Illinois 2016 New Relocation Law – Predicting Success in ~~Removal~~ Relocation Decisions Remains Murky Despite Illinois Supreme Court Decisions and Rewrite of Illinois Relocation Law

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BACKGROUND

The 2016 law changes dramatically regarding what was called removal. Even the title has changed, with Illinois now using the term commonly used nationally – relocation. But Illinois in a sense went in the opposite direction of the national trend. While the trend has been for relocation to be somewhat more lenient, Illinois has now become far more restrictive regarding where a party can move.

Under the 2016 law, when the child's primary residence is in a collar county (defined as Cook, DuPage, Kane, Lake, McHenry, or Will) to another residence in the state greater than 25 miles, this is a prohibited relocation. For those outside of the collar counties, then there is a 50 mile rule. And when the child's current primary residence can be changed outside the borders of Illinois but within 25 miles of the current primary residence, this would be allowed.

For there to be relocation beyond these boundaries, the parent who has either equal or primary parenting time must jump through the hoops that apply to relocation cases. If contested, whether relocation is granted is still based on the best interest of the children. Accordingly, it is anticipated that the previous Illinois case law will remain valid, although the factors in the 2016 amendments will supercede the so called *Eckert* factors. But keep in mind that the 2016 amendments were designed to basically clarify what was existing law – with the very significant exception of the far more restrictive boundaries.

Under the 2016 amendments a parent seeking to move outside of the boundaries (25 or 50 miles) must provide written notice of the relocation to the other parent under the parenting plan or allocation judgment. A copy of the notice must be filed with the clerk of the court. The written notice must then provide at least 60 days' notice unless this is "impracticable." There are other detailed requirements for what the notice must contain.

If the non-relocating parent signs the notice that was provided and the relocating parent files the notice with the court, the relocation must be allowed. The court then modifies the parenting plan or allocation judgment to accommodate a parent's relocation as agreed by the parents, as long as

the agreed modification is in the child's best interests. If the non-relocating parent objects or does not sign the notice (or the parents cannot agree on a modification of the parenting plan or allocation judgment), then the parent seeking relocation must file a petition seeking permission to relocate.

There are now 11 factors the court applies in determining relocation:

(1) the circumstances and reasons for the intended relocation;

(2) the reasons, if any, why a parent is objecting to the intended relocation *[ABA Model Act: "the parents' reasons for seeking or opposing relocation and whether either parent is acting in bad faith"]*

(3) the history and quality of each parent's relationship with the child and specifically whether a parent has substantially failed or refused to exercise the parental responsibilities allocated to him or her under the parenting plan or allocation judgment; *[ABA Model Act: "(1) the quality of relationship and frequency of contact between the child and each parent";]*

(4) the educational opportunities for the child at the existing location and at the proposed new location;

(5) the presence or absence of extended family at the existing location and at the proposed new location; *[ABA Model Act: "the child's ties to the current and proposed community and to extended family members"]*

(6) the anticipated impact of the relocation on the child; *[ABA Model Act: "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."*

(7) whether the court will be able to fashion a reasonable allocation of parental responsibilities between all parents if the relocation occurs;

(8) the wishes of the child, taking into account the child's maturity and ability to express reasoned and independent preferences as to relocation; *[ABA Model Act: "the views of the child, having regard to the child's age and maturity;]"*

(9) possible arrangements for the exercise of parental responsibilities appropriate to the parents' resources and circumstances and the developmental level of the child;

(10) minimization of the impairment to a parent-child relationship caused by a parent's relocation; and *[ABA Model Act: "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 a child, and that a continuing relationship with the other parent will endanger the health or safety of either the parent or the child." But that is, in a sense, contained within the provisions of what should be in a parenting plan, "[*] The personal information under items ... (8) of this subsection is not*

required if there is evidence of or the parenting plan states that there is a history of domestic violence or abuse, or it is shown that the release of the information is not in the child's or parent's best interests."

(11) any other relevant factors bearing on the child's best interests.

Flow Chart for 2016 Relocation Cases:

Parenting Plan Contents:

- The Parenting Plan should provide, "[*](8) a requirement that a parent changing his or her residence provide at least 60 days prior written notice of the change to any other parent under the parenting plan or allocation judgment, unless such notice is impracticable or unless otherwise ordered by the court. If such notice is impracticable, written notice shall be given at the earliest date practicable. At a minimum, the notice shall set forth the following:
  (A) the intended date of the change of residence; and
  (B) the address of the new residence;"
  The exception is, "[*] The personal information under items ... (8) of this subsection is not required if there is evidence of or the parenting plan states that there is a history of domestic violence or abuse, or it is shown that the release of the information is not in the child's or parent's best interests." *A copy of form language is contained at page 20, Paragraph C, of Jacki Birnbaum's excellent model parenting plan.*

Does the Current Judgment (MSA) Provide Restrictions for Moving out of State and Not Refer to Statutory Provisions Generally? It is an open ended question about whether to apply the new relocation law in some cases.

Do the 2016 Relocation Provisions Apply?
Parent who has either:
- equal access; or
- primary parenting time.

Initial Mileage Restrictions:

- **Collar Counties = 25 Miles**: Child's primary residence is in a collar county (defined as Cook, DuPage, Kane, Lake, McHenry, or Will) to another residence in the state greater than 25 miles. Relocation initially prohibited.

- **Other Areas = 50 Miles**: For those outside of the collar counties, then there is a 50 mile rule.

- **Outside State But within 25 Miles**: When the child's current primary residence can be changed outside the borders of Illinois but within 25 miles of the current primary

residence, this would be allowed.

Written Notice:

The parent who has either equal or primary parenting time must jump through the hoops that apply to relocation cases.

- Written notice of the relocation to the other parent under the parenting plan or allocation judgment.
    - A copy of the notice must be filed with the clerk of the court.
    - The written notice must then provide at least 60 days' notice unless this is "impracticable."
    - **Minimum Contents of Notice**:
      (1) the intended date of the parent's relocation;
      (2) the address of the parent's intended new residence, if known; and
      (3) the length of time the relocation will last, if the relocation is not for an indefinite or permanent period.

Non-Relocating *Signs* Notice:

"The relocation must be allowed." The court then modifies the parenting plan or allocation judgment to accommodate a parent's relocation as agreed by the parents, as long as the agreed modification is in the child's best interests.

Non-Relocating Parent Does not Sign or Parents Cannot Agree on Modification of Parenting Plan or Allocation Judgment: Parent seeking relocation must file a petition seeking permission to relocate.

See above standards.

What occurs when there is a consent to the relocation but the parties cannot agree on the parenting plan? In this case, the parent seeking relocation still must supposedly file a petition seeking permission to relocate. But this conflicts with the fact that the relocation must be granted. In fact, the only issue then would be reallocating parenting time under the guise of a petition seeking permission to relocate.

Comparison to ABA Model Relocation Act: Compare these factors to the ABA Model Relocation Act. The "domestic violence" factor is not in the Illinois amendments ["a history of or threat of domestic violence, child abuse, or child neglect." Overall, one can see that the Illinois law effectively is more restrictive in terms of how the standards are generally phrased as compared to the ABA's Model Act.

As stated, the new 10 plus one factors essentially replace what had been the so called *Eckert* factors. The Illinois Supreme Court in its 1988 *IRMO Eckert* opinion, establish the factors that Illinois courts had followed in deciding whether to allow custodial parents to move children out of Illinois. As *Eckert* aged, appellate court decisions significantly diverged in applying the *Eckert* factors. In the years following this decision it appeared that there was a gap among the districts regarding whether removal was essentially more permissive or more restrictive as to whether indirect benefits could be considered. It was widely believed that after Illinois Supreme Court made its important ruling in *Collingbourne*, no longer should there be a significant difference in treatment of removal cases based upon the district where the case is filed. The decision should have finally resulted in the pendulum being swung back toward the middle in terms of how removal cases are treated in Illinois. But as have previously written, in the cases following *Collingbourne*, removal / relocation proceedings remain highly unpredictable. These cases are all the more important because of the far more restrictive provisions for relocation as of January 1, 2016.

The *IRMO Matchen* (McHenry County to Wisconsin Dells), *Newton v. Sale, IRMO Stahl v. DeLeo* (Cederburg, Wisconsin) and *Johnson* cases, however, indicate that *Collingbourne* was not a revolutionary case in Illinois but that it still remains difficult to obtain removal in Illinois (as compared to most other states). However, the contrast between the decisions in one district -- the Second District -- indicate that the goal of uniformity remains elusive with court taking lenient stance in allowing removal in *IRMO Repond* and in *Main* while taking a restrictive stance in *IRMO Johnson (and Pisowicvz)*, *IRMO Stahl v. DeLeo* and in *IRMO Matchen*. In fact, two of these decisions seem to indicate that in the Second District the result may depend upon the panel of judges that hears a given case -- with the differing panels emphasizing different aspects of the *Collingbourne* decision.

2009 brought one of the more lenient cases in terms of allowing removal -- in a decision probably influenced by the fact that travel was essentially free where the father was an executive with United Airlines and where there would be indirect benefits (financial) due to the removal and the proposed removal. *IRMO Meeta Bhati and Ajay Singh*, 397 Ill.App. 3d 53 (1st Dist., 2nd Div. 2009). But this contrasts with the 2012 1st District decision in *IRMO Demaret*, 2012 IL App (1st) 111916 (January 2012). There the appellate court upheld the trial court's denial of removal to an executive mother with a significant pay increase due to her move – and this time only to New Jersey.

The first month of 2012 also brought another interesting contrast from the same district: a lenient and a restrictive Third District decision. This lenient Third District affirmed the trial court's decision granting leave to remove to the mother who obtained a job as a foreign service officer. *IRMO Coulter*, 2012 IL App (3d) 100973 (January 2012). And the restrictive decision was one where the appellate court reversed the trial court - in *Shinall*. Keeping with the thesis it is difficult to reconcile while the same appellate court chose not to reverse the decision in *Coulter* yet did choose to reverse the decision in *Shinall*. And the more recent lenient decision from the Third District was July 2012 in *IRMO Kincaid*, 2012 IL App (3d) 110511, where the appellate court affirmed the trial court's granting of removal to Texas where there was a support network of extended family, positives regarding career advancement as well as other factors favoring removal.

Of interest not just to basketball fans, 2011 brought us the *D. Wade* removal decision, granting leave to remove to Florida. But again, that was a decision which was likely influenced by unique factors: a mother with significant negative evidence involving alienation. *In Re D.T.W.*, 2011 IL App (1st) 111225 (2011).

And our most recent cases – both reversing the trial court's denial of removal are:

- A parentage case, *In Re Parentage of Rogan M.*, 2014 IL App (1st) 141214 (September 12, 2014) reversing the trial court's denial of removal and remanding the opinion; and

- A divorce case emphasizing the same point in my original article – the importance in many cases of what might be called the economic impairment argument – especially where that economic impairment involves the divorcing parent rather than their paramour / new spouse. *IRMO Tedrick*, 2015 IL App (4th) 140773 (January 2015).

I. **INTRODUCTION AND THEMES SHOWN BY SPREADSHEET**

In the seminal *IRMO Eckert* decision, the Illinois Supreme Court laid out five factors to determine whether a custodial parent should be allowed to remove a child from Illinois – and these have now been expanded to double this number with the 11th factor being a catch-all. With the *Eckert* holding, the supreme court hoped to consolidated divergent trends in the appeals courts, providing a unified removal rule. In February 1996, I co-authored an article titled, "Post-*Eckert* Trends in Child Removal: A review of Appellate Cases." Shortly after this original article was published back 1996, the Supreme Court (in April 1996) decided the *IRMO Smith* case (note that there is now a recent *IRMO Smith* appellate court case involving removal), in which the Court again tried to bring what had been divergent rulings back to the principles originally set forth in the *Eckert* decision. Because of the continuing difference among the districts, in 2003 the Illinois Supreme Court for the second time tried to clarify its opinion in *Eckert* so as to hopefully provide greater consistency in the treatment of removal in Illinois courts. *IRMO Collingbourne*. Despite three Illinois Supreme Court decisions, meeting this goal remains elusive. And clarity will be even more elusive given how dramatically the law changes with the 2016 rewrite of Illinois law on relocation.

Consider what may be called "conservative judicial activism." By this, I mean that the goal of the state's highest court should be to remedy the situation that occurs when there is a difference as to how a case is handled depending upon the location the case is brought. By accepting such cases for review in divorce cases, the high Court can best serve the public's interest. Prior to the Supreme Court's *Collingbourne* and *Smith* decisions, two cases -- *IRMO Gibbs*, a first appeals district case, and *IRMO Eaton*, a fourth district case -- illustrated that the determination of whether removal would be allowed depended upon the appellate district reviewing the case. In my original article I urged that among the appellate districts, the outcome often depended upon whether the custodial parent could demonstrate "economic necessity": in most districts the custodial parent had to demonstrate that the move for pressing economic reasons. While prior to the *Smith* decision, the appellate courts appeared headed in different directions with respect to removal, I had suggested that the single judicial district that was out of line with the rest of the state was the District where I practice in, the Second Judicial District (which had included

counties such as DuPage County, Kane County, Lake County and McHenry County, Illinois). It is not coincidental that the Illinois Supreme Court ruled chose to accept for review a Second District case in which the appellate court rejected what is referred to below as a consideration of any “indirect benefits” stemming from the proposed removal.

The author has analyzed all of the cases since *IRMO Eckert* using a spreadsheet format. The full spreadsheet as updated is available on www.gitlinlawfirm.com. Prior to the Supreme Court's *Smith* decision it appeared that the trend was somewhat towards allowing removal. The reason for the original *Eckert* decision was that the appellate decisions had become too permissive in allowing removal. It appears that the reason the appellate court accepted certiorari with respect to the *Smith* decision was to gently suggest that the pendulum had once again swung slightly toward the side of allowing removal too liberally.

The thesis of our original article was, "the first, fourth and fifth appellate districts allow removal upon showing of economic necessity, although this test has never been expressly articulated. The third appellate district almost always allows removal, and the second appellate district almost always denies removal." I had predicted after the *Smith* decision that the pendulum had swung slightly back to the middle -- with the appellate decisions being more unified than at any time in the recent past on this issue. But, as discussed below contrasts with decisions such as the recent *Singh* decision as against many much more narrow appellate decisions reveal that removal in Illinois remains extremely unpredictable with certain appellate court panels being pro removal and others being far more restrictive.

"Economic necessity" is not sharply defined. A parent may show economic necessity by showing he or she faces serious economic problems in Illinois, and that these economic troubles will be resolved in another state. Usually, the serious economic problems are long-term unemployment or underemployment despite concerted efforts to find work. Presumably, economic necessity works to allow removal because it offers direct benefits to a custodial parent. These direct benefits transfer to the child, and are sometimes called "indirect benefits." Often, pressing economic conditions would force the custodial parent to make the choice between staying in Illinois with his or her child and having an improved life.

This article begins with a summary of *IRMO Eckert* and *IRMO Smith*. It ends with the Illinois Supreme Court case of *IRMO Collingbourne* decision. On only one other area of Illinois family law is there a trio of Supreme Court cases -- that is, addressing personal and professional goodwill. For that line of cases there is relative clarity. But there remains a lack of clarity by the Illinois appellate courts regarding their treatment of removal cases.

Over the years I have developed a spreadsheet of all significant Illinois removal cases following Eckert. The spreadsheet shows several themes. But these themes can be overstated easily because a number of the cases are somewhat ad hoc. The principles, though, that can be culled by the case law are:

☞ **Economic Imperative** Remains a Key Factor.

First Subrule: Historically, a better case was made where a spouse's job was transferred.

But recent cases have more focused on cases where there was a significantly better job prospects for the custodian.

Second Subrule: Even with significantly better job prospects a generous parenting schedule or other factors may trump.

☞ **Distance** is Important But Often Can be Trumped by Other Factors.

First Subrule: If relocating a long distance the party seeking removal propose a generous parenting schedule in order to increase chances of success in the relocation case. For example, we had two cases involving a move to another country. Both involved substantial career advancements for the custodial parent. A key in each of those decisions was the father did not exercise all the parenting time he was awarded.

Second Subrule: A short distance does not necessary mean that obtaining removal is easy. It is not.

☞ The **Impact on Parenting Time of the Non-Residential Parent** is Critical.

First Subrule: The removing parent does better when she or he proposes a generous parenting schedule without a very substantial impact on parenting time.

Second Subrule: For the non-residential parent to contest removal, exercising his or her parenting time assiduously is critical. This is now a statutory factor, "(3) *** and specifically whether a parent has substantially failed or refused to exercise the parental responsibilities allocated to him or her under the parenting plan or allocation judgment."

☞ **Extended Family**: This is important but often not critical. The 2016 amendments for the first time name this as a specific factor, "the presence or absence of extended family at the existing location and at the proposed new location."

☞ **Age of the Children**: The age of the children can be important, especially if you are dealing with a very young child. This is because attachment theory, etc., addresses the importance of frequency of contact when dealing with young children. In fact, what was part of Illinois removal case law is now codified in the relocation law – "possible arrangements for the exercise of parental responsibilities appropriate to the parents' resources and circumstances and the developmental level of the child."

☞ **Reversals of Orders Granting Removal are Difficult**: If you win at the trial court, it is easier to obtain a reversal if removal were not granted than if removal were granted. Put another way: consider appealing more strongly if there are good facts and a denial of removal.

☞ **Overall Cases are Split, But...**: Published decisions are fairly evenly divided between cases in which removal was ultimately granted and not granted, although post-*Collingbourne*, we are seeing a few more cases where removal is ultimately granted.

This makes sense because *Collingbourne* was a somewhat pro-removal Illinois Supreme Court decision.

☞ **Removal to One State Outside 25 Mile Boundary May Mean Removal to All**: One more place where Illinois law is less than clear is whether removal from the State of Illinois, essentially allows removal to any state. The Fourth and Fifth Districts have weighed in on the subject and are split. See my 2013 case law discussion of the *Banister* decision and my spreadsheet regarding Illinois removal case law.

☞ **Virtual Visitation – A Misnomer**: In 2010, Illinois had adopted the first change to the law regarding removal in decades. This legislation had made clear that what some refer to as "virtual" visitation cannot be a substitute for actual parenting time but is the equivalent of phone contact. This 2010 legislation first defines "visitation" and "electronic communication:"

> (1) "Visitation" means in-person time spent between a child and the child's parent. In appropriate circumstances, it may include electronic communication under conditions and at times determined by the court.
> (2) "Electronic communication" means time that a parent spends with his or her child during which the child is not in the parent's actual physical custody, but which is facilitated by the use of communication tools such as the telephone, electronic mail, instant messaging, video conferencing or other wired or wireless technologies via the Internet, or another medium of communication.

Then it added subsection (c) was added to the removal provisions of the IMDMA:

> (c) The court may not use the availability of electronic communication as a factor in support of a removal of a child by the custodial parent from Illinois.
> (Source: P.A. 96-331, eff. 1-1-10.)

And note that these provisions were removed with the 2016 rewrite in that they only applied to non-parents. The 2016 amendments now provide that a parenting plan should address:

> (11) provisions for communications, including electronic communications, with the child during the other parent's parenting time;
> (12) provisions for resolving issues arising from a parent's future relocation, if applicable;
> (13) provisions for future modifications of the parenting plan, if specified events occur

II. ***Eckert – The Seminal Illinois Supreme Court Case***

Relocation cases involve application of the Illinois Marriage and Dissolution of Marriage Act under §609.2. In a sense, the goal of this was to codify the provisions that case law has fleshed out under the various cases. But the new law provides far more strict mileage provisions without even stating whether the mileage restrictions were road miles or "as the crow flies." Moreover,

while case law involving boundaries per mileage restrictions and fairly strict country guidelines were deemed inappropriate based upon case law, the new law incorporating what can be urged are somewhat arbitrary mileage restrictions – far more restrictive than what had been initially proposed, e.g., a 75 mile rule.

This section allows a court to grant leave to any party having custody of the parties' minor children to relocate the children from Illinois. As always, relocation must be in the best interests of the children. The section also sets the burden of proof upon the party seeking removal. The statute, therefore, sets the focus of a relocation inquiry on the children.

Prior to passage of the original removal statute, Illinois courts tended toward allowing removal. In *Gray v. Gray,*[1] the first appellate district found a trial court erred in denying removal. The first appellate district reasoned a court "should not oppose removal of the child unless there is a specific showing that the move would be against the child's best interests." The appellate court held that it is in a child's best interest to remain with the parent who has custody.[2]

IRMO Eckert applied the new IMDMA removal statute to shift the burden of proof to the removing parent.[3] The question is whether under the 2016 amendments the burden of proof is on the parent who has the burden of going forward with bringing the petition seeking to relocate or not.

In any event there were not just five *Eckert* factors but the factors for the court to consider in removal cases per *Eckert* had included:

1. whether the move enhances the **general quality of life** for the custodial parent and the children;
2. what the **motives** of the **custodial parent in seeking removal** are, i.e. whether removal is simply a ruse to defeat or frustrate visitation;
3. the motives of the **noncustodial parent in resisting** removal;
4. that it is in the best interest of the child to have a healthy and **close relationship** with **both parents** as well as **other family members**; and
5. whether a **realistic and reasonable visitation schedule** can be reached if the move is allowed.[4]

Focusing on the distance from Illinois to Arizona, the supreme court determined the policy behind the IMDMA -- including securing the maximum involvement and cooperation of both parents regarding the physical, mental, moral and emotional well-being of the children -- would not be served by requiring the noncustodial parent to bear the burden of proof to prevent

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[1]57 Ill.App.3d 1, 4 (Ill. App. Ct., 1st Dist. 1978).

[2]Id., citations omitted; see 1 H. Joseph Gitlin, *Gitlin on Divorce: A Guide to Illinois Matrimonial Law* §12.00 (3d ed. 2009) for a detailed discussion of the history of removal.

[3]119 Ill. 2d 316 (1988).

[4]119 Ill. 2d 316, 326-27 (1988).

removal.

II. *SMITH* -- THE SECOND IL SUPREME COURT DECISION AND LACK OF CLARITY WITH ITS AFTERMATH

In *IRMO Smith*,[5] the Illinois Supreme Court ruled that the trial court properly denied removal, despite indirect benefits of the removal for the children, when evidence showed that one of the children would suffer severe emotional problems if the removal were allowed. As is discussed below, the consideration of indirect benefits usually is under the guise of actually considering the economic necessity of a proposed move.

In *Smith*, the Third District Court of Appeals affirmed the trial court's judgment denying the mother's post-divorce removal petition in an unpublished opinion and in *Smith* the Illinois Supreme Court affirmed.

The Supreme Court looked to *Eckert*. The high court stated denial of the removal petition was proper, since the trial judge found removal to New Jersey would be severely detrimental to the mental health of one of the children, based upon expert testimony. Experts for the mother and father showed that the troubled child was suffering severely as a result of the friction between parents:

> We need not detail the extent of [the child's] emotional problems . . . The trial judge was correct to place great weight on the harm that a move to New Jersey would cause to [the child's] mental health in this case. Where, as here, the evidence shows that a child will be severely damaged by removal as a result of the child's emotional problems, this is a factor which weighs heavily against allowing the removal.

The Supreme Court in *Smith* rejected the mother's argument that the trial judge had not considered indirect benefits to the children:

> [T]he judge found that, despite the indirect enhancement factor, [the mother] had failed to show that an overall enhancement of the children's lives would result from the move. . . . The evidence further showed that the girls were very involved in school and community activities in Peoria. Although comparable schools and essentially the same activities were available to the girls in New Jersey, a move to New Jersey would require them to leave their familiar surroundings and establish new relationships with friends and community members. This would burden the children with stress and pressure, which is exactly what the court-appointed expert advised against. . .

It appears that the *Smith* court deliberately accepted certiorari in a case where it could approve of the consideration of indirect benefits in a case where the mother seeking removal would be

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[5]172 Ill.2d 312 (1996).

economically advantaged by the removal but where the evidence showed that the removal would not otherwise be within the best interest of the children.

As is addressed below, subsequent to *Eckert*, the most significant factor under *Eckert* with which the appellate districts have dealt is the first factor, the enhancement of the quality of the life of both the custodial parent and the children.

Since *Eckert* there have been at least 23 appellate court cases considering the issue of indirect benefits. The facts of *Smith* are somewhat typical of the cases which deal with indirect benefits. In perhaps a typical case, the stepfather will be transferred out of Illinois -- a good career move for him. The reasoning is that if it is a good career move for him, it serves the mother's best interest and what is good for the mother is good for the child.

Considering the number of appellate court removal cases which have been decided based largely on the issue of indirect benefits, and considering the fact that before the *Smith* decision, all of the appellate districts, except for the second, had allowed removal on the basis of indirect benefits, I had predicted the Illinois Supreme Court would accept an appellate court involving the issue.

What was curious about Justice Bilandic's opinion was that he made no reference to the earlier appellate court opinions considering the issue of indirect benefits. It is little wonder the Illinois Supreme Court revisited the issue in *Collingbourne* seven years later. The *Smith* opinion merely noted that the trial court properly considered the indirect benefits and then rejected this as a persuasive reason for removal. Justice Bilandic would have been made aware of the indirect benefit removal cases. But the majority in 1996, deliberately chose not to refer to these cases believing that the Supreme Court had already set forth the appropriate standards in *Eckert*.

Regarding indirect benefits, the opinion stated:

> Here, the trial judge wrote in his opinion that, although [the mother's] life may be enhanced by moving to New Jersey, where she could join her new husband, there had been no showing that the children's lives would be enhanced. [The mother] asserts that the trial judge failed to consider the indirect benefits which would result to the children from the enhancement of her quality of life. See *IRMO Pfeiffer*, 237 Ill.App.3d 510, 514 (1972) (noting that a mother's establishment of a new and successful marriage relationship would enhance the mother's quality of life and in that way would indirectly enhance the child's quality of life). We are not persuaded that the trial judge failed to consider the indirect benefits which would result to the children from the enhancement of [the mother's] life should the removal be allowed. Rather, the judge found that, despite the indirect enhancement factor, [the mother] failed to show that an overall enhancement of the children's lives would result from the move.

Thus, *Smith* stands for the proposition that consideration of indirect benefits is proper and that the trial court should consider indirect benefits to the children from the proposed removal. But while the trial court may consider the indirect enhancement to the children's life by the improvement in economic lifestyle, the mother in this fact specific case failed to show that there would be an overall enhancement of the children's lives as a result of the move.

At the time I wrote that I would have liked to have seen the high court take a clearly defined stand on the issue of indirect benefits -- as it ultimately needed to do with the *Collingbourne* decision.

A. **The First Appellate District - Lenient Where Economic Incentive to Removal**

2009 *Bhati and Singh* Case: The First District remains lenient in terms of allowing removal where there is a significant economic advantage to the removal as can be seen by the December 2009 decision in *IRMO Bhati and Singh*. The mother appeared from the order denying her petition for leave to remove the child to North Carolina. The parties, who were both of Indian descent, were married in 1995 in India. The father, Ajay, was living in the Chicago area at the time of the marriage and the mother, Meeta, moved from India to Chicago after the wedding. They purchased a two bedroom townhome in Schaumburg, in which they resided, and Sonia was born in October 2001. Ajay was and is an executive with United Airlines. At the time of the removal hearing, he earned $400,000 a year. The divorce judgment was entered in 2005. The ex-wife was worked for RSM McGladrey and earned a yearly salary of approximately $60,000. She had primary residential custody. The Father's parenting time was alternating weekends from Thursday to Monday and one night overnight each week. The father had three weeks parenting time during the summer. The daughter had just completed first grade.

Regarding other pertinent facts, the appellate court noted:

> Meeta testified that since her divorce, she has felt like a "pariah" or social outcast in the community. She noted that a single mother in Indian culture is ostracized and not given much respect. As a single mother, Meeta receives few social invitations and primarily socializes with other single mothers. Meeta is currently engaged to Dr. Viren Desai, who is also of Indian descent. They met through an Indian social networking website that brings people of Indian descent together for the purpose of marriage. She and Dr. Desai first began communicating with one another in April 2006 and met in person in May and became engaged that October. Dr. Desai is a physician who resides in Fayetteville, North Carolina. He is also divorced and shares custody of his two children who live nearby.
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> Meeta stated that if the court granted her petition for removal, she would not work and would be a stay-at-home mother to Sonia. Meeta and Sonia travel about once a month to visit Dr. Desai in North Carolina and Sonia has become very close to his daughter, Bianca, who is about two years older than her. Dr. Desai travels to Schaumburg to visit Meeta and Sonia about once a month as well. The plane ride from Chicago to Raleigh-Durham, North Carolina, is about 1 hour and 45 minutes long, and then the drive to Fayetteville is about 1 hour long. Meeta described Dr. Desai's home as a large, four bedroom, four bathroom home with a big backyard, swimming pool ... located in a gated community of single family homes. Sonia would attend Fayetteville Academy, a private school close to Dr. Desai's home, and where his two children also attend. The school includes grades from kindergarten to twelfth grade and offers many after school programs and sporting activities. Dr. Desai's office is also located close to his home. He is a member of the country club in Fayetteville, which has a golf course, tennis courts, swimming

> pool and dining facility. Dr. Desai has a large family, which gets together frequently to celebrate various holidays and birthdays. Meeta and Sonia have been welcomed into his family. Dr. Desai is also a member of various Indian organizations in Fayetteville and Raleigh-Durham that often host social gatherings.
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> Meeta testified that if she and Sonia were permitted to move to North Carolina, they would be able to spend more time together because Sonia would not need to be in daycare and Sonia would have more time for extracurricular activities and more of an opportunity to play with children from her school and the neighborhood. Meeta also stated that Sonia will be able to observe Meeta in her new role as a married woman, which Meeta thinks is important for Sonia. Meeta stated that Sonia and Bianca already consider each other stepsisters and love one another.
>
> Meeta further stated that to minimize the disruption of moving, she would ensure that Sonia was available to visit with Ajay either in Chicago or in North Carolina as much as possible. Meeta has a cellular telephone and a web camera that Ajay and Sonia can use to communicate. Meeta stated that she would keep Ajay informed about Sonia's school and her extracurricular activities. She also proposed that Sonia could visit Ajay during her spring break, half her summer vacation and they could alternate holidays as they currently do. Meeta denied threatening Ajay in any way if he did not agree to the move to North Carolina.

There was, however, negative evidence about the ex-wife. This included the following recap by the appellate court:

> He stated that around September 2006, Sonia told him about moving to North Carolina, which "completely shocked" him because Meeta had never said anything to him about it. As a result, he and Meeta agreed to meet at Starbuck's to discuss the situation. Ajay claimed that Meeta gave him 24 hours to decide if he would agree to removal and that if he did not agree, she would file a petition in court. Ajay further claimed that Meeta told him that she and Dr. Desai would make his life a "living hell" in that they would file lawsuits against him, they would send letters to his boss, and would make his life a difficult financial hardship if he did not agree. Ajay stated that anonymous letters were written to the CEO and CFO of United Airlines as well as the head of human resources concerning him and accusing him of things he never did.

The entire case should be reviewed in detail because removal cases are inevitably fact sensitive. A 604(b) was appointed to determine the impact of the proposed removal on the emotional, psychological and physical health of the daughter as well as the impact of the removal on the father daughter relationship. Regarding the 604(b) report, the appellate court noted:

> [T]he report discussed the concept of "protective factors," which were described as "the residential parent's sincere commitment to the involvement of the other parent, evident in frequent sharing of information, business-like and effective

> communication about the child, flexibility about time and working with the other parents whenever appropriate." Dr. Star concluded that in this case, protective measures "do not seem evident." Specifically, her report stated "[w]hile [Meeta] has allowed [Ajay] his parenting time without difficulty, she does not inspire confidence due to her apparent attempts to coach the child, her quasi-negative remarks about [Ajay] to Sonia, her exclusionary policy regarding decisions about Sonia's school, activities and medical matters and her willingness to manipulate situations to her advantage in an attempt to make [Ajay] look bad." The report concluded that "[t]he overall effects point to a potentially negative outcome to Sonia's adjustment and development immediately and in the future and a high risk for damage to her relationship with [Ajay]."

In analyzing the removal factors the appellate court first noted that the general quality of life for the custodial parent and child factor favored removal. Regarding the motives of the mother in seeking removal, the appellate court stated first stated that her motives were genuine and sincere regarding economic improvements but also noted that, “Meeta's motives insincere in that she had "failed to embrace the spirit" of the joint parenting agreement and left the court with the impression that she would be pleased if she did not have to interact with Ajay as frequently as she was obligated to do. The court further found that in this respect, Meeta's motives were intended to frustrate Ajay's visitation.” There were no issues regarding the father's motives in resisting the removal in the eyes of the trial and appellate courts. The fourth factor is the effect on the non-custodial parent's visitation if removal were granted. Regarding this factor the appellate court simply noted the finding by the trial court that the father had been “diligent in exercising all the parenting time afforded him in the parties' joint parenting agreement and routinely seeks additional time with Sonia.” So the focus was on the fifth factor – whether a realistic and reasonable visitation schedule could be reached if removal is allowed. The appellate court stated that financially this was quite possible because travel would be at essentially no cost. The appellate court, however, stated that this factor, “became irrelevant when the court considered the lack of "protective factors" as described by Dr. Star.

The trial court had noted that the move would substantially impair the father's regular and ongoing parenting time and that the emotional toll on the daughter would be, “too high a price to allow removal.” The trial court also noted that the quality of time allowed would be substantially than the quality under the current visitation schedule.

Somewhat surprisingly, the appellate court commented favorably on the trial court's findings except as to the fourth factor: "We note that the court found that any proposed schedule would substantially impair Ajay's parenting time with Sonia; however, the consideration is whether a realistic and reasonable schedule can be reached. This factor weighs in favor of removal."

In an extremely generous pro removal stance the appellate court concluded:

> Here, we are presented with a situation in which some of the *Eckert* factors weigh in favor of as well as against removal. As stated above, no one factor is controlling and a determination of the best interests of the child must be made on a case by case basis. In this case, we find [inconsistent with the trial court's findings] three of the factors in Meeta's favor, namely, that removal would

> enhance the quality of life for both Meeta and Sonia, Meeta's motives in seeking removal are genuine and a reasonable visitation schedule could be established. The remaining two factors in Ajay's favor, that his motives for resisting removal are genuine and that his visitation with Sonia would be diminished, do not outweigh the other factors. This determination should not be interpreted to mean that removal is in Sonia's best interests because there were three factors in Meeta's favor and only two factors in Ajay's favor. Rather, it is the nature of those factors in Meeta's favor that lead to the determination that removal is in Sonia's best interests. The fact that the move will enhance the quality of life for Meeta and Sonia, that Meeta is seeking to move to marry Dr. Desai and that a reasonable visitation schedule could be established, weigh heavily in our determination that in this case, removal would be in Sonia's best interests. We find the court's determination that removal was not in Sonia's best interests to be against the manifest weight of the evidence. A review of the record leads to the conclusion that in this case, the opposite conclusion is clearly evident.
>
> We note that a child is neither a chattel that can be split between two owners nor an object in which any one person can hold a possessory interest. When drafting the removal statute the legislature provided that the best interests of the child were paramount. If removal results in an enhanced quality of life for Meeta and Sonia, then the fact that Ajay's visitation with Sonia would be diminished, should not overcome the other benefits to Sonia, which the court noted were numerous. We conclude that removal to North Carolina is in Sonia's best interests and the court's findings denying removal are against the manifest weight of the evidence. Meeta has met her burden of establishing that the petition for removal should be granted.

Justice Hoffman's dissent is better reasoned that the majority opinion in light of the deference that is supposed to be given to the trial court's decision. Justice Hoffman correctly urges:

> The majority has correctly set forth the standard of review in this case; namely, the manifest weight of the evidence. However, instead of according the trial court's decision the deference it is due (*IRMO Collingbourne*, 204 Ill. 2d 498, 522 (2003)), the majority appears to have usurped the fact finding function of the trial court and decided this case de novo. As I believe that the trial court's well-reasoned order is not against the manifest weight of the evidence and should be affirmed, I dissent.

The dissent pointed out the trial court's finding that only one *Eckert* factor favored the removal, i.e., the indirect benefit – general quality of life factor.

2012 *Demaret* Decision Denying Removal Where No Economic Necessity Despite Significant Pay Increase for Executive Mother: The *IRMO Demaret* decision follows the economic necessity thesis laid out in this article – that is if all other factors are close when there is an economic necessity removal will likely be granted but in close cases without an economic necessity, removal is an uphill battle. *IRMO Demaret*, **2012** IL App (1st) 111916. The 2006 divorce judgment incorporating the parenting agreement awarded the mother sole custody of the

parties' four children. The father received parenting time alternate weekends and one evening per week. He also had a right of first refusal when the mother was out of town for work. At the time of the divorce the mother expressed concerns regarding the father's alcohol consumption. The parenting agreement contained provisions regarding the father's alcohol use during his parenting time. In July 2010 the mother filed a petition for removal seeking to move the children to New Jersey.

From 2001 until July 2010, the former wife (Elizabeth) worked for Arthur J. Gallagher (Gallagher), servicing clients in their international operations. In 2007, her gross income was $266,933; in 2008, she earned $293,176; and in 2009, she earned $263,263. Her job required her to travel periodically, both within the country and internationally.

The appellate court then summarized the Elizabeth's next choices:

> In December 2009, Elizabeth began exploring an employment lead with Marsh, a company located in New York. Elizabeth knew that accepting a job with Marsh would require that she relocate to the New York area. In June 2010, Elizabeth executed an employment contract with Marsh. She would begin with a gross salary base of $245,000, which would increase to $275,000 upon relocating to the New York area. She would also receive a minimum of $125,000 in a guaranteed bonus and $75,000 in stock options. According to Elizabeth's testimony, her annual salary would be a minimum of $475,000, with the possibility of additional bonuses. After signing the contract with Marsh, Elizabeth informed James of her new employment and her intent to move to New Jersey with the children. She resigned from her job at Gallagher.

In addition to earning more money at Marsh, Elizabeth would be required to travel less than when she worked at Gallagher. Work-related travel would be on a "need driven" basis. While at Gallagher, Elizabeth traveled 30 to 35 times per year. At Marsh, she would travel less often, but her travel would more frequently take her out of the country. Marsh also provided better medical benefits with lower out-of-pocket expenses. Her commute from her anticipated home in Middleton to New York City would be shorter than her Chicago-area commute to Gallagher by approximately 10 minutes. According to Elizabeth, the shorter commute time and reduced travel would give her more time at home with the children.

Other factors of interest were the fact that Elizabeth had extended family on the east coast since her parents lived five miles from Middleton, and her sister lived in D.C. The appellate court stated:

> In New Jersey, the children would have a nanny or Elizabeth's mother would take care of them when Elizabeth could not be home. In Illinois, the children have a nanny and at times Elizabeth's mother flies in to stay with the children when Elizabeth travels. James also cares for the children in accordance with his right of first refusal.

The former wife pointed out that flights to Newark leave essentially ever hour and are quite

affordable – about $225 for a round trip ticket at the time of trial on removal. She offered to pay her former husband $5,000 annually for travel expenses. She envisioned a schedule for parenting time similar to the current schedule but granting the father longer blocks of time. She envisioned her former husband flying to New Jersey on various alternating weekends and staying with Elizabeth's parent's home – who had a separate apartment contained within the building structure of their house. There were many other significant facts in this decision.

I liked the appellate court's quote from *Collingbourne* summarizing the balancing of the *Eckert* factors:

> In assessing best interests, the circuit court should keep in mind two salient considerations. First, "a child has an important interest in 'maintaining significant contact with both parents following the divorce.' " Id. at 522 (quoting *Eckert*, 119 Ill. 2d at 325). Second, the quality of a child's life may be enhanced from the child's experience "stemming from the [custodial] parent's life enhancement."

Regarding the manifest weight standard the decision stated:

> A circuit court's decision on removal is entitled to substantial deference because the judge, as trier of fact, directly observes the parties from which he or she can " 'evaluate their temperaments, personalities, and capabilities.' " *Eckert*, 119 Ill. 2d at 330 (quoting *Gallagher v. Gallagher*, 60 Ill. App. 3d 26, 31-32 (1978)). A court of review will reverse only if the appealing party can demonstrate that the decision is against the *manifest weight* of the evidence such that the ruling constitutes a *manifest injustice*. *Eckert*, 119 Ill. 2d at 328. "A decision is against the manifest weight of the evidence where the *opposite conclusion is clearly evident or where the court's findings are unreasonable, arbitrary, and not based on any of the evidence*." *In re Marriage of Matchen*, 372 Ill. App. 3d 937, 946 (2007) (citing *In re Marriage of Main*, 361 Ill. App. 3d 983, 989 (2005)). (Emphasis added.)

The appellate court then reviewed each *Eckert* factor and ultimately ruled that the decision was not against the manifest weight of the evidence.

Recall what I have referred to as my “economic necessity” article regarding removal and the general quality of life factor. The appellate court stated:

> The trial judge characterized Elizabeth's claim of additional savings for college expenses based on her increased salary as "self-serving" given that Elizabeth earned a substantial salary while at Gallagher. Elizabeth argues that she is the sole source of financial support for the children as James makes only small contributions; even if this is true, she has not shown that she was unable to support her children during her employment at *Gallagher*. *In other words, leaving her job in pursuit of more money for the children was not a necessity.* Although the trial judge's statement that Elizabeth's most recent gross income at Gallagher of $263,000 is "substantially similar" to her base earnings of $475,000 at Marsh is questionable, *the trial judge reasonably concluded that a higher*

salary alone is not enough to favor removal on the first factor.

Recently, the *DTW* case is consistent with the thesis that the First District remains one where is presented strong economic advantage facts, removal is likely to be granted, although I believe that the cornerstone of involves strong evidence of alienation. *IRMO D.T.W and S.L.W.*, **2011** IL App (1st) 111225. This case involves a professional basketball player awarded custody and granted leave to remove the child to Florida. For professional basketball fans, we all know who this case involved: a native son who chose not to sign with the Chicago Bulls.

DTW involves an award of custody against what was the primary caretaker of the children. The first issue was one seeking to reverse the sole custody decision based upon the manifest weight standard. There was evidence of "alienation" in this case that the mother argued favored an award of custody to her. The appellate court found essentially that the trial court properly considered the evidence that the majority of alienating behaviors were on behalf of the mother in its award of custody. The case stated:

> We are unpersuaded by respondent's argument that before awarding sole custody to D.T., the court should have provided her with an opportunity to avail herself of professional help to change her alienating behavior as recommended by Doctor Amabile. In support of this argument respondent relies on *In re Marriage of Bates*, 212 Ill. 2d 489 (2004), and *In re Marriage of Divelbiss*, 308 Ill.App.3d 198 (1999). Respondent points out that in the May 6, 2010, report, Amabile recommended joint custody with respondent as the primary residential parent and advised respondent to seek counseling with the goal of helping her learn to support the children's relationship with D.T. In her July 26, 2010, report, Amabile concluded that sole custody should be awarded to respondent and recommended: respondent seek counseling with a professional who is familiar with the process of alienation; the court appoint a parenting coordinator to help the parties start communicating with each other and someone to monitor the family to ensure that the process of alienation is diminishing; and specific court orders that address visitation times and phone contact.

The discussion regarding the nature of custody evaluations is significant:

> We note that Doctor Amabile's recommendations are not controlling. Prince, 261 Ill.App.3d at 615. A recommendation concerning the custody of a child is just that, a recommendation. Prince, 261 Ill.App.3d at 615-16 (citing *In re Marriage of Felson*, 171 Ill.App.3d 923 (1988)). A trial court is free to evaluate the evidence presented and accept or reject the recommendation in whole or in part. *Prince*, 261 Ill.App.3d at 616. Just because a trial court followed an expert's recommendations in *Bates* and *Divelbiss* does not mean the same result should necessarily follow in this case. This is especially so where, as here, Amabile: was not aware of certain instances of alienation on respondent's part at the time she filed her reports and recommendations; noted that sole custody with respondent was a less desirable arrangement than joint custody because of the risk that respondent would abuse her authority and continue to alienate the children from

> D.T.; expressed concerns as to whether respondent would follow court directives; acknowledged that respondent tried to manipulate the court system; and testified at the custody trial that respondent's alienating behavior had progressed beyond the moderate range and was entering the severe range.

Regarding the actual evidence of alienation during the case, the appellate court state:

> Contrary to respondent's argument, the record shows that her alienating behavior worsened during the two-year course of the custody proceeding. The record also shows that respondent had ample opportunity to comply with Doctor Amabile's recommendations to seek counseling but failed to do so.

The most remarkable portion of the decision addressed the trial court's granting leave to remove from Illinois to Florida:

> Respondent claims the court erred in prompting and allowing D.T. to a file a petition for removal after he had rested his case. In the alternative, respondent maintains the court erred in granting D.T.'s petition.

The appellate court reviewed each of the *Eckert* factors and affirmed the granting of the removal – even though a removal petition was not specifically filed until immediately before the close of the proofs.

C. **The Fifth Appellate District**

The fifth appellate district holdings appear in line with the first and fourth appeals districts. In the three cases dealing with removal, *Zamarripa* figures prominently.

The Other *Smith* Case – The most recent Fifth District case is *IRMO Smith*, 2013 IL App (5th) 130349, where the appellate court reversed the trial court's alternative orders – one where the mother could retain primary residential custody if she continued to live in Illinois and alternatively where the father would be awarded custody if the mother did not return to Illinois in 30 days. The appellate court stated:

> Such an alternative order implies that the minor child's best interest will literally change overnight, depending on whether Mother opts to relocate to Illinois within 30 days or stay in Ohio. Such an immediate and radical shift in the determination of what constitutes the "best interests" of the child in a custody proceeding is not contemplated by the kind of alternative order entered by the trial court. It certainly is not contemplated by section 602 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/602 (West 2010)), which requires a detailed analysis of those factors to be considered when entering a custody award. Here, the court ignored the statutory mandate and placed Mother in an impossible situation by creating an "either or" decree that had very little to do with the "best interests" of the child. We also do not understand why, given some of the reasons upon which the court based its decision to require Mother to return to Illinois immediately, the court would allow Mother to retain primary physical custody at

> all, particularly in light of the fact that the court also gave Father sole decision-making authority over their son. Moreover, for Mother to comply with the court's order to return to Illinois in order to retain primary custody, she will compromise both the financial stability and security of herself and her son. If she returns to Illinois, the present custody and visitation schedule will remain essentially unchanged, but the child will be uprooted from the home and daycare he has now known for over two years. Additionally, as maintenance was denied, Mother will have no income with which to provide for the child, other than child support.
>
> Forcing Mother to choose between being gainfully employed or being unemployed in order to have primary custody of her son cannot be in the best interest of the child. *We further have trouble with the court's decision to allow Father to have the sole decision-making power for the child, whether or not Mother returns to Illinois*. We fail to see how this is in the child's best interest, especially when such a decision undoubtedly will result in additional changes given that Father has exhibited ambivalence toward a number of decisions regarding his son's well-being.
>
> Clearly Mother and Father have different personalities and styles of living. Father is more laid back and relaxed in his approach. Mother, who admittedly has a more rigid personality, is dedicated to the child's best interest, from his nutrition and healthcare to his daycare, schooling, and personal safety. This is not unnatural in light of the fact that she is a first-time mother and has primary physical custody of the child. Under the circumstances presented, we conclude that the court's ruling was arbitrary and against the manifest weight of the evidence.

The appellate court concluded:

> While we reverse the court's decision denying Mother's request for permanent removal of the minor child to Ohio, we regretfully are forced to remand this cause for additional proceedings. We, however, are remanding this cause on the sole issue of visitation. We are not in a position to set up a workable visitation schedule given that the child, now older, will be entering school in the near future.
>
> In summary, we are reversing the court's alternative custody orders and are allowing Mother to remain in Ohio and retain primary physical custody of the parties' minor child while granting joint custody to Mother and Father.

The decision also touched in the connection between the maintenance decision and removal.

> We also find fault with the court's denial of temporary maintenance if we were to uphold the court's decision. Given that Mother was ordered to return to Illinois within 30 days in order to retain primary physical custody, an award of, at a minimum, temporary maintenance would have been in order. If Mother agreed to return, she would have been faced not only with relocation expenses but also with

> the loss of her full-time income. While the parties' marriage was not long in duration, and Mother is more than capable of supporting herself, she would not have been able to do so immediately once she was forced to give up another lucrative career position. Clearly the court's order was unjustified if Mother were forced to return to Illinois. Given that we are reversing the denial of Mother's request for permanent removal of the child to Ohio, and, as a result thereof, Mother will not need maintenance, we need not address the issue any further.

Sale: The Fifth District demonstrated the fact that post-*Collingbourne* although there may be an economic improvement in the custodial parent's lifestyle due to a remarriage (with benefits that might indirectly trickle down to the child) in the situation where the proposed move is made virtually immediately after the divorce decree (and joint parenting agreement), the courts will closely analyze the effect upon the non-custodial parent's parenting time. *IRMO Sale*, 347 Ill.App.3d 1083 (Fifth Dist. 2004). In *Sale*, the parties had one child, who was born in 1997 and the parties separated in October 2001. The wife filed her divorce petition in February 2002 and the divorce judgment and JPA were entered on October 8, 2002. Under the JPA the former husband had parenting time from 5:30 to 8:00 p.m., and on alternating weekends, etc. On October 9th, the ex-wife remarried a man from Washington state and on the 29th of that month she filed her petition to remove. The evidence indicated that the ex-wife earned $8,000 in Illinois and would earn $10,000 in Washington. However, her new husband owned a three bedroom home located on 25 acres. He earned $62,000 annually as one of four partners in a steel fabricating business. The home was only a few blocks from the school where the minor child might attend. There was evidence as to class size being smaller in Washington state but there was no evidence of "test scores or benefits or drawbacks of either school." The ex-wife testified that day care would be eliminated in the state of Washington because of the work schedules of the ex-wife and her new husband. There were several relatives in Illinois including cousins with whom the child had regular contact. The ex-husband testified that neither he nor his family had the financial means to travel to Washington should the removal be granted. The trial court stated, " I found the testimony concerning the improvement in her lot on that point to be rather speculative. Quite frankly, it's obvious to this [c]ourt that the-that this move would not be taking place but for the relationship with Mr. *Newton*... But the point is that is a relationship taken up that results in a change almost immediately-actually it was in anticipation of the impending dissolution." The court then stated, “I certainly-I was impressed by Mr. *Newton*. It has absolutely nothing to do with him. I'm quite willing to believe that-that this is an improvement in [the petitioner's] lot in life. If the relationship with Mr. *Newton* appears to be a loving relationship, and I'm sure that's quite the case, but the problem is that coming right on the heels of the Joint Parenting Agreement, I don't believe it's justified to the extent of removing a child and taking him as far away as you can in these United States[-] away from the other parent, and for those reasons, I'm denying the application for removal.”

The appellate court examined the economic impact and stated, "We agree that the petitioner's life stands to be enhanced by the economic security her new husband can provide by virtue of his job and home, but we must look to more than economic factors." However, the court found that noneconomic factors did not favor the removal. First, the appellate court pointed out that there was no evidence showing the improvements of schools in Washington versus Illinois. Additionally, there was no evidence as to better or more plentiful cultural or recreational opportunities in Washington. As to the testimony that the work schedule in Washington would

be favorable the appellate court commented that the ex-wife worked part time in Illinois. As to the step-father's potential involvement the appellate court commented, "Nor is it enough that the petitioner's new husband appears to be sincere in his desire to be a good stepparent, because the facts also indicate that the biological father is more than willing to be involved in D.S.'s life and assist him in extracurricular activities as he matures." Regarding the relationship with relatives the appellate court noted the close relationship with grandparents, aunts and uncles in Illinois and therefore stated that the relationships with the child's extended family would certainly suffer if removal were granted. Thus, the court stated, " Overall, the testimony did not indicate that D.S.'s quality of life would improve by removing him from Illinois."

Regarding the effect upon the father's parenting time and whether a realistic and reasonable visitation schedule could be accomplished, the appellate court noted that the father had been diligent in exercising his visitation. The mother proposed that if removal were granted, the father could have parenting time for the majority of the holidays and the majority of the summer (excepting the first two weeks and the last two weeks of the summer). The appellate court stated, "This schedule would not only reduce the number of actual days the respondent sees his son but also leave large gaps in time between visits. We agree with the respondent that this would not assist him in maintaining a close relationship with his son, especially as D.S. matures and develops his own friendships. It will become increasingly difficult for D.S. to leave his friends for the extended periods of visitation proposed by the petitioner."

It appears that the timing element of the case was critical where the appellate court specifically noted, "The petitioner is correct that there is nothing to prohibit her from petitioning for a removal any time she desires; however, we believe that the fact that she did so three weeks after signing a joint-parenting agreement was a relevant factor for the trial court to consider. It is also relevant that the petitioner married as quickly as she did after her divorce and that she married a man she had not spent much time with prior to the marriage, due to the distance between them." Therefore, the appellate court ruled that the trial court's decision was not against the manifest weight of the evidence and affirmed the trial court.

IV. **APPELLATE DISTRICTS THAT DID NOT ADHERE TO THE NECESSITY RULE**

The "indirect benefits" test plays a prominent role in those districts in which economic necessity is not a major factor. Indirect benefits are benefits to the parent. The benefits are deemed benefits to the child, on the theory that a better life for the custodial parent must have positive effects on the child. The second district rejects indirect benefits to the child as a basis upon which to allow a removal. The third district, on the other hand, recognizes indirect benefits to the child and has applied the test so liberally as to allow virtually all removals. Because of these polar extremes regarding indirect benefits in the second and third districts, no economic necessity doctrine has emerged.

A. **Second Appellate District**

Following *Eckert*, the second appellate district historically had not accepted indirect benefits as a basis for removal, focusing instead on the direct benefits to the child, economic necessity has

never provided a compelling basis for removal.

In *IRMO Collingbourne*, 332 Ill.App.3d 665 (2nd Dist. 2002) the second appellate district appellate court had ruled that it was insufficient to focus only on the improvement in the custodial parent's life because this is significant only to the extent that it increases and furthers the child's quality of life. The Second District appellate court reversed the decision of the trial court and ruled that direct benefits of the removal must be proven. The Illinois Supreme Court reversed this decision in 2003. (See further discussion below). Accordingly, I will only focus on post-*Collingbourne* Second District case law.

***Stahl* - Move to Wisconsin Not Allowed**: In 2004, the Illinois Second District appellate court appeared to give short-shrift to the *Collingbourne* Supreme Court decision. *IRMO Stahl v. DeLeo*, 348 Ill.App.3d 602 (2nd Dist. 2004) (Justice O'Malley). In *Stahl*, the Second District affirmed the trial court's determination that mother failed to prove that removal of children from Illinois to Wisconsin would be in children's best interests and found that the ruling was not against manifest weight of evidence. *Stahl* involved a proposed move from Kane County to Cederburg, Wisconsin (a picturesque city 20 miles north of Milwaukee in Wisconsin with many B&Bs, etc.) In *Stahl* the mother was engaged to a man who lived and worked in the Cederburg area.

In *Stahl*, the Second District appellate court stated simply that the trial court had properly considered all *Eckert* factors and direct as well as indirect benefits to children in its determination. The trial court then rejected the mother's argument that the decision was in direct contravention of the Supreme Court's *Collingbourne* decision. It was noteworthy that one justice of the three justice panel dissented (Justice Bowman).

***Matchen* -- Another Move to Wisconsin Not Allowed**: In 2007, the Second District appellate court again appeared to take a restrictive reading of the *Collingbourne* decision. *IRMO Matchen*, 367 Ill.App.3d 695 (2nd Dist., 2007). The mother appealed from the order of Judge Michael Feetterer denying her petition for leave to remove the parties' two minor children from Illinois to Wisconsin. On appeal, the mother argued that the trial court findings were against the manifest weight of the evidence. The appellate court affirmed the decision of the trial court. In this case, the mother was engaged to an individual who after working 22 years in Hoffman Estates retired to 88 acres of land in the Wisconsin Dells area that are held in a trust for him and his brother. The land has been in his family since 1955. The mother was engaged but had not yet married her prospective new husband – pending the results of the removal hearing. The mother was a house cleaner who worked fifteen hours weekly and had a relatively nominal gross income (under $8,000 annually). The mother further testified that she currently rented a "run-down, three-story home, one block from Highway 120 in McHenry." She testified that there is constant traffic in front of her house and to other problems with the rental property and location. There was also significant testimony as to the advantages of the proposed new property in Wisconsin: 88 acres, quite neighborhood, three bedroom house, pond, etc. There were extended families in both locations. Questions of the wife's fiancé as to the possibility of moving back to Illinois included the following:

> A: Well I would have to say where I live now it's been a 30 year dream and I have been working on this very very hard for the

> second half of my life to develop what I have. It would be an extremely difficult decision. It would be hard. I suppose if I had to -- I can't sell the property because it's in a trust. It can't be divided or sold so certainly I would like to reside somewhere in a rural area. I pretty much had my fill of the city.
>
> Q: Would there be any place in Illinois that you would consider living?
>
> A: More likely it would be back in the farmlands again south. I enjoy the south.

The fiancé, testified that if removal were not granted that he did not intend to break off his relationship. However, he stated that the financial assistance he provided would be difficult to maintain if removal were not granted. The mother proposed that the father have an extra week in the summer. The mother also proposed that in lieu of the one evening per week that the father could have three day weekends if such a weekend occurred when he had the children. In addition, she proposed that the father could have an additional hour for Sunday drop-off time (to 7:00 p.m.) She proposed meeting the father half way for pick up and drop off for the 1.5 hour trip each way. The father objected to the loss of 52 weekday visits. Both children testified in camera that they did not want to move to Wisconsin. The court found that it was unclear that the move would enhance the general quality of life for the children because of their strong ties to family, friends and the McHenry community.

The court found that, "while [respondent's] proposed visitation schedule appears reasonable at first blush, the court will not make Jeffrey and Jessica change schools, leave their friends and much of their family, sit in a car for six hours every other weekend in order to see their father, and eliminate their time with their father during the week, simply because Mr. Mayer chooses not to move if he can avoid it." The court further found that the negative aspects of the children's current living situation in McHenry exist, in large part, due to the mother's decision to work only 15 hours per week. (She testified that she had not looked for other work in the past two years).

Of significance the appellate court agreed with the trial court's finding that the:

> respondent's proposed schedule was reasonable only "at first blush." This conclusion is supported by the record. For example, making up for the loss of weekday visitation by offering petitioner time with the children on three-day weekends initially appears reasonable. But, upon closer examination, it appears respondent offers those weekends only if they happen to fall on petitioner's already-scheduled weekends. This would do essentially nothing to offset the 52 lost weekdays per year. Also at first blush, offering petitioner alternating spring breaks appears reasonable, but, upon closer examination, it is clear that he is already entitled to alternating spring breaks pursuant to the dissolution judgment.

The appellate court commented that the father exercised his parenting time "religiously." The dissent by Justice Bowman should be noted.

***Repond* - Move to Switzerland Allowed**: The results of *IRMO Repond*, 349 Ill.App.3d 910 (2nd

Dist. 2004) show that the Second Judicial District appears to have one panel clearly rejecting the reasoning of the *Stahl* decision and taking a much more permissive view of whether to grant removal. In *Repond,* the appellate court found that the trial court's decision denying the mother's petition to remove the children to Switzerland (where she had employment offers that would enable her to pursue her career as physicist, after being unable to find suitable employment in Illinois) was against manifest weight of the evidence. The significant factors were that the father had exercised only half his allotted visitation, had family in Switzerland, could visit the children during several business trips he took each year to Europe, and would not allow children to live with him. Mother, on the other hand, could provide suitable housing with her new husband, livelihood, education, and extended family, if petition were allowed. The appellate court then discussed the *Stahl* decision because it could be urged that *Stahl* is not consistent with the ruling in *Repond*. The *Repond* appellate court stated:

> We recognize that in *IRMO Stahl,* *** , this court recently considered a trial court's denial of a mother's petition to remove her children from Illinois to Wisconsin. On review, the *Stahl* majority applied the five factors identified in *Eckert* and affirmed. *Stahl,* slip order of protection. at 13-15. It is not clear from the opinion whether the trial court was aware of *Collingbourne* and applied the five factors in the context of *Collingbourne*. The majority in *Stahl* affirmed the judgment by stating:
>
> > "Here, we do not believe that the trial court considered only the direct benefits the children would incur if Lisa's removal petition was granted. Rather, the record reveals that the trial court considered all of the possible benefits to the children and determined that there was 'no substantial evidence of enhancement in the quality of the lives of the children either directly or indirectly.' As such, Lisa's contention is without merit." *Stahl,* slip order of protection. at 16.

The majority did not reconcile the *Collingbourne* perspective and the trial court's finding wherein the trial court stated:

> "The court does not believe that either party has impure motives, but does believe, based upon the evidence, that they have each been spurred on in this litigation by a desire to improve his or her own life, rather than by an objective view of the best interests of the minor children." *Stahl,* slip order of protection. at 12.
>
> The majority opinion did not address the apparent conflict between *Collingbourne,* which notes the interrelationship between the quality of life of the custodial parent and the quality of life of the child, and the trial court's finding that there was no substantial evidence of indirect enhancement in the quality of the lives of the children. We believe that the majority analysis in *Stahl* sufficiently addressed neither the contextual changes *Collingbourne* imposed upon the factors set forth in *Eckert* nor the apparent inconsistencies between the finding of the trial court and the new perspective on benefits set forth in *Collingbourne*. To the extent that our decision in the present case represents a

> conflict of application or interpretation of authority within this court, we resolve this conflict by explaining our rationale of review. See 166 Ill. 2d R. 23(a)(2).

The case is good reading in any removal case. In its summary Justice Hutchinson aptly states:

> The purpose of a published opinion is to develop and maintain a coherent body of law. *Siegel v. Levy Organization Development Co.*, 153 Ill. 2d 534, 544 (1992). To this end, it is imperative that a reviewing court set forth a rationale, discussing relevant case law pertaining to the issues. Siegel, 153 Ill. 2d at 544-45. Although we recognize that removal requests must be decided on a case-by-case basis (*Eckert*, 119 Ill. 2d at 326), we believe that our consideration here of the entire body of supreme court precedent pertaining to removal is more thorough than that presented in *Stahl*. We believe that this published opinion will provide future guidance to trial courts and parties in this sensitive area of removal.

Johnson* -- Move to Arizona Not Allowed in Decision Following *Stahl : The permissive attitude of three of the Second District appellate court justices in *Repond* is tempered with the more restrictive ruling in the 2004 *IRMO Johnson* decision, 352 Ill.App.3d 605 (2nd Dist. 2004). *Johnson* ruled that the trial court's decision to deny petition by mother, the physical custodian, to remove the minor children to Arizona was not against the manifest weight of the evidence in light of the trial court's conscientious application of *Collingbourne*, and *Eckert*, the close and beneficial relationship between the children and their father, which would be adversely affected by removal, and the children's desire not to be separated from their friends and family in Illinois. The *Johnson* court noted the apparent conflict with *Repond* when it stated:

> We are mindful that our decision may, at first glance, seem at odds with this court's recent decision in *IRMO Repond*, 349 Ill.App.3d 910 (2004). In *Repond*, this court applied the *Eckert* factors and reversed a trial court's ruling denying the custodial parent's petition to remove the children to Switzerland. *Repond*, 349 Ill.App.3d at 917. The *Repond* court then went on to state its disagreement with another recent decision of this court in *IRMO Stahl*, 348 Ill.App.3d 602 (2004), which affirmed a trial court's denial of a custodial parent's petition for removal to Wisconsin. *Repond*, 349 Ill.App.3d at 920-21.

The court then emphasized its agreement with the reasoning in the *Stahl* decision stating, "This court stands by the *Stahl* case as being sound in reason and consistent with our supreme court's pronouncements in *Eckert* and *Collingbourne*." The court concluded:

> There are several other important aspects to *Collingbourne* that must be emphasized, besides the nexus between the well-being of the custodial parent and the well-being of the child. Indeed, after explaining the connection between the well-being of the custodial parent and that of the child, the *Collingbourne* court went on to further explain:
>
> > "Our decision today, however, should not be interpreted as standing for the proposition that any enhancement in the quality of life of the custodial parent automatically translates into an

> improvement in the quality of life for the child, or that such benefits will always be sufficient to warrant removal. However, we emphasize that because there is a nexus between the well-being of the custodial parent and the child who is in this parent's care, all benefits afforded to the child as a result of the move must be considered by the circuit court in making its best interests determination. We caution, however, that in making this determination, a circuit court should not limit its examination solely to enhanced economic opportunities for the custodial parent. A court must also consider other noneconomic factors resulting from the move which are likely to contribute to, or detract from, the well-being and happiness of the custodial parent and the child." *Collingbourne*, 204 Ill. 2d at 528.

We reiterate that a child's best interests cannot be determined on the basis of any bright-line rule. *Eckert*, 119 Ill. 2d at 326; *Smith*, 172 Ill. 2d at 321. Rather, a child's best interests largely depend upon the circumstances present in the case. *Eckert*, 119 Ill. 2d at 326; *Smith*, 172 Ill. 2d at 321. Furthermore, the weight accorded to each *Eckert* factor will vary according to the facts of each particular case. *Smith*, 172 Ill. 2d at 321. A careful reading of both *Repond* and *Stahl* will reveal that the facts and circumstances surrounding *Repond* were vastly different from those surrounding *Stahl*. Indeed, rarely will the facts and circumstances in two separate removal cases be comparable. Reviewing courts and trial courts alike should take care to review the particular facts of each removal case, as one case is likely distinguishable from the next.

The case at hand is certainly distinguishable from *Repond*. In *Repond*, the noncustodial parent was not involved in his children's lives. *Repond*, 349 Ill.App.3d at 919. He had exercised only half of his allowed visitation with the children. *Repond*, 349 Ill.App.3d at 919. He did not attend the children's extracurricular activities. *Repond*, 349 Ill.App.3d at 919. He did not allow the children to bring friends over. *Repond*, 349 Ill.App.3d at 919. Moreover, he even refused to allow one of the children to live with him. *Repond*, 349 Ill.App.3d at 920. However, in the present case, Joseph is a loving, involved parent whose life revolves around his children. He is a parent who possesses a unique and strong bond with his children; a bond that, if broken, could be detrimental to the children.

***Main* - Move to Florida Allowed Despite Mother's Losing First Removal Petition**: A post-*Collingbourne* decision from the Second District was the *Main* decision, 361 Ill.App.3d 983 (Second Dist., 2005), in which the Second District appellate court followed *Collingbourne* and allowed a removal to Florida. What was remarkable about *Main* is that the removal was affirmed on appeal despite the fact that the petition was filed only two years after the court had awarded custody to mother the on the condition that she relocate children back to Illinois from same location in Florida to which she proposed to move. One of the key aspects of this case was that when the mother moved back to Illinois, she moved to Marshall, a city which is in

downstate Illinois -- and only several miles from the Illinois / Indiana border. The significant quote in *Main* stated:

> In the unpublished order, this court noted that "[respondent] presented no evidence that her employment or housing opportunities in Florida were better than those available in Illinois." Main, slip order of protection. at 6. Here, on the other hand, respondent testified regarding the superior employment opportunities awaiting her in Florida, and she also described the much larger house her mother owns in Florida. While we do not have the transcript of the original divorce proceedings, the trial court acknowledged in its written opinion that, though the facts underlying each of respondent's attempts to move to Florida were similar, there were significant differences in that respondent had lost her job and demonstrated that she received much lower pay in Illinois and that, when she moved back to Illinois, respondent chose to relocate 4½ hours away from petitioner's home. We therefore disagree with petitioner's characterization of the testimony here as identical to that presented during the original divorce proceedings. Regardless of the testimony during the divorce proceedings, we hold that the trial court's finding here was supported by ample evidence, because, as noted, respondent testified regarding the improvement in employment and housing opportunities that awaited her move to Florida. Further, the fact that respondent chose to live so far from petitioner upon relocating to Illinois had a significant impact on the trial court's finding that a move to Florida would be in the children's best interests.

In somewhat of an understatement, the court then stated:

> We recognize the implication here that the law with regard to removal is subject to some abuse by a custodial parent who can move far away from the noncustodial parent, yet stay within Illinois, and then request removal to a different state on the basis that removal would not increase the travel time for visitation. It is true that section 609 of the Act does not apply to intrastate transfers and that a custodial parent need not obtain permission from a court before moving to another location within Illinois. *IRMO Means*, 329 Ill.App.3d 392, 394 (2002); see *IRMO Wycoff*, 266 Ill.App.3d 408, 416-17 (1994) ("[custodial parent] cannot be criticized for her decision to *** move to [a more distant city within Illinois], in the absence of any showing that she did so in an attempt to frustrate visitation or interfere with the relationship between [the child and the noncustodial parent]"). However, in this case, in evaluating the second *Collingbourne* factor, the trial court expressed its concern for respondent's choice to relocate 4½ hours away from respondent upon moving back to Illinois. Thus, respondent's motives in relocating to a city so distant from petitioner were included in the trial court's weighing of the *Collingbourne* factors to decide whether removal from Illinois was proper.
>
> Further, in considering issues other than removal, such as custody, a trial court could certainly consider whether a custodial parent's moving far away (within Illinois) from the noncustodial parent was motivated by a desire to frustrate the

noncustodial parent's visitation rights. *IRMO Divelbiss*, 308 Ill.App.3d 198, 207-08 (1999) (affirming trial court's decision to change primary residential custody to father because mother interfered with father's visitation); see *Wycoff*, 266 Ill.App.3d at 416-17 (trial court's decision to change primary custody of children to father may have been tenable with showing that mother relocated in order to frustrate visitation). Therefore, we conclude that it would have been improper for respondent to interfere with petitioner's visitation by moving to Marshall in order to facilitate removal to Florida, even if the move to Florida itself was not improperly motivated. However, here, the trial court considered any indications of respondent's possible improper motive in moving to Marshall in reaching its best-interests determination.

B. **Third Appellate District**

Prior to *Collingbourne*, it had appeared that the Third District case law reflected a trend toward allowing removal. Other than the *Hansel* and *Elliott* case, in only one case was removal not allowed, and in that case the facts are highly unusual. In all other pre-*Smith* and *Elliott* cases, the third appellate district allowed removal, three times overturning trial courts. Therefore, prior to both *Smith* and *Collingbourne* the third appellate district had shown a tendency toward allowing removal. The post-*Collingbourne* case, *IRMO Hansel*, however, reflects the Third District's more even-handed approach in addressing removal cases, although as seen by the recent *Coulter* decision the appellate manifest weight of the evidence standard is one that is difficult to overcome as to the trial court's findings.

Denial Cases:
***Creedon* – Removal Sought 15 Days after divorce judgment**: The facts in one of the third appellate district's early denial cases, *IRMO Creedon*, were highly suspicious as to the motives of the mother. She sought to remove two teen-age boys to Texas. The mother wanted to move because her brother lived in Texas and because she would live only 6½ hours from her hometown. The mother, a school teacher, would have increased salary. On the other hand, the father, an attorney, exercised his visitation rights regularly after the divorce.

The critical factor in denying the removal was that the petition for removal was filed only 15 days after a marital settlement agreement between the parties was signed. The appellate court affirmed the trial court's denial.[6] "It seems obvious that [the mother] sought to obtain the benefits of the agreed order but not bear the burdens," the reviewing court wrote in commenting upon the timing of the petition. The opinion went on to hold that the existence of a joint custody order could be considered in determining the child's best interests. Furthermore, the trial court could have properly allowed removal, but also could properly deny it, given the facts of the case. In other words, the trial court denial was not against the manifest weight of the evidence and was upheld.

***Hansel* - Testimony by §604.5 expert that move would harm the child**: In 2006 in *IRMO*

[6]245 Ill.App.3d 531, 537-38 (Ill. App. Ct., 3d Dist. 1993).

Hansel, the Third District appellate court affirmed the denial of a petition for leave to remove a child from Illinois to North Carolina. The mother sought removal to accommodate mother's pending marriage to self employed fiancé whose income was sufficient to enable mother to stop working outside of the home. The appellate court stated that the ruling was not against the manifest weight of the evidence in light of the eight year old child's close relationship with her father, and extended family, and testimony of a psychologist (a §604.5 expert) that removal would actually harm child. The §604.5 expert pointed out that research showed to his satisfaction that adolescent girls whose fathers are relatively absent from their lives have greater social problems than girls with fathers active in their lives. The §604.5 testimony was not refused by other expert testimony.

IRMO Coulter, 2012 IL App (3d) 100973 (2012) is a recent decision of the Third District Appellate court in which removal was granted. Keep in mind that 2012 has brought us two removal cases named *Coulter*. The later case is *IRMO Robert Lee Coulter and Eleanor Trinidad*, 2012 IL 113474 (September 2012). I refer to that case as *Coulter and Trinidad* and it was the Illinois Supreme Court case that essentially decided that the parties could pre-agree to a removal.

In the January 2012 *Coulter* decision (and note that the *Coulter v. Trinidad*, decision was also from the Third District but the appellate decision had been unpublished), the result might be seen as remarkably pro-removal because the mother would be spending significant time in overseas posts. The appellate court in that decision affirmed the trial court's decision granting mother's petition for removal of her nine-year-old daughter, after the mother obtained employment as a foreign service officer for State Department. The mother would have two-thirds overseas posts and one-third posts in Washington, D.C. The posts would last for two to three years, with transitions typically occurring in summers. The appellate court noted the trial court's findings that the move of mother would greatly enhance quality of life for mother and child. The trial court's decision stated, “The economic, social, educational and cultural opportunities afforded by [Melissa's] achievement of obtaining a position with the United States State Department as a Foreign Service Officer cannot be understated."

The mother attached to the petition data sheets reported that the schools in Virginia or with American students in overseas schools had better SAT schools than the national average. More importantly, she attached a proposed parenting agreement to her petition. It proposed 10 weeks visitation to the father during the summer (basically the entire summer except two weeks). Transportation costs would be covered by the State Department. The mother proposed that she would assume responsibility to ensure that the children were chaperoned during travel from [her] residence to [Donald's] residence. There was also a proposal regarding extended spring break and Christmas break. The proposed agreement provided that the mother would provide the daughter with a computer and Internet access so Donald could communicate with her via webcam and e-mail. The agreement provided that the mother would pay the cost for school (actually the portion not covered by the State Department).

Curiously, at the time of the removal hearing the mother had been working in Washington D.C. and had been living in Virginia. In any event, best viewed this case can be viewed as one where the appellate court simply affirmed the rulings of the trial court. Recall that the standard is manifest weight. To reverse the appellate court needed to find that the trial court's findings were

against the manifest weight of the evidence. Thus, the appellate court concluded:

> This is undoubtedly a difficult case, as the removal significantly decreases Donald's visitation time. Nevertheless, under the circumstances of this particular case, we cannot say that the circuit court's findings on the relevant factors were against the manifest weight of the evidence. See, e.g., 275 Ill.App.3d at 48 ("[t]he presumption in favor of the trial court's decision is compelling in such cases and should not be disturbed merely because we might arrive at a different conclusion").

V. **2007 SIDE AGREEMENT CASE**

Boehmer: A 2007 case which addresses the impact of a "side-agreement" allowing removal was *IRMO Boehmer*, 371 Ill.App.3d 1154 (Second Dist., 2007) (Lake County). This case becomes even more important considering the 2016 amendments given their restrictive nature. We can anticipate that parents will in their parenting plans vary the mileage restrictions.

Boehmer held that the trial court erred when it entered a post-divorce order incorporating the earlier side agreement between the parties ("without court approval or participation") allowing for the removal of the minor child to Louisiana. In this case the side agreement was notarized. The side agreement also provided for explicit visitation and for items such as payment of transportation expenses. The father in this case filed a petition seeking to enjoin the mother from removing the child from Illinois. The appellate court ruled that the trial court erred when it failed to make an independent determination as to the child's best interest. It stated that the Father's current protest refuted any assumption of best interests that could be drawn from the agreement. The appellate court noted that the, "plain language of Section 502 [of the IMDMA] states only that parties' agreements regarding custody, visitation, and support are not binding on the court." In somewhat dangerous language the court stated, "Thus, while the court is not bound to accept parties' agreements concerning custody, visitation, and support, the plain language of Section 502 does not prohibit the court from accepting agreements as to these matters without further inquiry. The appellate court stated that the court was not required to make an independent determination of best interest before entry of the agreement as the court's order.

Next, however, the father urged that despite the parties' agreement, §609 of the IMDMA required the trial court to hear evidence as to his daughter's best interests. The appellate court articulated the issue as to "whether, in a post-decree environment, §609 required the trial court to independently consider factors concerning Caylee's best interests prior to entering as an order the parties' agreement to removal." The appellate court then stated, "Similar to the *Ayers* court's analysis of §602, we do not believe that §609 necessarily requires an independent examination of factors concerning best interests when the parties agree regarding the removal of a child." The limited nature of the opinion was clear, however, when the appellate court ruled, "That being said, the facts presented in this case do not concern an uncontested agreement." The key quote from the case stated:

> Section 609 places on the party seeking removal the burden of proving that removal is in the best interests of the child. Although as discussed above, parental

> agreement generally indicates that removal is in the child's best interests, in this case respondent's argument that removal was not in Caylee's best interests refuted any assumption of best interests that could be drawn from the agreement. A parental agreement symbolizes the child's best interests precisely because both parents affirmatively support the decision.

VI. ***COLLINGBOURNE*** **AND CONCLUSION**

The critical aspect of the Illinois' Supreme Court's *Collingbourne* decision was its discussion regarding indirect benefits. The decision attempts to strike the correct balance in emphasizing that especially in cases where there is a remarriage and greater economic opportunity for the custodial parent in light of the remarriage, sufficient benefits of the removal may be proven if there is not a significant impact on the other parent's overall parenting time.

In discussing the indirect benefit factor (whether the proposed move would enhance the general quality of life for both the custodial parent and the child, the Illinois Supreme Court stated:

> With respect to this factor, the circuit court held that [the Mother] met her burden of proof "by demonstrating that the initial disruption caused by the move would be outweighed by the benefits resulting from the move." The circuit court acknowledged that by allowing [the child] to be removed to Massachusetts, [the child] would be separated from his brother, he would be forced to leave his friends, and would lose the closeness of his relationship with his father as well as his extended family. However, the court also observed that by granting [the Mother] permission to remove [the child] to Massachusetts, [the Mother] could marry [the new husband], live in his home in Sharon, obtain employment with a greater salary, enroll [the child] in a school system which she believed offered her son superior educational and extracurricular opportunities, conform her work schedule to [the child]'s school schedule, and afford transportation allowing [the child] to spend as much time with his father as before the move. Although the circuit court found that [the child] did not derive a "direct" benefit from the move, it also found that [the child] derived a substantial "indirect" benefit from the enhancement of [the Mother]'s life should removal be allowed.
>
> [The Father], echoing the apparent position of the appellate majority below, urges us to hold that a custodial parent seeking to remove a child must show a "direct" benefit to the child in order to sustain the removal petition. [The Father] also urges us to hold that any "indirect" benefits that may flow to the child as a result of an enhancement in the custodial parent's quality of life are insufficient to justify a child's removal from this state. Accordingly, [the Father] contends that because the circuit court determined that [the Mother] had failed to show that [the child] would reap a "direct" benefit from the move to Massachusetts, the circuit court erred in granting the removal petition, and the appellate court correctly reversed that judgment. We disagree.
>
> As we emphasized in *Eckert*, the "paramount question" presented by removal cases is whether the move is in the best interests of the child. *Eckert*, 119 Ill. 2d at

325; see also 750 ILCS 5/609(a). In *Eckert*, we did not characterize the benefits a child may experience as a result of a move as "direct" or "indirect," and we find that such a distinction is not particularly helpful in assisting the circuit court in making the important determination of whether removal is in the child's best interests. To the contrary, this distinction may divert focus from the real issue of whether the child's general quality of life will be enhanced by the move. See *Eckert*, 119 Ill. 2d at 326-27. We reiterate our holding in *Eckert* that in conducting a best interests inquiry in the context of a removal petition, a circuit court must "consider the proposed move in terms of likelihood for enhancing the general quality of life for both the custodial parent and the children." (Emphases added.) *Eckert*, 119 Ill. 2d at 326-27; see also *Smith*, 172 Ill. 2d at 322-23. Indeed, "[i]f only the direct benefits that affected children were considered, rarely would a situation arise where removal would be permitted where children were in a good environment with good schools, good parents, and good friends." *IRMO Ludwinski*, 312 Ill.App.3d 495, 499 (2000). The vast majority of cases from our appellate court have correctly interpreted our decision in *Eckert* and, in determining the best interests of a child in removal actions, have appropriately considered the potential of the move for increasing the general quality of life for both the custodial parent and the child, including any benefit the child may experience stemming from the parent's life enhancement. See, e.g., *IRMO Shaddle*, 317 Ill.App.3d 428, 434 (2000); *Ludwinski*, 312 Ill.App.3d at 499; *IRMO Miroballi*, 225 Ill.App.3d 1094, 1098 (1991); *IRMO Carlson*, 216 Ill.App.3d 1077, 1081 (1991); *IRMO Roppo*, 225 Ill.App.3d 721, 728 (1991); *IRMO Taylor*, 202 Ill.App.3d 740, 745 (1990); *IRMO Zamarripa-Gesundheit*, 175 Ill.App.3d 184, 189 (1988). It follows that what is in the best interests of the child cannot be considered without assessing the best interests of the other members of the household in which the child resides, most particularly the custodial parent.

Indeed, absurd results would occur were we to accept the contrary argument advanced by [the Father] that a custodial parent wishing to remove a child from Illinois must prove that the child will experience a "direct" benefit as a result of the move, and that proof the child will reap "indirect" benefits as a result of the enhancement in the quality of life for the custodial parent is insufficient to meet this burden. First, as stated, [the Father]'s position ignores the fact that the best interests of the child cannot easily be severed from the interests of the custodial parent with whom the child resides, and upon whose mental and physical well-being the child primarily depends. Because the principal burden and responsibility of child rearing falls upon the custodial parent, there is a palpable nexus between the custodial parent's quality of life and the child's quality of life.

This principle is illustrated in the case at bar. Upon dissolution of the marriage, [the Mother] was awarded physical custody of [the child] and has had to deal with all the day-to-day issues a single parent must face, including the child's physical and emotional well-being, the child's school performance, and the care of the child when he is not in school and [the Mother] cannot be with him. In addition, as evinced by the facts in the matter at bar, a single parent must also face a myriad of financial, social, and scheduling pressures, including the conflict

between the parent's work schedule and the parent's desire to have the child become involved in extracurricular activities in which the child expresses an interest. At the time of the hearing on the removal petition, [the Mother] planned to marry a man who would provide her with love, economic security, and a comfortable home in a desirable location, and also be a partner and helper in rearing her child. It is in this new family structure that [the child]'s day-to-day routine and emotional interaction would be formed and influenced. Thus, it is reasonable to assume that there is a nexus between the quality of life of the custodial parent and the quality of life of the child.

Second, requiring a parent seeking removal to establish that the child would "directly" benefit from the move, to the exclusion of any "indirect" benefits experienced by the child, would mean that the marriage of a custodial parent would rarely, if ever, provide a valid basis for removal. Requiring the custodial parent to meet such a heavy burden of proof would not only de facto eliminate the balancing process set forth in *Eckert*, but also impermissibly "allow[ ] a noncustodial parent who enjoys a good relationship with his child[ ] to veto the good-faith and reasonable desire of the custodial parent to remarry and move out of State without any consideration of what have been called the 'indirect benefits' to the child[ ]." *IRMO Eaton*, 269 Ill.App.3d 507, 514 (1995). Such a result would also contravene the intent of the General Assembly, as expressed in section 609 of the Act, which allows a custodial parent to remove a child from Illinois upon a proper showing that such removal is in the child's "best interests." 750 ILCS 5/609(a). We agree with those courts that have held that the interests of the custodial parent should not be automatically subordinated to those of the noncustodial parent in a removal action. See *Shaddle*, 317 Ill.App.3d at 435; *Ludwinski*, 312 Ill.App.3d at 503; *Eaton*, 269 Ill.App.3d at 517; *IRMO Branham*, 248 Ill.App.3d 898, 905 (1993). Indeed, "our society is a mobile one" (*Eckert*, 119 Ill. 2d at 330) and "since a court has no power to require the noncustodial parent to remain in Illinois, or to require members of the extended family to remain in Illinois, some deference is due to the custodial parent who has already determined the best interests of her child and herself are served by remarriage and removal. The best interests of children cannot be fully understood without also considering the best interests of the custodial parent." (Emphasis in original.) *Eaton*, 269 Ill.App.3d at 515-16.

Our decision today, however, should not be interpreted as standing for the proposition that any enhancement in the quality of life of the custodial parent automatically translates into an improvement in the quality of life for the child, or that such benefits will always be sufficient to warrant removal. However, we emphasize that because there is a nexus between the well-being of the custodial parent and the child who is in this parent's care, all benefits afforded to the child as a result of the move must be considered by the circuit court in making its best interests determination. We caution, however, that in making this determination, a circuit court should not limit its examination solely to enhanced economic opportunities for the custodial parent. A court must also consider other noneconomic factors resulting from the move which are likely to contribute to, or

> detract from, the well-being and happiness of the custodial parent and the child. We reiterate our holding in *Eckert* that a custodial parent's mere desire to move to another state, without more, is an insufficient basis for removal. *Eckert*, 119 Ill. 2d at 325. The burden of proof remains upon the custodial parent to establish that the move would be in the best interests of the child. *Eckert*, 119 Ill. 2d at 330; 750 ILCS 5/609(a) (West 2000).

The final paragraph is the one in which the Court tries to strike what it believes is the right balance. The burden of proof is always on the parent seeking to remove.

The opinion continued:

> As stated, the circuit court determined that [the child] would experience substantial "indirect" benefits as a result of moving with his mother to Massachusetts, and concluded that the evidence presented on this specific factor favored the move. The court observed that as a result of the move, [the Mother] would be able to marry [the new husband] and live in his home in Sharon. The creation of a new family unit and the social environment of a traditional family setting may be considered an important benefit to a child. The circuit court also found that [the Mother] established that as a result of the move she has the opportunity to become an integral part of a family-owned business and substantially increase her income. An improvement in the financial situation of the custodial parent will generally benefit a child by enhancing the child's standard of living. In addition, the circuit court found that as a result of the move [the Mother] could schedule her work hours around [the child]'s school day, and be available to transport him to and from school and also extracurricular activities. This is in contrast to the situation in Illinois, where [the child] went from day care to school, and from school back to day care, offering him little family life until after 5 p.m. The flexibility of [the Mother]'s work schedule would benefit [the child] not only by allowing his mother to spend more time with him, but also by permitting his mother to withdraw him from a day care environment in which he was unhappy and providing her the opportunity to enroll [the child] in various activities that were unavailable to him as a result of her work schedule. [The Mother]'s new work arrangement would afford her the time, energy and means to be a part of [the child]'s life in ways that had not been possible in the past. In addition, the circuit court found that the move will allow [the child] to attend a school system that [the Mother] believes will offer [the child] academic opportunities superior to those available in Hampshire. Although the circuit court found that the evidence pertaining to the school systems in Sharon and Hampshire was "not conclusive," the court also found that the school system in Sharon "is at least comparable to that of Hampshire." In addition, the circuit court found that the educational and cultural amenities are plentiful in the area in which [the Mother] wishes to relocate. In assessing whether the move to Massachusetts would enhance the quality of [the child]'s life, the circuit court also observed that the existing joint custody arrangement "has already resulted in the separation of the siblings in this case." The court noted that the brothers already resided in separate households, attended separate schools, and that the five-year age

> difference between Geoffrey and [the child] underscored their different interests.

The step-parent aspect of the *Collingbourne* decision should be emphasized. That decision stated:

> In the final analysis, we adhere to our statement in *Eckert* that a trial court's examination of a removal petition should be guided by the policies of the Act, one of which is to " 'secure the maximum involvement and cooperation of both parents regarding the physical, mental, moral and emotional well-being of the children during and after the litigation.' " *Eckert*, 119 Ill. 2d at 328, quoting Ill. Rev. Stat. 1987, ch. 40, par. 102(7), now 750 ILCS 5/102(7) (West 2000). We agree that policy is "best served when, in addition to a favorable determination of all of the *Eckert* factors, the court considers the aspects of cooperation of both parents in achieving as reasonable an expectation of normalcy and family life for the child involved as can be achieved following a divorce, which includes adjustments to stepparents in the event of the marriage of one or both parents." *IRMO Roppo*, 225 Ill.App.3d at 732.

In an iteration of this article, I stated:

> It is anticipated that the Supreme Court in *Collingbourne* will determine that it is improper to require direct benefits to be proven to allow a removal but that even when proving indirect benefits, the burden of proof is always on the petitioner and the petitioner must demonstrate that based upon the totality of the evidence that the removal would benefit the children.

This is exactly the balance attempted to be struck by the Illinois Supreme Court. As illustrated by the contrast between the *Stahl* and the *Repond* decisions, this balance remains elusive.

And now in light of the 2016 amendments, we can now anticipate far more litigation regarding relocation cases and another line of case law with a number of open ended questions including:

- Is more than the burden of going forward on the parent seeking relocation?
- Will courts be more generous in cases where the attempt to relocate is within the state and not far outside of the boundaries?
- Are the mileage restrictions the most direct road miles or miles as the crow flies?
- Where the 2016 amendments provide that, “A parent's relocation constitutes a substantial change in circumstances for purposes of Section 610.5" what does this mean.
    - Keep in mind that this is contrary to prior case law.
    - Also keep in mind that 610.5 is the modification provisions and now differs substantially:

- Does the language above trump the provisions of 610.5(a) – where a modification is sought within two years? It appears not but this is not clear. Recall that 610.5(a) is limited to modification of "allocation of parental responsibilities." Recall that the definitions provide that, ""Allocation judgment" means a judgment allocating parental responsibilities. And there is another provision that, ""Parental responsibilities" means both parenting time and significant decision-making responsibilities with respect to a child.

- The standards for modification are multi-faced and includes:

    - Modification of parenting time;
    - Decision making.

- Modification of parental responsibilities (including parenting time) has a more lenient standard because it is a mere preponderance rather than clear and convincing evidence.

- Will there be an impact of the elimination of the 2010 virtual visitation provisions and only applying those in cases involving grandparents and the like?

- Anticipate the effect of these changes on relocation cases, especially when creating your original parenting plan.

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