family Law regarding Parental Responsibilities. The Principle relevant to relocation does not comprise any definition of relocation. There is an obligation to give notice, but the time frame is not specified.⁵⁸ The Principle does not distinguish between the relocation within or outside the jurisdiction, so it addresses national as well as international relocation cases.⁵⁹ The Principle also provides a set of non-exhaustive consideration factors:

1. The age and opinion of the child;
2. The right of the child to maintain personal relationships with the other holders of parental responsibilities;
3. The ability and willingness of the holders of parental responsibilities to co-operate with each other;
4. The personal situation of the holders of parental responsibilities;

56 A.-G. Report, p. 2.

57 Established in Utrecht in September 2001, with the main objective to develop the non-binding principles which may serve as an inspiration for the harmonisation of family law in Europe.

58 Principle 3.21(1) says: "in advance".

59 See: K. Boele-Woelki, *Principles of European Family Law Regarding Parental Responsibilities* (Intersentia, Antwerpen-Oxford, 2007) p. 141.

5. Geographical distance and accessibility; and
6. The free movement of persons.⁶⁰

2. Attempts on global level

The Hague Conference on Private International Law⁶¹ is a permanent inter-governmental organisation with the aim “to work for the progressive unification of private international law rules”.⁶² To achieve that, the Conference develops international legal instruments to serve worldwide needs.⁶³ When it comes to relocation, the Hague Conference on Private International Law has long seen the need to develop more satisfactory ways to decide relocation cases because of the interrelationship between relocation and child abduction.⁶⁴ Namely, both of them are concerned with the removal of the child from his or her habitual residence, but while relocation is the lawful removal of the child after having obtained the consent of the other parent or the court, abduction is the unlawful removal of the child from his or her habitual residence. The other similarity is the same basic concern – whether or not to allow the custodial parent to move with the child to another country, i.e. “which option is the lesser of two evils for a child where the custodial or joint custodial parent wishes to move to another country and the other parent does not”.⁶⁵ Generally speaking, a liberal approach to relocation means less child abductions. *Vice versa*, the harder it is to obtain permission to relocate, the greater is the incentive to abduct.

On the other hand, relocation law comes into play only where the relocating parent needs the consent of the other parent to change the child’s country of residence. If the left behind parent does not have joint legal custody or the

60 For guidance on how this question can be solved see: P. Parkinson, ‘Freedom of movement in an era of shared parenting: the differences in judicial approaches to relocation’ 36 *Fed. L. Rev.* (2008) p. 145.

61 The Conference had its first meeting in 1893. It became a permanent inter-governmental organisation in 1955. At this moment there are 72 members of the Conference, representing all the continents.

62 See pages of the Hague Conference www.hcch.net (12 June 2015).

63 Bérénois, *op. cit.* n. 13, p.12.

64 Elrod, *op. cit.* n. 7, p. 346.

65 Schuz, *op. cit.* n. 8, p. 71.

right to *ne exeat*,⁶⁶ the custodial parent is free to move with the child as he or she wants. However, the majority of legislators today accept the trend towards granting joint legal custody, and even joint physical custody. Combined with the increased number of international marriages, this approach makes some parents desperate enough to attempt child abduction. In that sense, as early as in 2001, the Fourth Special Commission Meeting identified the existing need for harmonisation of laws with respect to parental responsibility and relocation, especially because the frequency of international child abductions is growing by the day and different courts are taking different approaches. The Commission expressly pointed out the adverse effects of restrictive approach to relocation. In 2006 the Fifth Special Commission Meeting went a step further and expressly “encouraged all attempts to seek to resolve differences among legal systems so as to arrive as far as possible at a common approach and common standards as regards relocation”.⁶⁷

Some years later, in 2010, the Hague Conference on Private International Law, together with the International Centre for Missing and Exploited Children, took part in a conference in Washington, which ended with the adoption of a document called the “Washington Declaration on International Family Relocation”. The Declaration gives 13 recommendations and a list of 13 Principles as a guide to the courts when deciding on relocation issues. The Declaration is clearly against any presumptions and in favour of the best interests of the child as the paramount consideration. It also requires a reasonable notice and gives 13 factors as relevant for the judges to consider:

1. 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 interests;
2. The views of the child having regard to the child’s age and maturity;
3. The parties’ proposals for the practical arrangements for relocation, including accommodation, schooling and employment;

66 The right to veto removal from jurisdiction. It can be allocated to the party by court decision or *ex lege*. “A *ne exeat* order is a custody device used by international courts that requires either both parents’ consent or permission from the court before a custodial parent may change a child’s country of residence.” *Black’s Law Dictionary* (9th ed. 2009) p. 1131. A *ne exeat* clause is defined as “an equitable writ restraining a person from leaving, or removing a child or property from the jurisdiction”.

67 Conclusions and Recommendations of the Fifth Special Commission Meeting, at www.hcch.net/index_en.php?act=publications.details&pid=3905&dtid=2 para. 1.7.5. (12 June 2015).

4. Where relevant to the determination of the outcome, the reasons for seeking or opposing the relocation;
5. Any history of family violence or abuse, whether physical or psychological;
6. The history of the family and particularly the continuity and quality of past and current care and contact arrangements;
7. Pre-existing custody and access determinations;
8. 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;
9. 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;
10. Whether the parties' proposals for contact after relocation are realistic, having particular regard to the cost of the family and the burden to the child;
11. The enforceability of contact provisions ordered as a condition of relocation in the State of destination;
12. Issues of mobility for family members; and
13. Any other circumstances deemed to be relevant by the judge.

Unfortunately, already two years later, in 2012, at the next Special Commission Meeting most of the members believed that relocation is a question of national law and not directly within the auspices of the Hague Conference. So, at the end, this great initiative remained limited to Conclusions and Recommendations in the sense of recognition of the Washington Declaration as a platform for further investigation, support to further investigation of the relocation problem and support to the ratification of the 1996 Hague Convention, as an instrument of value for international relocation.

Namely, the 1996 Hague Convention deals, amongst other things, with "rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence".⁶⁸ But, with regard to applicable law, the 1996 Convention also points to the law of habitual residence of the child.

68 Article 3(b) of the 1996 Hague Convention.

So, up until today the question of international relocation remains unsolved, meaning that there are no international instruments that deal with the relocation issue. It is still a question which has to be solved in front of the domestic court, either the national or the court of habitual residence of the child, depending on whether it is a national or international case. This has for many years created great problems in abduction cases where the 1980 Hague Convention⁶⁹ applies, because of the lack of clear definition of “custody” in the Convention’s language.⁷⁰ Namely, Article 5 of the Convention includes an autonomous definition of the “rights of custody”, as rights relating to the care of the person of the child, in particular the right to determine the child’s place of residence. However, the removal or retention of a child will be considered wrongful if “it is in breach of the rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention”, under the condition that “at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention”.⁷¹

So, whether the removal or retention of the child will be considered wrongful depends on the law of the state of habitual residence of the child. A problem appears if the law of the respective state does not expressly regulate relocation or does not explain the meaning of a *ne exeat* clause given to the parent with visitation rights.⁷²

The case law of the United States clearly shows the importance of a better formulation of relocation law. The first published case, which marked the next eleven years (1999 – 2010) of American adjudication was *Croll v. Croll*.⁷³ The mother got “custody, care and control” and the father got “reasonable access”. The judgment also included a *ne exeat* clause which expressly stated

69 Convention on the Civil Aspects of International Child Abduction, at http://www.hcch.net/index_en.php?act=conventions.text&cid=24 (12 June 2015).

70 See: M. Sattler, ‘The Problem of Parental Relocation: Closing the Loophole in the Law of International Child Abduction’ 67 *Wash. & Lee. L. Rev.* (2010) p. 1709, at <http://scholarlycommons.law.wlu.edu/wlulr/vol67/iss4/12> (12 June 2015).

71 Article 3 of the 1980 Hague Convention.

72 The question of what is to be considered the “law of the State” for the purposes of application of the 1980 Hague Convention’s provisions is also a very delicate one because part of the national law are also private international law rules, but we are not going to deal with it here. For more see: E. Peres-Vera, *Explanatory Report, III Hague Conference on Private International Law* (Acts and Documents of the 14th Session 429, 1982) para. 68. p. 446.

73 C.B. Whitman, ‘Croll v. Croll: The Second Circuit Limits ‘Custody Rights’ Under The Hague Convention on the Civil Aspects of International Child Abduction’ 9 *Tulane J. of Int’l & Comp. L.* (2001) pp. 605-627.

that the child is not to leave the country without a court permission or written permission from the father. The mother took the child from Hong Kong to the United States in breach of the *ne exeat* clause. The father then started proceedings pursuant to the 1980 Hague Convention and the first instance court decided in his favour. The mother complained and the Second Circuit Court of Appeals reversed the first instance judgment in favour of the mother, holding that, even when paired with a *ne exeat* clause, the rights of access do not become the rights of custody within the realm of the Hague Convention and thus do not invoke the return of the child.⁷⁴ The Second Circuit Court of Appeals consulted dictionary definitions on “custody” and concluded that all the dictionaries with regard to the term “custodial parent” refer to the person with whom the child lives, so it can never be a parent who holds only visitation rights.⁷⁵ Additionally, the court held that the *ne exeat* right refers exclusively to the right to determine the child’s residence within that state.

A second case, *Gonzalez v. Gutierrez*,⁷⁶ which was brought before the Ninth Circuit Court of Appeals, also ended with the conclusion that the *ne exeat* right means no more than protection of visitation rights.⁷⁷ To support its interpretation, the Court referred to the history of the 1980 Hague Convention, i.e. the fact that in 1996 while the discussion of possible amendments of the 1980 Hague Convention was in progress the *ne exeat* clause was not even discussed. The Court concluded that it shows the intention of the authors of the Convention to keep the clear division between the custody and visitation rights.

A third case, *Fawcett v. McRoberts*,⁷⁸ followed the same road as the previous two. The Fourth Circuit Court of Appeals adjudicated against *ne exeat* as part of custody rights.

74 Judge Sotomayor gave a separate view, in which she pointed out that, in her opinion, the purpose and aims of the 1980 Hague Convention call for such interpretation according to which the right given by the *ne exeat* clause constitutes a custody right. See: D.L. Brewer, ‘The Last Rights: Controversial Ne Exeat Clause Grants Custodial Power under *Abbott v. Abbott*’ 62 *Mercer L. Rev.* (2011) p. 674.

75 Whitman, *op. cit.* n. 73, pp. 618-619

76 S.J. Bass, ‘Ne Exeat Clauses Proven Ineffective: How the Hague Convention Renders Access Rights Illusory’ 29 *N. C. J. Int’l L. & Com. Reg.* (2004) pp. 573-594.

77 According to the Court’s explanation, only the party which violates someone’s custody right can be submitted to the 1980 Hague Convention’s provisions. On the contrary, a violation of someone’s visitation rights stays outside the scope of the Convention (“not all parental disputes warrant direct intervention by the courts of the State to which children are taken”, “the Convention allows remedy of return only for the parent with superior rights”). See: Bass, *op. cit.* n. 76, p. 577.

78 T. Jones, ‘A Ne Exeat Clause is a “Right of Custody” for the Purposes of the Hague Convention: *Abbott v. Abbott*’ 49 *Duq. L. Rev.* (2011) pp. 537-538.

New winds started to blow in 2004. In *Furness v. Reeves*,⁷⁹ the decision of the Eleventh Circuit shows a paradigm shift in adjudications of American courts. After repealing the first instance judgment, the Eleventh Circuit Court of Appeals adjudicated that the *ne exeat* clause constituted a custody right under the 1980 Hague Convention, thus making removal without consent “wrongful” under the Convention. Ms. Reeves appealed against the decision of the Eleventh Circuit Court of Appeals to the Supreme Court of the United States, but the Supreme Court denied her petition for certiorari.⁸⁰ By doing that, the Supreme Court of the USA missed a great opportunity to set the precedent in such an important question, leading to a uniform interpretation of the Convention.

Finally, in 2010, with *Abott v. Abott*,⁸¹ the American saga on the interpretation of the *ne exeat* right ended. The district court “held that the father’s *ne exeat* right did not constitute a right of custody under the 1980 Hague Convention and, as a result, that the return remedy was not authorised”. On an appeal, the United States Court of Appeals for the Fifth Circuit affirmed the district court’s decision, following the precedent of the United States Courts of Appeals for the Second, Fourth and Ninth Circuits. So, the Fifth Circuit Court of Appeals also determined that a parent’s *ne exeat* right is merely a “veto right” over the child’s departure from a country. Having in mind the dissenting views of the Eleventh Circuit Court of Appeals and the dissenting opinion of Judge Sotomayor in *Croll v. Croll*, the Supreme Court of the United States decided it was time to resolve the conflict between the circuits and the granted certiorari. The Supreme Court of the United States held that a parent’s *ne exeat* right granted in a foreign court is to be considered by the United States to constitute a “right of custody”, as defined in the 1980 Hague Convention, rather than a “right of access”. Namely, having in mind Article 5 of the Convention and its autonomous definition of the custody rights, which includes the right to determine the place of residence of the child, the Supreme Court adjourned that the

79 K.A. O'Connor, ‘What Gives You The Right? – Ne Exeat Rights Should Constitute Rights of Custody after Furnes v. Reeves’ 24 *Penn St. Int’l L. Rev.* (2005-2006) pp. 451-452, 461-465.

80 In the United States, it is a writ seeking judicial review. It is issued by a superior court, directing an inferior court, tribunal, or other public authority to send the record of a proceeding for review; at <http://en.wikipedia.org/wiki/Certiorari> (12 June 2015).

81 Brewer, *op. cit.* n. 74, p. 663-683.; A. Gupte, ‘Rights of Access with Ne Exeat Clause Do Not Create Rights of Custody Under Hague Convention – Abbot v. Abbot’ 33 *Suffolk Transnat’l L. Rev.* (2010) p. 187.

term “place of residence” can also be understood as “country of residence”,⁸² especially having in mind that the child’s life, mother tongue and all the other circumstances are closely connected with the country of the child’s habitual residence.⁸³ The consequences of this ruling can be observed on different levels. On the domestic level, the Supreme Court resolved a federal circuit split and dictated the standard for domestic courts to follow in cases involving the 1980 Hague Convention. On the international level, this decision signals to the international community that the United States’ judicial system is willing to utilise foreign laws and policies to interpret treaties to which the United States is a party.⁸⁴

The definition enclosed in BU II bis⁸⁵ mainly copies the one for child abduction found in Article 3 of the 1980 Hague Convention. However, compared to the definition incorporated in the 1980 Hague Convention, in our view, it has an important addition which clears the problems with the interpretation of the *ne exeat* clause. According to Article 2(11)(b), “custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child’s place of residence without the consent of another holder of parental responsibility”.⁸⁶

Namely, since the EU law has priority with respect to national law, it means that, even when the applicable law attributes the exclusive legal and physical custody to one parent and visitation rights and *ne exeat* to the other parent, for the purpose of the application of the BU II bis provisions, custody shall

82 Judge Stevens dissented from the majority opinion and argued that such interpretation was wrong because the authors of the Convention in certain provisions used the term “place of residence” and in some other provisions the term “state of residence”, so it is to conclude that their intention was to keep the distinction between these two terms. The dissent also criticised the weight afforded to the contrary opinions of international courts (of Australia, United Kingdom, Israel, Austria, South Africa and Germany) and noted that the Department of State’s opinion on the issue has changed a great deal throughout the years since the implementation and ratification of the Hague 1980 Convention. See: Brewer, *op. cit.* n. 74, p. 681.

83 For more details see: J.D. Hon Garbolino, ‘The United States Supreme Court Settles the Ne Exeat Controversy in America: *Abbot v Abbot*’ 59 *Int’l & Comp. L.Q.* (2010) p. 1158.

84 See: Brewer, *op. cit.* n. 74, p. 665.

85 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, OJ L 338, 23. 12. 2003., pp.1-29.

86 On other important issues see: N. Lowe, ‘The Impact of the Revised Brussels II Regulation on Cross-Border Relocation’ *The Judges' Newsletter, Special Edition No 1* [International Judicial Conference On Cross-Border Family Relocation, 23-25 March 2010, Washington D.C., United States of America] (2010) pp. 69-72.

be considered to be exercised jointly (i.e. the removal or retention will be considered wrongful).

Of course, there are divided opinions with regard to such solution. Supporters refer to Article 5 of the 1980 Hague Convention, which defines custody rights as "... in particular, the right to determine the child's place of residence". They point out that such formulation indicates that exercise of the *ne exeat* right gives its holder a much bigger influence on the child's life than obvious at first sight. By exercising this right, he or she influences the child's identity, culture, language, etc. On the other hand, opponents believe that the only role of the *ne exeat* right is to protect the visitation rights and, as such, it is a part of visitation rights and not a part of custody rights.⁸⁷ They argue that such perception of the *ne exeat* clause blurs the distinction between visitation and custody rights.⁸⁸

IV. State of play in Croatia

As already said, until today only some states in Europe have enacted special legislative provisions governing relocation disputes. The Republic of Croatia is not one of them. In Croatia, the question of relocation is considered to be an aspect of child custody determination (or modification) and is decided in accordance with the law governing custody disputes. According to Article 99 (1) of the Croatian Family Law Act,⁸⁹ "parents, whether they live together or are separated, equally, jointly and by agreement take care of the child, unless prescribed differently by this Act". According to Article 101 of the FLA, if parents are unable to reach an agreement with regard to the realisation of parental responsibilities or child's rights, the dispute can be settled through non-contentious court proceedings, at the request of the parents, social welfare officer or the child. If necessary, because of a substantial change of circumstances, the

87 Custody of a child entails the primary duty and ability to choose and give sustenance, shelter, clothing, moral and spiritual guidance, medical attention, education, etc. See: J.A. Jackson, 'Interpreting Ne Exeat Rights as Rights of Custody: The United States Supreme Court's Chance to Advance the Purposes of the Hague Convention on International Child Abduction' 84 *Tul. L. Rev.* (2009-2010) p. 200.

88 The Court considered the *ne exeat* right as purely a right to veto, which enables the other parent to forbid the child's removal to another country. Considering that such right does not obtrude the obligation to actively care for the child, it cannot be considered as a custody right and its holder cannot be considered as a custody rights holder. See: Jackson, op. cit. n. 87, p. 202.

89 Obiteljski zakon Republike Hrvatske, NN RH 116/03, 17/04, 136/04, 107/07, 57711, 61/11.

court shall issue a new decision on custody and visitation, and, if required, on other aspects of parental responsibilities.⁹⁰

It is obvious that the Croatian FLA provides for joint legal custody and that neither parent has the right to independently change the child's place of residence. So, for the relocation to be lawful there has to be an agreement or that question has to be settled by a court decision. Even though this is not expressly stated, the provisions of this Act are also applicable in cases where the custodial parent wants to relocate abroad with the child.

In our opinion, absence of specific relocation provisions, especially with regard to international relocation, is in no one's interest. Because each case is fact-sensitive, and there are currently no uniform standards, the potential for conflict is great.⁹¹ Polarised parents, often contemptuous to each other, may easily lose focus of their child. On the other hand, the well intentioned, child-centred and "neutral" legal standard to consider "the best interests of the child" is vague enough to allow subjectivity and other sorts of influences to dictate the outcome of the proceedings.⁹²

In that sense, it would be recommendable to the legislator to set some standards with regard to the notice, objection, burden of proof and factors for the court to consider when adjudicating relocation cases. It should improve legal certainty and, at the same time, allow a court to focus on the child's needs and customise the decision to best serve primarily the child's interests.

The current state of play in Croatia shows great differences amongst the decisions of different courts and as such only confirms the need for some guidance. Some judges emphasise the importance of stability, past caretaking and emotional bonds while others consider a variety of factors. Some judgments are highly restrictive while others are not. It makes the outcome utterly unpredictable for the parent who wishes to relocate with the child, which is a strong incentive for child abduction. Even more so with regard to international relocations.

90 Article 102 of the FLA.

91 L.D. Elrod, M.D. Dale, 'Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance' 42 *Family L. Q.* (2008) p. 389.

92 G. Skoler, 'A Psychological Critique of International Child Custody and Abduction Law' 32 *Fam. L. Q.* (1998-1999) p. 558. For some other arguments see: L. Elrod, 'A Move in the Right Direction? Best Interests of the Child Emerging as the Standard for Relocation Cases', at <http://jcc.haworthpress.com> (12 June 2015).

V. Conclusion

Family law issues are no longer just local or national. In an era of international marriages and globalisation, it is hard to expect people will not move all over the globe. In such context, international child relocation is becoming a prominent question. Undoubtedly, compared to interstate relocation, relocation to a foreign country involves added difficulties.⁹³ For example, the country to which the relocation is planned may have different cultural conditions, the greater distance may lead to additional costs of visitation if not even make it practically impossible, there may also be some concerns with respect to enforcement of custody and visitation order in that country, etc. Then there are the internationally protected rights, which also have to be respected. For example, the child has the right not to be separated from his or her parents against his or her will⁹⁴ and to express his or her view freely and have contact on a regular basis with both parents.⁹⁵ The parent has the right to have contact with his or her child(ren)⁹⁶ and to move and reside throughout the territory of the European Union,⁹⁷ etc.

As case law shows, it is a handful for a judge to take care of. Without any guidance, it is not a surprise that some of them are reluctant to take any other but a restrictive approach. If at least there were some standards for interstate relocation, it would be easier to upgrade them to correspond to the demands of adjudication in international relocations. But there are none, at least in Croatia, so in our view the time has come for a new framework for relocation evaluations. It is an issue which requires close attention since it has a great impact on the lives of all the parties involved, especially on the life of the child.

93 J. Grayson, 'International Relocation, the Right to Travel, and the Hague Convention: Additional Requirements for Custodial Parents' 28 *Fam. L. Q.* (1994-1995) p. 531.

94 Article 9(1) of the UN Convention on the Rights of the Child (1989), at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (12 June 2015).

95 Article 24 of the Charter of Fundamental Rights of the European Union, OJ EC C 364/1, 18 December 2000.

96 Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), at http://www.echr.coe.int/Documents/Convention_ENG.pdf (12 June 2015).

97 Article 21 of the Treaty on the Functioning of the European Union, OJ EU C 326/47, 26 October 2012. See also: P. Parkinson, 'Freedom of Movement in an Era of Shared Parenting: The Differences in Judicial Approaches to Relocation' 36 *Fed. L. Rev.* (2008) p. 145.