MILITARY PARENTING & DEPLOYMENT ISSUES

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I. UCCJEA JURISDICTION.

A. **Applicability**. UCCJEA jurisdiction required before any parental responsibility proceeding, including dissolution, legal separation, grandparent visitation, guardianship, dependency & neglect, paternity, etc. C.R.S. 14-13-102(4).

B. **Home state** of child (6 months residence) at commencement, or within 6 months of commencement if one parent remains in CO. C.R.S. 14-13-201(1)(a). NOT APPLY if home state solely due to deployment of reservist parent (see below).

C. **No other state has jurisdiction**, or other state with jurisdiction declined to exercise on grounds that CO is more appropriate, AND child and at least one parent has significant connection with CO other than presence. C.R.S. 14-13-201(1)(b).

D. **Decline to exercise**. All other courts with jurisdiction have declined to exercise it. C.R.S. 14-13-201(1)(c).

E. **No other state has jurisdiction**. C.R.S. 14-13-201(d).

F. **Temporary emergency jurisdiction**. Child is present in CO, and been abandoned, or necessary to protect child due to abuse against child, sibling or parent. C.R.S. 14-13-204(1). Duration of jurisdiction:

1. If prior or pending proceedings in other state, until such time that a state with jurisdiction issues order.

2. If prior or pending proceeding in another state, only so long as is adequate to allow person seeking order to apply to other state.

G. **Personal Jurisdiction Over Respondent** N/A. Can be served anywhere, as long as there's UCCJEA jurisdiction.

H. **Continuing Jurisdiction** until CO determines that child & parents no longer have continuous connection with state, or other state determines that child & parents no longer live in CO. C.R.S. 14-13-202.

II. TEMPORARY FAMILY SUPPORT.

A. **Applicability**. Physical separation, including deployment, without court order or agreement. Important if servicemember deploys before support order enters.

B. **Army**

1. Army Regulation 608-99.
www.army.mil/usapa/epubs/pdf/r608_99.pdf

2. Amounts (para. 2-6):

Spouse/children in military housing: None.
Civilian spouse/children: BAH-II-WITH.
Civilian spouse/children living separately: Pro rata share of BAH-II-WITH.
Military spouse, no children: None
Military spouse, split custody of children: None.
Military spouse with children: BAH-II-Diff.

3. No in-kind payments, with limited exceptions (e.g. rent/mortgage or essential utilities). Para. 2-9.

4. Relief. Battalion/Squadron commander may relieve soldier of spousal obligation (not children) if civilian spouse has higher income, is in jail, has committed physical abuse against soldier, or soldier has already paid support per regulation for 18 months. Para. 2-14.

5. Examples: E-5 (SGT): $804
E-9 (SGM): $1129.80
O-3 (CPT): $1101
O-6 (COL): $1565.70

C. Air Force.

1. Air Force Instruction 36-2906, Personal Financial Responsibility. www.e-publishing.af.mil/shared/media/epubs/AFI36-2906.pdf.

2. Servicemembers "are expected to provide adequate financial support to family members."

3. In-kind payments are allowed.

D. Navy

1. MILPERSMAN 1754-030, Chapter 15, Support of Family Members. http://www.npc.navy.mil/ReferenceLibrary/MILPERSMAN/1000MilitaryPersonnel/1700Morale/1754_030.htm

2. Amounts. Support is fraction of sailor's "gross pay" (defined as base pay plus BAH, if entitled, but excludes all other allowances, such as BAS, hostile fire pay, etc).

Spouse only: 1/3
Spouse & 1 minor child: 1/2
Spouse & 2 or more children: 3/5
1 minor child: 1/6
2 minor children: 1/4
3 minor children: 1/3

3. Relief. Servicemember may request waiver of spousal portion only (not children) on grounds of desertion without cause, physical abuse or adultery.

E. Marine Corps.

1. MCO P5800.16A, Marine Corps Manual for Legal Administration, Chapter 15. http://sja.hqmc.usmc.mil/Pubs/P5800/15.pdf.

2. Amount. Greater of specific dollar amount or a pro rata share of BAH/OHA, up to maximum of 1/3 full gross pay:

1 family member: 1/2 BAH/OHA, minimum $350 each.
2 family members: 1/3 BAH/OHA, minimum $286 each.
3 family members: 1/4 BAH/OHA, minimum $233 each.

4 family members: 1/5 BAH/OHA, minimum $200 each.
5 family members: 1/6 BAH/OHA, minimum $174 each.
6 or more family members: 1/7 BAH/OHA, minimum $152 each.

3. Relief: Commanding officer may relieve marine of obligation where marine cannot determine "whereabouts and welfare of the child concerned", civilian spouse committed documented physical abuse against marine, or is in jail.

F. Coast Guard

1. COMDINST M1000.6A, Personnel Manual, Chapter 8M. www.uscg.mil/directives/cim/1000-1999/CIM_1000_6A.pdf. (17MB+ file takes forever to load).

2. Amounts (para 3.M.3.c.):

Spouse only: BAH-Diff, plus 20% of base pay.
Spouse & 1 child: BAH-Diff, plus 25% of base pay.
Spouse & 2 or more children: BAH-Diff, plus 30% of base pay.
1 child: 1/6 of base pay.
2 children: 1/4 of base pay.
3 or more children: 1/3 of base pay.

G. Enforcement

1. Violation of Lawful General Regulation is UCMJ Article 92 offense.

2. No ability to divert money, just disgorge it.

3. Enforcement of civilian orders. AR 608-99 – must comply with support (para. 2-4a) & custody orders (para. 2-10b).

4. Fort Carson
a. Legal Assistance: 526-0490
b. Inspector General: 526-3900

5. Peterson AFB
a. Legal Assistance: 556-4500
b. Inspector General: 556-2104

6. Air Force Academy
a. Legal Assistance: 333-3940
b. Inspector General: 333-3490

III. PARENTING DURING DEPLOYMENT

A. **Frequency**. Army typically 15 months at least once in 3-year cycle (except Special Forces, which is have more frequent 4-6 month deployments). Air Force typically 4 months per 20-month cycle.

B. **Family Care Plans**. Applies to single parents, dual military with children. Must have plan in place for care of children if deploy. No impact on civilian court.

1. Army Regulation 600-20, para 5-5. (Sample at Attachment 1).
2. Air Force Instruction 36-2908.

C. **IRM DePalma**, 176 P.3d 829 (Colo. App. 2007) (Attachment 2). Reserve father with equal parenting time sought to delegate parenting time to stepmother while deployed, despite first right of refusal provision.

1. Parent has presumptive right to control children's upbringing, including making decisions on who cares for children during his/her time.
2. Court determines best interests if dispute, but fit parent presumed to act in best interests of children.
3. Stepmother had no independent right to children, but analogy was to other third parties providing care to children, such as teachers, day care, etc.
4. Stepmother has no right to made decisions, so mother makes day-to-day decisions.
5. First right of refusal essentially set aside in that case.

D. **Colorado Protection for Reservist Parents**. HB 08-1176 (Attachment 3), applies to parenting changes due to a **RESERVIST PARENT** being activated / deployed, effective August 5, 2008.

1. **Creates CRS 14-10-131.3**.

a) Parenting time modification based solely upon deployment or active federal service is temporary, and any orders entered based solely upon deployment are interim.

b) Interim order vacated automatically and previous parenting plan immediately reinstated upon servicemember filing written notice of return to Colorado.

c) Not prevent modification based upon reasons other than deployment (but Servicemembers Civil Relief Act).

d) Servicemember agreement to temporary modification while deployed not constitute consent to integration of child into household of other for purposes of motion to modify primary residential parent or decision-making.

2. **Modifies UCCJEA**. CRS 14-13-102(7) home state jurisdiction excludes state where child lived temporarily due to interim order entered pursuant to CRS 14-10-131.3.

IV. REMOVAL OF CHILDREN

A. **Servicemembers move!!** 2001 GAO report found average military tour was 2 years. Presently longer, especially for special forces.

B. **While Case is Pending**. C.R.S. 14-10-107(4)(b)(I)(C) injunction prevents removing child from state w/o consent of other party or order of court.

C. **Initial Custody Determination –** Spahmer v.Gullette, 113 P.3d 158 (Colo.2005). (Attachment 4). During initial custody determination, parties are on equal footing, so court cannot require relocation statute criteria to be satisfied. Instead, best interests of children applies, and court should assume parents already live where they intend to live, then determine parenting.

D. **Post-Decree**.

1. **C.R.S. 14-10-129(2)(c) Criteria**:

(I) The reasons why the party wishes to relocate with the child;

(II) The reasons why the opposing party is objecting to the proposed relocation;

(III) The history and quality of each party's relationship with the child since any previous parenting time order;

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

(V) The presence or absence of extended family at the existing location and at the proposed new location;

(VI) Any advantages of the child remaining with the primary caregiver;

(VII) The anticipated impact of the move on the child;

(VIII) Whether the court will be able to fashion a reasonable parenting time schedule if the change requested is permitted; and

(IX) Any other relevant factors bearing on the best interests of the child [i.e. 14-10-124 factors]

2. **IRM Ciesluk**, 113 P.3d 135 (Colo. 2005). (Attachment 5). Parents have constitutional right to travel, so cannot impose burden of proving best interest of child on relocating parent. Court must consider relocation & best interests factors w/o presumption in favor or against relocation.

V. SERVICEMEMBERS CIVIL RELIEF ACT OF 2003 (Formerly SSCRA of 1940).

A. Stay of Proceedings When Notice. 50 U.S.C. App. § 202.

1. Court **may**, on own motion, and **shall**, upon application by a servicemember which meets these criteria, stay the proceedings for at least 90 days:

a. Applicant is in military service, or within 90 days after it ended,
b. Applicant has actual notice of the proceeding,
c. Application is written, and includes facts stating (i) how service materially affects ability to appear, and (ii) date when servicemember may appear, and
d. Application includes communication from commander that military duty prevents appearance, and military leave not authorized.

2. Initial 90-day stay is mandatory. Thereafter, servicemember may apply for additional stay, using same criteria. Court must grant application unless appoints attorney to represent servicemember.

3. Simply being stationed overseas, thereby making it harder to appear, does not materially affect ability to appear. Telephonic testimony, 30 days annual leave, cooperative military.

4. If request for stay denied, servicemember cannot then invoke §201 to set aside default judgment.

5. Sample Motion for Stay at Attachment 6. Sample Order at Attachment 7.

B. Protection Against Default Judgment. 50 U.S.C. App. § 201.

1. Provides servicemember in civil action with relief against default judgment.

2. Petitioner seeking default judgment must first submit affidavit stating whether Respondent is in military, or whether Petitioner does not know. Judgment obtained without affidavit is voidable if servicemember later shows that military service prejudiced the presentation of a defense.

3. If cannot determine status of military service from affidavit, Court may require bond to indemnify Respondent against any loss.

4. Court shall reopen default judgment and allow servicemember to defend when:

a. Judgment entered during military service or within 60 days thereafter,
b. Servicemember's ability to defend materially affected by service,
c. Servicemember has meritorious or legal defense, and
d. Application to reopen is made during the military service, or within 90 days after it ended. Technically, this means total military service, not just the specific contingency which prevented servicemember from appearing.

FAMILY CARE PLAN

For use of this form, see AR 600-20; the proponent agency is DCS, G-1.

PRIVACY ACT STATEMENT

AUTHORITY: 10 U.S.C. Section 3013, Secretary of the Army: Army Regulation 600-20, Army Command Policy and E.O. 9397 *(SSN)*

PRINCIPAL PURPOSE: To emphasize to soldiers the significance of their responsibilities to the military service and their family members while performing required military duties.

ROUTINE USES: None

DISCLOSURE: Mandatory; Failure to maintain a Family Care Plan could subject the soldier to separation, administrative action, or disciplinary action under the UCMJ.

PART I - SOLDIER'S FAMILY CARE

		INITIALS
A.	I was counseled on _____ *(date)*, and fully understand the policy on family member care responsibilities. I understand that I must arrange for care of my family members, remain available for deployment and training, and report for duty as required without interference of responsibility for family members. I assume responsibility for all obligations for such things as child care, food, adequate housing, transportation, and emergency needs of my family members regardless of age.	
B.	I have made and will maintain arrangements for the care of my family members during all the following: 1. Duty 2. Exercises/field duty 3. Permanent Change of Station 4. Alerts 5. Annual Training 6. Temporary Duty 7. Unit Training Assembly 8. Active Duty Training 9. Unaccompanied Tours 10. Mobilization 11. Deployment 12. Other Military Duty 13. Emergencies 14. Leave/non-duty Time	
C.	I understand the importance of ensuring the proper care for my family members, and ensuring my own readiness and deployability as well. I further understand that in light of the critical nature of both these requirements:	
	1. Failure to make and maintain adequate family member care arrangements in accordance with the Army's policy is grounds for disciplinary action or separation.	
	2. Nonavailability for worldwide assignment and/or unit deployment may lead to my separation from the Army.	
	3. If arrangements for the care of my family members fail to work, I am not automatically excused from prescribed duties, unit deployment, or reassignment.	
	4. If I fail to maintain a Family Care Plan or provide false information regarding my plan, I am subject to separation, administrative action, or disciplinary action under UCMJ.	
	5. I must maintain an up-to-date Family Care Plan and revise my Plan when circumstances change. I understand that Family Care Plans may be tested at the discretion of the commander.	
	6. I will receive no special consideration in duty assignments or duty stations based on my responsibilities for my family members unless enrolled in the Exceptional Family Member Program *(EFMP)* in accordance with AR 600-75.	
D.	I have made all necessary arrangements *(legal, educational, financial, religious, special, etc.)* to ensure a smooth, rapid turnover of family member care responsibilities in case this plan is implemented.	
E.	I have arranged for necessary travel required to transfer my family members to a designated person. If my principal designee is not in the local area, I have arranged with a nonmilitary person in the local area to assume temporary guardianship of my family members until they are transferred to my principal care designee, or that designee arrives to assume responsibility for their care.	
F.	A copy of DA Form 5841 *(Power of Attorney)* or **equivalent documents** and a copy of DA Form 5840 *(Certificate of Acceptance as Guardian)* for each escort or guardian whether temporary or long-term is attached to this plan.	
G.	The following additional required documents are completed, included in this plan, and will be put into effect as part of my Family Care Plan.	
	1. DD Form 1172 *(Application for Uniformed Services Identification Card)* for each family member whether they have a currently valid ID card or not.	
	2. DD Form 2558 *(Authorization to Start, Stop or Change an Allotment for Active Duty or Retired Personnel)* or other proof of financial support for expenses incurred by guardian and family members.	
	3. Copies of Letters of Instruction *(which have been forwarded to designated escorts or guardians along with powers of attorney and other pertinent documents)*, outlining all special instructions concerning the care of my family members have also been included in my Family Care Plan.	
H.	I have thoroughly briefed escorts and guardians on the full extent of their responsibilities and on procedures for gaining access to military/civilian facilities, services, entitlements and benefits on behalf of my family members.	
I.	I am confident that my Family Care Plan is workable, and to the best of my knowledge, the guardian*(s)* and escort*(s)* I have designated will be both willing and able to carry out the responsibilities of caring for my family members.	

PART II - DESIGNATION OF GUARDIANS/ESCORTS

A. *I (We) have designated the following temporary guardian to care for my (our) family member (s) until responsibility is transferred to escort or principal (long-term) guardian.*

1. TYPED OR PRINTED NAME	2a. COMPLETE ADDRESS *(Including Street, Apartment Number, P.O. Box Number, Rural Route Number, City, State, and ZIP + 4 where applicable)*
3. TELEPHONE NUMBER *(Include Area Code)*	2b. E- MAIL ADDRESS

ATTACHMENT 1

B. *I (We) have designated the following individual(s) as principal long-term guardian(s) for my(our) family member(s). The designated guardian(s) reside in the continental United States or United States territories.*

1. TYPED OR PRINTED NAME	2a. COMPLETE ADDRESS *(Including Street, Apartment Number, P.O. Box Number, Rural Route Number, City, State, and ZIP + 4 where applicable)*
3. TELEPHONE NUMBER *(Include Area Code)*	2b. E-MAIL ADDRESS

C. *I (We) have designated the following individual(s) as escort for my(our) family member(s) if evacuation from OCONUS becomes necessary (applies only to persons assigned OCONUS):*

1. TYPED OR PRINTED NAME	2a. COMPLETE ADDRESS *(Including Street, Apartment Number, P.O. Box Number, Rural Route Number, City, State, and ZIP + 4 where applicable)*
3. TELEPHONE NUMBER *(Include Area Code)*	2b. E-MAIL ADDRESS

PART III - DUAL MILITARY COUPLES ONLY MILITARY SPOUSE AND COMMANDER CERTIFICATION

A. **Spouse:** *We have made arrangements and will maintain arrangements for the care of our family member(s) in all circumstances required by our commitment to the military and our family.*

1. SIGNATURE OF SPOUSE	2. DATE *(YYYY/MM/DD)*
3. TYPED OR PRINTED NAME OF SPOUSE	4. SSN

5. Recertification	a. INIT.	DATE	b. INIT.	DATE	c. INIT.	DATE	d. INIT.	DATE	e. INIT.	DATE

B. **Commander:** *I have counseled the military spouse assigned to my unit, reviewed the Family Care Plan, and I am satisfied that the members have made adequate family care arrangements.*

1. SIGNATURE OF COMMANDER	2. DATE	3. UNIT ADDRESS
4. TYPED OR PRINTED NAME OF COMMANDER		

5. Recertification	a. INIT.	DATE	b. INIT.	DATE	c. INIT.	DATE	d. INIT.	DATE	e. INIT.	DATE

PART IV - SOLDIER AND COMMANDER CERTIFICATION

A. **Soldier:** *I (We) have made arrangements and will maintain arrangements for the care of my(our) family member(s) in all circumstances required by my(our) commitment to the military and my(our) family.*

1. SIGNATURE OF SOLDIER	2. DATE *(YYYY/MM/DD)*
3. TYPED OR PRINTED NAME OF SOLDIER	4. SSN

5. Recertification	a. INIT.	DATE	b. INIT.	DATE	c. INIT.	DATE	d. INIT.	DATE	e. INIT.	DATE

B. **Commander:** *I have reviewed the Family Care Plan, and I am satisfied that the members have made adequate family care arrangements that will allow for a full range of military duties and for worldwide availability as defined here.*

1. SIGNATURE OF COMMANDER	2. DATE	3. UNIT ADDRESS
4. TYPED OR PRINTED NAME OF COMMANDER		

5. Recertification	a. INIT.	DATE	b. INIT.	DATE	c. INIT.	DATE	d. INIT.	DATE	e. INIT.	DATE

ATTACHMENT 1

176 P.3d 829
IN RE MARRIAGE OF DEPALMA

IN RE MARRIAGE OF DEPALMA
176 P.3d 829 (CO 2008)

In re the MARRIAGE OF P. Jon DEPALMA, Appellee, and
Melissa Ann DePalma, Appellant.

No. 06CA1478.

Colorado Court of Appeals, Div. IV.

July 26, 2007

Certiorari Denied February 19, 2008.

Appeal from the District Court, El Paso County, Richard V. Hall, Connie L. Peterson, JJ.

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Willoughby & Eckelberry, L.L.C., Kimberly R. Willoughby, Denver, Colorado, for Appellee.

Baker & Gaithe, LLC, Carla L. Baker-Sikes, Colorado Springs, Colorado, for Appellant.

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Opinion by Judge GRAHAM.

In this post-dissolution of marriage proceeding, Melissa Ann DePalma (mother) appeals from orders permitting P. Jon DePalma (father) to exercise his parenting time rights during his military deployment by having his current wife care for the children in his home during his parenting time. We affirm.

Father and mother are the parents of two children. In May 2002, they agreed to a parenting plan providing, among other things, that the children would be in father's care two evenings a week and every other weekend, that they would be in mother's care at all other times, and that if either parent was unavailable during his or her designated parenting time, that parent would offer the other parent the right of first refusal for the care of the children. When their marriage was dissolved in June 2002, the parenting plan was incorporated into the decree.

Father is an airline pilot and an Air Force Reserve pilot. Before he remarried in 2004, he and mother coordinated their parenting time each month to take his schedule into account. When he was deployed by the Air Force, mother exercised all parenting time.

After father remarried, he was again deployed to Iraq. During this deployment, the children spent one night and one evening per week in the care of father's new wife (stepmother). The remainder of the parenting time was exercised by mother. In January 2006, facing another deployment, father requested that parental responsibilities be modified to allow the children to spend equal time with each parent. He also requested that the parenting time schedule remain in effect when he was stationed in Iraq. He asserted that this would be in the children's best interests because it would allow them to maintain their normal schedule and their bonded relationship with stepmother and their stepbrother. Mother opposed this motion, arguing that father was impermissibly attempting to establish parental rights for his new wife that the new wife could not have obtained in her own right, and that mother should not be required to decrease her parenting time in favor of a nonparent.

An initial hearing was held in April 2006, followed by a second hearing in May. After considering the parties' arguments, the court determined that the presumption that a natural parent has the right to control the upbringing of a child is rebuttable; that the best interests of the children must be considered in determining whether the presumption has been rebutted; and that in the case before the court, the court was required to consider the relationship between the children and the stepparent as well as father's rights.

An additional hearing was held in June 2006. After considering the testimony of both parents, the stepmother, and the child and family investigator, the court determined that father could decide to have stepmother care for the children during his parenting time and that in doing so, he was presumed to be acting in the best interests of the children. The court further found that allowing father to designate stepmother as the children's caregiver during his absence did not modify the parties' parenting plan, as the children would remain in mother's care at all times except during father's parenting time, nor did it grant parenting time to stepmother. The court concluded that the right of first refusal set forth in the parenting plan did not require that father offer the children to mother while he was deployed, and that imposing such a requirement would interfere with father's parenting time. Accordingly, the court ordered that the children should be in the care of stepmother during father's parenting time as he had requested.

Mother now appeals from these orders.

I.

Mother contends that the trial court erred in holding that father could choose to delegate his parenting time to stepmother while he is deployed or otherwise unavailable for extended periods of time. Mother argues that the court

failed to accord her the presumptions to which she was entitled as the children's natural mother; that the court erred in denying her legal objection to father's motion to modify parenting time; that the court erred in failing to require that stepmother petition for parenting time; and

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that the court failed to make the necessary findings regarding the children's best interests before making its decision. We are not persuaded by these arguments.

A.

We first address mother's argument that the trial court failed to accord her the presumption that she had the first and prior right to parenting time of the children, and the presumption that, as a fit natural parent, she acted in the best interests of the children. We are not persuaded that the court failed to accord mother the benefit of any applicable presumption.

In determining a custodial dispute between a parent and a nonparent, Colorado courts recognize a presumption that a biological parent has a first and prior right to the custody of his or her child. *In re Custody of C.C.R.S.*, 892 P.2d 246, 256 (Colo.1995). Colorado courts also recognize a presumption that a fit parent acts in the best interests of his or her children. *In re Adoption of C.A.*, 137 P.3d 318, 327 (Colo.2006) (citing *Troxel v. Granville*, 530 U.S. 57, 67, 120 S.Ct. 2054, 2061, 147 L.Ed.2d 49 (2000)).

Here, the court expressly recognized that a parent has "a presumptive right to control the upbringing of a child," and that there is a presumption that a natural parent can make the decisions concerning the children. The court ultimately concluded that father could make the decision to have stepmother care for the children during his parenting time, noting that because parental unfitness had not been alleged, father was presumed to act in the best interests of the children.

We are not persuaded that the trial court failed to accord mother the benefit of the presumptions to which she was entitled as one of the children's biological parents.

We note that from the beginning, the trial court treated this matter as a dispute between two fit parents regarding the arrangements for the care of the children during father's parenting time, rather than a dispute between a nonparent seeking parenting time and a parent opposing it. We are not persuaded that the court erred in doing so. Stepmother never requested parenting time in her own right, and we are aware of no authority for the proposition that a parent's request that a stepparent or other nonparent be permitted to provide care for a child should be imputed to the nonparent and treated as a request by the nonparent for parenting time.

Because the dispute was between mother and father, and not between mother and stepmother, the presumption that a parent has a "first and prior" right to the custody of his or her child was not implicated, and there was no need for the court to comment upon the presumption that a parent's right to custody is superior to that of a nonparent.

Because the dispute was between mother and father, the court did not err in according the presumption that a fit parent acts in the best interests of the children to father as well as to mother. As the courts of several other jurisdictions have found, when two fit parents disagree, the court must weigh the wishes of both to determine what is in the child's best interests. *See, e.g., Thomas v. Nichols-Jones*, 909 A.2d 595, 2006 WL 2844525 (Del.2006) (unpublished table decision) (in a dispute between parents regarding visitation by grandmother, father's determination that visitation was in the child's best interests was entitled to the same weight as mother's contrary determination, and the trial court properly considered the wishes of each parent together with the other best interests factors); *In re Marriage of Sullivan*, 342 Ill.App.3d 560, 565, 277 Ill.Dec. 25, 795 N.E.2d 392, 396-97 (2003) (a dispute between mother and father regarding father's petition to allow his parents to visit child while he was on military duty overseas requires the court to weigh the wishes of two fit parents to determine the child's best interests); *Yopp v. Hodges*, 43 Va.App. 427, 438-39, 598 S.E.2d 760, 766 (2004) (where one parent supports grandparents' petition for visitation with child, and the other parent opposes it, and both parents are fit, the trial court must presume that both parents are acting in the best interests of the child; thus, faced with a contest in which one parent's fundamental rights are pitted against the other's fundamental rights, the trial court

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properly resolved the matter by considering the child's best interests).

Because the dispute concerned father's parenting time and father's determination that it would be in the best interests of the children to allow them to maintain their relationship with their stepmother and stepbrother by maintaining the usual parenting time schedule during his deployment, we conclude that the court did not err by considering first the presumption that father was acting in the best interests of the children, and determining that the issue of stepmother's care of the children was resolved when that presumption was not rebutted by mother. The presumption that mother, too, was acting in the best interests of the children, was addressed by the court when it acknowledged mother's concern that parental rights should not be extended to stepmother, and resolved the issue by stating explicitly that the court did not intend to grant parenting time or parenting responsibility to stepmother. By addressing her concern in this manner, the court acknowledged that her concern was reasonable

and that she also was acting in the best interests of the children in bringing it to the court's attention.

B.

We next consider mother's argument that the trial court erred in denying her legal objection to father's motion to modify parenting time. We construe this as an argument that the trial court effectively granted parenting time to stepmother when it granted father's motion, and, thus, entered an order that violated mother's constitutional right to the care, custody, and control of the children. We do not agree with this argument.

We begin our analysis by observing that the trial court expressly stated in its June 8, 2006, order that "[t]he court is not granting any parenting time or parenting responsibility to [stepmother]." Indeed, the orders entered by the court do not grant stepmother any rights at all. Her "right" to parenting time is in reality only a potential obligation, if she chooses to accept it, to care for the children during father's parenting time. It is father's right to ask her to do so, and if he does not, the orders entered by the court do not grant her the right to see the children or care for them. In addition, stepmother has no right to make decisions for the children, as that authority is shared exclusively by mother and father, with day-to-day decision-making allocated to mother during father's deployments.

Because the orders from which mother appeals do not provide stepmother with any legal rights, this case is distinguishable from cases in which a parent has attempted to delegate his or her parental rights to a nonparent, or has requested that the court do so, without regard to the availability of a fit, natural parent who already possesses parental rights and is prepared to assume the responsibility for the child. *Diffin v. Towne*, 3 Misc.3d 1107(A), 787 N.Y.S.2d 677 (N.Y.Fam.Ct.2004), an unpublished decision cited by mother in support of her argument that the orders from which she appeals improperly granted parental responsibilities to stepmother, is such a case, and we find it unpersuasive for that reason.

C.

Mother's argument that the trial court erred in extending "special rights" to stepmother and that the court should have required stepmother to petition for parenting time is also unpersuasive.

Stepmother did not seek parental rights, and father did not ask that such rights be extended to her. Rather, father requested only that stepmother be permitted to care for the children in his home during his absence. As mother acknowledges, parents routinely entrust their children to the care of teachers, family, and daycare providers during their parenting time. Although mother suggests that there is a substantive difference between leaving a child with a nonparent on a short-term basis and doing so for an extended period, she has not cited any authority in support of this proposition or explained why she believes this to be true. Nor has she explained why the entrustment of children to the care of a nonparent over a longer period necessarily requires the extension of parental rights to the nonparent.

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The trial court concluded that stepmother could care for the children during father's parenting time without holding parenting time rights in her own name. Mother has cited no authority for the proposition that the court erred in reaching this conclusion, and we are aware of none. Accordingly, we reject it.

D.

Finally, we reject mother's argument that the trial court erred in failing to make specific findings regarding the best interests of the children.

Under § 14-10-129(1)(a)(I), C.R.S.2006, with certain exceptions not applicable here, a court may make or modify an order granting or denying parenting time rights whenever such order or modification would serve the best interests of the child.

Here, mother did not dispute that it was in the children's best interests to maintain a relationship with their stepmother and stepbrother, and she did not contend that the children's visits with them were harmful. She specifically agreed that father was a fit parent and that he should have joint decision-making responsibility for the children. She testified that she thought that it was "very important" that the children continue to spend time with father's family, including stepmother, and that she felt that "[t]he more people who love them, the better." When asked about the reason for her opposition to father's proposal that stepmother be permitted to care for the children during his deployment, mother stated that she felt that it diminished her rights as a parent, and that it was "not anything, against [stepmother] as a person, or as a parent." Thus, the court could reasonably conclude that both parents agreed it was in the best interests of the children to continue their relationship with stepmother and that they disagreed only as to whether father's proposal improperly extended parental rights to stepmother.

While it might have been better practice for the trial court to make explicit findings regarding the best interests of the children, we are not persuaded that the trial court erred in failing to do so where the record indicates that this issue was not disputed. We note that the court found that neither party argued stepmother inadequately cared for the children, and that the parties agreed the children had a good relationship with both stepmother and their stepbrother. In addition, the court acknowledged that it was in the children's best interests to allow stepmother to care for them during father's

parenting time and that because parental unfitness had not been alleged, father was presumed to act in the best interests of the children.

II.

Mother contends that the trial court violated the right of first refusal provision of the parties' parenting plan by allowing father to offer time to stepmother before offering it to mother. We do not agree.

Modification of parenting time is governed by § 14-10-129, C.R.S.2006. A court may modify an order regarding parenting time where such modification serves the best interests of the children. *See In re Marriage of West*, 94 P.3d 1248, 1250 (Colo.App.2004).

Here, the parenting plan incorporated into the decree dissolving the parties' marriage provides that "[i]n the event either parent is unavailable during their designated time with the children, they will contact the other parent for First Right of Refusal."

Testimony presented at trial showed that the right of first refusal had not been consistently and routinely offered in every case in which it might have applied.

The court ordered that the right of first refusal should be applied only to the parties, and added that father's decision to have stepmother care for the children during his absence did not require that the children be offered first to mother. The court explained that "[u]nder the circumstances and evidence presented, such a requirement would be inconsistent with the parenting plan as a whole and would interfere with [father's] parenting time."

To the extent that the trial court's ruling operated as a modification of the parenting plan incorporated into the decree, it was within the trial court's discretion to make

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such a modification. In light of the evidence in the record that the "parties had operated under a de facto modification of the plan and that the children would be least disrupted by continuing with their current sleepover arrangements, we do not perceive that it was an abuse of discretion to modify the plan to accommodate the best interests of the children.

III.

In her reply brief, mother makes a number of arguments that were not made in her opening brief, and, apparently, were not made to the trial court. We will not consider these arguments. *See In re Marriage of Atencio*, 47 P.3d 718, 722 (Colo.App.2002) (issue not raised before the trial court will not be addressed on appeal); *In re Marriage of Smith*, 7 P.3d 1012, 1017 (Colo.App.1999) (issue raised for the first time in appellant's reply brief will not be considered).

The orders are affirmed.

Judge VOGT and Judge HAWTHORNE concur.

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P.3d

NOTE: This bill has been prepared for the signature of the appropriate legislative officers and the Governor. To determine whether the Governor has signed the bill or taken other action on it, please consult the legislative status sheet, the legislative history, or the Session Laws.

An Act

HOUSE BILL 08-1176

BY REPRESENTATIVE(S) Labuda, Borodkin, Carroll M., Frangas, Gallegos, Gardner B., Lambert, Looper, Lundberg, Marostica, Massey, Middleton, Mitchell V., Rice, Stafford, and Todd;
also SENATOR(S) Ward, Boyd, Brophy, Cadman, Gibbs, Groff, Isgar, Kester, Kopp, Morse, Penry, Renfroe, Romer, Sandoval, Schultheis, Schwartz, Shaffer, Spence, Tapia, Taylor, Tochtrop, Tupa, Wiens, and Williams.

CONCERNING THE MODIFICATION OF THE ALLOCATION OF PARENTAL RESPONSIBILITIES OF CERTAIN DEPLOYED SERVICE MEMBERS.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Article 10 of title 14, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SECTION to read:

14-10-131.3. Modification of the allocation of parental responsibilities and parenting time based upon military service - legislative declaration - definitions. (1) (a) THE GENERAL ASSEMBLY HEREBY FINDS THAT:

(I) AN ARMED FORCES RESERVES OR STATE NATIONAL GUARD MEMBER WHO IS CALLED TO ACTIVE DUTY FACES UNIQUE CHALLENGES WITH

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

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RESPECT TO PARENTING HIS OR HER CHILD WHILE AT THE SAME TIME MEETING HIS OR HER OBLIGATION TO SERVE IN THE MILITARY;

(II) THE ALLOCATION OF PARENTAL RESPONSIBILITIES AND THE PARENTING PLAN FOR A CHILD IS OFTEN MODIFIED AS A RESULT OF A PARENT BEING DEPLOYED OR CALLED TO FEDERAL ACTIVE DUTY. IT IS IMPORTANT THAT SERVICE MEMBERS, CHILDREN, AND OTHER PARENTS SHARE THE SAME EXPECTATION AS TO WHAT THE PARENTAL RESPONSIBILITIES AND PARENTING TIME ORDERS WILL BE WHEN THE SERVICE MEMBER PARENT RETURNS AND THAT THE RELATIONSHIP BETWEEN A SERVICE MEMBER PARENT AND HIS OR HER CHILD WILL NOT BE UNFAIRLY IMPACTED DUE TO MILITARY SERVICE.

(b) THE GENERAL ASSEMBLY THEREFORE FINDS THAT THE INTERESTS OF THE PARENTS AND THE CHILD ARE BEST SERVED WHEN:

(I) MODIFICATIONS OF PARENTAL RESPONSIBILITIES AND PARENTING TIME THAT ARE BASED SOLELY UPON THE DEPLOYMENT OR FEDERAL ACTIVE DUTY OF RESERVE OR NATIONAL GUARD MEMBERS ARE LIMITED IN DURATION; AND

(II) UPON THE SERVICE MEMBER PARENT'S RETURN FROM DEPLOYMENT OR ACTIVE DUTY, THE ALLOCATION OF PARENTAL RESPONSIBILITIES AND PARENTING TIME REVERTS TO THE ORDERS IN PLACE AT THE TIME THE SERVICE MEMBER WAS DEPLOYED OR CALLED TO FEDERAL ACTIVE DUTY.

(2) AS USED IN THIS SECTION, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(a) "ACTIVE DUTY" MEANS FULL-TIME SERVICE IN:

(I) A RESERVE COMPONENT OF THE ARMED FORCES; OR

(II) THE NATIONAL GUARD FOR A PERIOD THAT EXCEEDS THIRTY CONSECUTIVE DAYS IN A CALENDAR YEAR.

(b) "ARMED FORCES" INCLUDES THE RESERVE COMPONENTS OF THE UNITED STATES ARMY, NAVY, MARINE CORPS, AIR FORCE, AND COAST GUARD.

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(c) "PARENT" MEANS PARENT, LEGAL GUARDIAN, OR PERSON AWARDED PARENTAL DECISION-MAKING RESPONSIBILITIES OR PARENTING TIME.

(d) "SERVICE MEMBER" MEANS A MEMBER OF A RESERVE COMPONENT OF THE UNITED STATES ARMED FORCES OR A MEMBER OF A STATE NATIONAL GUARD.

(3) (a) IF A MOTION TO MODIFY AN ORDER CONCERNING THE ALLOCATION OF PARENTAL RESPONSIBILITIES OR PARENTING TIME IS FILED EITHER PRIOR TO OR DURING A SERVICE MEMBER PARENT'S ACTIVE DUTY DEPLOYMENT, AND THE COURT FINDS THAT THE SERVICE MEMBER PARENT'S ACTIVE DUTY DEPLOYMENT IS THE SOLE BASIS FOR THE MODIFICATION, ANY RESULTING ORDER SHALL BE AN INTERIM ORDER.

(b) UPON A SERVICE MEMBER PARENT'S FILING OF WRITTEN NOTICE WITH THE COURT OF HIS OR HER RETURN TO COLORADO FROM ACTIVE DUTY DEPLOYMENT, AND SERVICE OF THE NOTICE ON THE OTHER PARENT, THE INTERIM ORDERS ARE VACATED, AND THE ORDERS CONCERNING THE ALLOCATION OF PARENTAL RESPONSIBILITIES AND PARENTING TIME THAT WERE IN EFFECT AT THE TIME THE INTERIM ORDERS WERE ENTERED SHALL BE IMMEDIATELY REINSTATED WITHOUT THE NEED FOR COURT ACTION.

(4) NOTHING IN THIS SECTION RESTRICTS THE RIGHT OF A PARENT TO:

(a) CONSENT TO A MODIFICATION OF THE ALLOCATION OF PARENTAL RESPONSIBILITIES OR PARENTING TIME THAT CONTINUES BEYOND THE END OF THE SERVICE MEMBER PARENT'S ACTIVE DUTY DEPLOYMENT; OR

(b) FILE A MOTION, PURSUANT TO APPLICABLE LAW, SEEKING A MODIFICATION OF THE ALLOCATION OF PARENTAL RESPONSIBILITIES OR PARENTING TIME AFTER THE INTERIM ORDERS ARE VACATED.

(5) A SERVICE MEMBER PARENT'S AGREEMENT TO A MODIFICATION OF PARENTAL RESPONSIBILITIES OR PARENTING TIME ON AN INTERIM BASIS, DUE TO HIS OR HER ACTIVE DUTY DEPLOYMENT, SHALL NOT BE CONSIDERED AGREEMENT TO A MODIFICATION OR CONSENT TO THE INTEGRATION OF THE CHILD INTO THE OTHER PARENT'S HOUSEHOLD FOR THE PURPOSE OF A MOTION FILED PURSUANT TO SECTION 14-10-129 (2) OR 14-10-131 (2).

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(6) MODIFICATION OF CHILD SUPPORT MAY BE APPROPRIATE WHEN AN INTERIM ORDER IS ENTERED BASED UPON A SERVICE MEMBER PARENT'S ACTIVE DUTY DEPLOYMENT. IN ANY MOTION FILED PURSUANT TO THIS SECTION, IT IS THE PARTIES' RESPONSIBILITY TO ADDRESS CHILD SUPPORT AT THAT TIME PURSUANT TO SECTIONS 14-10-115 AND 14-10-122.

(7) MOTIONS FILED PURSUANT TO THIS SECTION SHALL NOT QUALIFY AS MOTIONS FILED FOR PURPOSES OF THE TWO-YEAR LIMITATION ON MOTIONS CONTAINED IN SECTIONS 14-10-129 AND 14-10-131.

SECTION 2. 14-13-102 (7), Colorado Revised Statutes, is amended to read:

14-13-102. Definitions. As used in this article, unless the context otherwise requires:

(7) (a) "Home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

(b) NOTWITHSTANDING THE PROVISIONS OF PARAGRAPH (a) OF THIS SUBSECTION (7), "HOME STATE" DOES NOT MEAN A STATE IN WHICH A CHILD LIVED WITH A PARENT OR A PERSON ACTING AS A PARENT ON A TEMPORARY BASIS AS THE RESULT OF AN INTERIM ORDER ENTERED PURSUANT TO SECTION 14-10-131.3.

SECTION 3. Applicability. This act shall apply to motions filed on or after the effective date of this act.

SECTION 4. Effective date. This act shall take effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly that is allowed for submitting a referendum petition pursuant to article V, section 1 (3) of the state constitution, (August 6, 2008, if adjournment sine die is on May 7, 2008); except that, if a referendum petition is filed against this act or an item, section, or part of this act within such period, then the act, item, section, or

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part, if approved by the people, shall take effect on the date of the official declaration of the vote thereon by proclamation of the governor.

Andrew Romanoff SPEAKER OF THE HOUSE OF REPRESENTATIVES	Peter C. Groff PRESIDENT OF THE SENATE
Marilyn Eddins CHIEF CLERK OF THE HOUSE OF REPRESENTATIVES	Karen Goldman SECRETARY OF THE SENATE

APPROVED_____

Bill Ritter, Jr.
GOVERNOR OF THE STATE OF COLORADO

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JENNIFER SPAHMER, v. TODD GULLETTE.

Colorado Supreme Court Opinions

SUPREME COURT, STATE OF COLORADO Two East Fourteenth Avenue Denver, Colorado 80203

Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 02CA1774

Case No. 03SC751

June 6, 2005

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Barry J. Seidenfeld, PC Barry J. Seidenfeld Denver, Colorado and Anne Whalen Gill, PC Anne Whalen Gill Castle Rock, Colorado Attorneys for the Petitioner

Todd W. Gullette, Pro Se Boulder, Colorado Ronald D. Litvak Litvak, Litvak, Mehrtens & Epstein, PC Denver, Colorado Amicus Curiae for Colorado Chapter American Academy of Matrimonial Lawyers

In this appeal from an initial allocation of parental responsibilities pursuant to subsection 14-10-124(1.5), C.R.S. (2004), Petitioner Jennifer Spahmer (Mother) argues that the trial court abused its discretion when it ordered her to live in Colorado in close proximity to Respondent Todd Gullette (Father). We agree, and conclude that in an initial determination to allocate parental responsibilities, a court has no statutory authority to order a parent to live in a specific location. Rather, the court must accept the location in which each party intends to live, and allocate parental responsibilities accordingly in the best interests of the child. As a result, we reverse the court of appeals'holding and remand with instructions to return the case to the trial court for proceedings consistent with this opinion.

Mother and Father met in Colorado in September 2000 and started dating. Shortly thereafter, Mother accepted a job as a financial analyst with Microsoft and moved to the state of Washington. Father continued to visit Mother in Washington and even considered moving there.

Mother learned she was pregnant in January 2001 and the parties subsequently got engaged. Father had originally planned to move to Washington, but changed his mind when he was offered a partnership with a

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real estate company in Colorado. Consequently, in May 2001, Mother left her job with Microsoft and moved back to Colorado.

A daughter, Jordan, was born to the parties in September 2001. Around this time, the relationship between Mother and Father began to deteriorate. As a result, the parties broke off their engagement and began counseling to mend their relationship. Following this decision, they spent Thanksgiving in Arizona with Mother's extended family and applied for jobs there. Mother's stepfather, mother, and halfsisters offered to assist the parties and Jordan if they moved to Arizona. Despite this offer, the parties separated upon their return to Colorado. Father moved in with his parents and Mother continued to live in Father's town home with Jordan.

The parties differ as to the events giving rise to this litigation. Mother indicates that she asked and received Father's permission to spend the Christmas holiday with her family and Jordan. Accordingly, on December 10, 2001, Mother began the drive to Arizona, informing Father of her departure from the road. Father became very concerned and upset when he learned of Mother's departure. Though he conceded that he had agreed to Mother's spending the Christmas holiday with her family, he claimed not to have known that Mother was leaving on December 10. Father also claimed he was concerned because, unbeknownst to him, Mother had moved most of her belongings from his town home. Father assumed that Mother was planning to leave Colorado permanently with Jordan. Mother maintained that she removed her belongings from the town home because Father had expressed a desire to rent the place to someone else.

On December 10, 2001, in response to these events, Father filed an action for the allocation of parental rights and responsibilities regarding Jordan. In addition, he filed a motion requesting a restraining order requiring Mother to return Jordan to Colorado, and prohibiting Mother from subsequently taking Jordan from Colorado. Mother was served with process at her family's home in Arizona and returned to Colorado with Jordan after Christmas.

The trial court subsequently entered temporary orders restraining Mother from removing Jordan from Colorado, granting Mother sole decisionmaking authority concerning Jordan, and allocating parenting time between Mother and Father. Since the court's temporary orders provided that Mother must have either Father or the court's permission to remove the child from Colorado, Mother filed a"Motion for Forthwith Hearing on

Removal of Minor Child From Colorado."In that motion, Mother requested that the court enter an order "allowing the permanent residence of the minor child to be changed from the State of Colorado to the State of Arizona and to modify previous parenting time orders to accommodate that change."Upon its own motion, the court appointed a special advocate and set a hearing for allocation of parental responsibility pursuant to subsection 14-10-124 (1.5).

In its subsequent order allocating parental responsibilities, the court briefly discussed the relevant statutes, explaining the tension between the best interests statute, section 14-10-124, and the relocation statute, section 14-10-129, C.R.S. (2004). The court ultimately determined that it was required to allocate parenting time and decisionmaking responsibilities between the parties in accordance with subsection 14-10-124(1.5). However, the court held that even if subsection 14-10-129(2) applied, its holding would be the same.

Based on the testimony of Mother, Father and the special advocate, the court held that it was in Jordan's best interests for the parents to have joint decisionmaking authority. The court also determined that it was in Jordan's best interests to remain in Colorado, stating, "Jordan was born here and has spent the entire eleven months of her life to date here. Jordan is to remain a Colorado girl."Accordingly, the court ordered Mother to remain in Colorado:

[Mother] has fifteen hours -one semester -left to graduate from Colorado State University. Should she choose to finish up and graduate the parties could still maintain their coparenting schedule by living along the northern I-25 or Highway 287 corridors between Longmont and Fort

Collins. Such an arrangement would allow [Mother] to go to school in Ft. Collins and [Father] to work in Boulder County. Otherwise, [Mother] is to seek employment and housing in the Denver-Boulder metropolitan area.

The court also ordered the parties to develop their own parenting schedule with the help of a parenting coordinator. Mother appealed.

In *In re Responsibility of J.N.G.*, 2003 WL 21940954 (Colo. App. 2003), the court of appeals affirmed the trial court's order, holding that the trial court properly applied the best interests standard "to determine Mother's request to relocate with the child to the State of Arizona."The court of appeals did not address Mother's constitutional argument that the trial court violated her right to travel when it ordered her to remain in Colorado because Mother failed to raise the constitutional issue prior to entry of permanent orders.

We granted certiorari to determine whether a trial court may order a parent to live in a specific location when it determines the best interests of the child. We conclude that in an initial determination to allocate parental responsibilities, a court has no statutory authority to order a parent to live in a specific location.(fn1) Rather, the court must accept the locationin which each party intends to live, and allocate parental responsibilities accordingly in the best interests of the child.

To determine whether the trial court abused its discretion in allocating parental responsibilities, we engage in a twopart analysis. First, we must establish that the trial court applied the correct statute. We must then analyze whether the trial court's decision under the statute was manifestly unfair, arbitrary, or unreasonable so as to constitute an abuse of discretion. *See People v. Riggs*, 87 P.3d 109, 114 (Colo. 2004). Here, though the trial court applied the correct statute to the facts of the case, its decision was manifestly unfair and unreasonable so as to constitute an abuse of discretion.

A. Section 14-10-124, not Section 14-10-129, Applies in an Initial Determination to Allocate Parental Responsibilities

This case began as a proceeding to allocate parental responsibilities pursuant to subsection 14-10-124(1.5). However, the proceedings were complicated when, as a result of temporary orders prohibiting her from leaving the state with Jordan, Mother filed a motion to relocate pursuant to subsection 14-10-129(2)(c). Such relocation motions are only appropriate to modify parenting time after an initial proceeding to allocate parental responsibilities. Even if temporary orders allocating parental responsibilities have entered, as here, it is well established that such orders merely allocate parental responsibilities pending a hearing pursuant to subsection 14-10-124(1.5). *In re Marriage of Fickling*, 100 P.3d 571, 574 (Colo. App. 2004); *In re Marriage of Lawson*, 44 Colo. App. 105, 107-08, 608 P.2d 378, 380 (1980). Accordingly, allocation of parental responsibilities pursuant to subsection 14-10-124(1.5) is separate and distinct from modification hearings pursuant to subsection 14-10-129(2)(c). *See In re Marriage of Fickling*, 100 P.3d at 574 (holding that only the entry of permanent parenting time orders in a dissolution proceeding grants parenting time rights, the revision of which would necessitate application of section 14-10-129); *In re Marriage of Lawson*, 44 Colo. App. at 107-08, 608 P.2d at 380 (holding that temporary order is not res judicata to a permanent order).

Mother first contends that the trial court abused its discretion and exceeded its statutory authority when it ordered her to live in Colorado. We agree.

Interpretation of a statute is a question of law that we review de novo. *E.g.*,

United Airlines, Inc. v. Indus. Claim Appeals Office, 993 P.2d 1152, 1157 (Colo. 2000). In construing a statute, we strive to give effect to the intent of the legislature and adopt the statutory construction that best effectuates the purposes of legislative scheme, looking first to the plain language of the statute. *E.g., People v. Yascavage*, 101 P.3d 1090, 1093 (Colo. 2004). Where the statutory language is clear and unambiguous, we do not resort to any further rules of statutory construction. *E.g., id.* at 1093. We construe a statute so as to give effect to every word, and we do not adopt a construction that renders any term superfluous. *See Cherry Hills Resort Dev. Co. v. City of Cherry Hills Vill.*, 790 P.2d 827, 830 (Colo. 1990).

Here, subsection 14-10-124(1.5) instructs trial courts to determine the allocation of parental responsibilities, including parenting time, in accordance with the best interests of the child, giving "paramount consideration to the physical, mental, and emotional conditions and needs of the child."The allocation of parenting time is a matter within the sound discretion of the trial court, taking into consideration the child's best interests and the policy of maintaining the child's relationship with both parents. *In re Marriage of Fickling*, 100 P.3d at 574-75. Thus, the General Assembly's mandate is clear: allocate parenting time between the parents in a manner which is in the best interests of the child.

Nothing in the plain language of subsection 14-10-124(1.5)(a), however, authorizes a trial court to allocate parenting time by ordering a parent to live in a specific locale. To the contrary, one of the factors set forth in subsection 14-10-124(1.5)(a) requires the court to consider "[t]he *physical proximity* of the parties to each other as this relates to the practical considerations of parenting *time."See* § 14-10-124(1.5)(a)(VIII) (emphasis added). Hence, while the trial court has the authority to consider where the parents live with relation to each other for the purpose of allocating parenting time, this authority, by its plain language, does not extend so far as to allow a court to order a parent to live in a particular or specific location.

We will not create an addition to a statute that the plain language does not suggest or demand. *See e.g., Scoggins v. Unigard Ins. Co.*, 869 P.2d 202, 205 (Colo.1994) ("We will not judicially legislate by reading a statute to accomplish something the plain language does not suggest, warrant or mandate."). Here, the plain language of the statute limits the authority of the trial court to merely taking into account, in its best interests of the child analysis, the residences of the parents and their proximity to each other.

This conclusion is buttressed by a comparison of the parental responsibility statute with the relocation statute. Such a comparison demonstrates that the General Assembly did not intend to give courts the authority to order parents to live in particular or specific locations in initial allocation proceedings. For example, subsection 14-10-124(1.5)(a) does not refer to the location of a parent, but rather speaks only in terms of the "physical proximity of the parties."Conversely, subsection 14-10-129(2)(c) specifically addresses postdissolution parental relocation.

Likewise, subsection 14-10-124(1.5)(a) is much less rigorous than subsection 14-10-129(2)(c) in terms of the factors it requires trial courts to consider. Subsection 14-10-124(1.5)(a) sets forth eleven factors the trial court must consider before determining the best interests of the child. Subsection 14-10-129(2)(c) incorporates these eleven factors and sets forth nine additional factors for a court to consider before allowing a parent to relocate. § 14-10-129(2)(c); see *also In re Marriage of Ciesluk*, No. 04SC555, slip op. at 10-12 (Colo. June 6, 2005).

Finally, in subsection 14-10-124(1), the General Assembly merely "urges"parents to share the rights and responsibilities of childrearing.(fn2) In contrast, in subsection 14-10-

129(2), the General Assembly prohibits majority time parents from relocating, mandating that a court "shall not modify"a prior order concerning parenting time unless certain conditions are met . (fn3)

These linguistic differences between the statutes are a reflection of the fact that the interests and circumstances of the parties at the time the relationship fails are quite different from those existing at the time of subsequent modification proceedings. *See Baures v. Lewis*, 770 A.2d 214, 229 (N.J. 2001) ("A removal case is entirely different from an initial custody determination. When initial custody is decided, either by judicial ruling or by settlement, the ultimate judgment is squarely dependent on what is in the child's best interests. ... Removal is quite different. In a removal case, the parents'interests take on importance. However, although the parties often do not seem to realize it, the conflict in a removal case is not purely between the parents' needs and desires. Rather, it is a conflict based on the extent to which those needs and desires can be viewed as intertwined with the child's interests."(citations omitted)); *Ford v. Ford*, 789 A.2d 1104, 1109 (Conn. App. Ct. 2002) (holding that "postjudgement relocation matters differ and should be treated differently from relocation issues that arise at the time of dissolution") .

For instance at the time of dissolution, the parties are on equal ground with respect to a determination of parental responsibilities. *Ford*, 789 A.2d at 1109. Neither has vested parenting rights or decisionmaking responsibilities subject to restriction by the court. *Id.* Rather, each party is as likely as the other to become the majority time parent based on a best interests analysis.

Conversely, in postdissolution modification proceedings, the parties are on unequal grounds with respect to parental responsibilities. *Id.* One party has already been named the majority time parent and a court has already rendered judgment as to issues such as parenting time and decisionmaking responsibilities. *See id.* As a result, each parent has vested rights in a specified amount of parenting time and decisionmaking responsibility. Hence, a more stringent standard for relocation is necessary to protect the already vested rights of the parents.

Similarly, the child's circumstances during the initial allocation are different than they are at modification. In most modification cases, the child has achieved a degree of stability in the postdecree family unit that has not occurred at the time of dissolution proceedings. *See In re Marriage of Francis*, 919 P.2d 776, 780-81 (Colo. 1996) ("The [Uniform Dissolution of Marriage Act] recognizes and carries out the philosophy that assuring stability and finality in a child's custody is an important factor in the postdissolution emotional health of a child."). This is because the interdependence and relationship between the majority time parent and the child that exist at the time of modification proceedings have presumably not yet formed at the time of dissolution. *See Ford*, 789 A.2d at 1109. As a result, as the statutory language indicates, the goal of dissolution proceedings is to create a stable situation between the new family units arising out of the divorce, whereas the goal of a modification proceeding is to maintain this stability, if possible, in the best interests of the child. *See* § 14-10-124; § 14-10-129.

In sum, since we will not read a statute to accomplish something the plain language does not suggest, we decline to find that a trial court has authority to order a parent to live in a specific place pursuant to subsection 14-10-124(1.5)(a).(fn4) Had the General Assem-

bly wanted the trial courts to have the authority to dictate the domicile of the parents, then it would have instructed courts to engage in an analysis akin to that set forth in subsection 14-10-129(2)(c). Rather, in the initial determination of parental responsibilities, the plain language of subsection 14-10-124(1.5) indicates that a trial court must accept the location in which each party intends to live, and allocate parental responsibilities, including parenting time, accordingly. Consistent with this approach, we encourage parties awaiting the initial allocation of parental responsibilities to submit to the court their proposed plans to move, instead of moving before the initial allocation occurs.

Thus, the trial court should have allocated parenting time with the understanding that Mother was intending to live in Arizona and Father was intending to live in Colorado. Unlike some cases where the parents'future plans are ambiguous, in this case Mother testified that she wanted to live in Arizona, and that she wanted to do so in order to have the support of her family and to pursue better job opportunities. In addition, Mother premised her proposed parenting schedule on her desire to live in Arizona. Finally, there was no testimony that either parent was unfit or did not have the best interests of the child at heart. *See Troxel v. Granville*, 530 U.S. 57, 68-69 (2000) ("So long as a parent adequately cares for his or her children (i.e. is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.") (citing *Reno v. Flores*, 507 U.S. 292, 304 (1993)).

Therefore, the trial court should have fashioned a parenting plan which took into account the "physical proximity of the parties to each other"; specifically, that Mother would be living in Arizona and Father would be living in Colorado. In failing to do this, the trial court abused its discretion and exceeded its statutory authority. Accordingly, we reverse the court of appeals'holding and remand with instructions to return the case to the trial court for proceedings consistent with this opinion.

Footnote:

1 Petitioner further argues that the court order is unconstitutional. Because we hold that the court had no statutory authority to order the mother to live in Colorado, we do not reach the constitutional issue.

2 "The general assembly finds and declares that it is in the best interest of all parties to encourage frequent and continuing contact between each parent and the minor children of the marriage after the parents have separated or dissolved their marriage. In order to effectuate this goal, the general assembly *urges* parents to share the rights and responsibilities of childrearing and to encourage the love, affection, and contact between the children and the parents."§ 14-10-124(1) (emphasis added) .

3 *See* § 14-10-129(2)(c).

4 Our resolution in this case has no impact on a trial court's authority to temporarily stabilize a situation or to preserve the status quo by issuing a temporary restraining order ordering a parent who has relocated without the court's knowledge to return to Colorado with the minor child. *See* § 14-13-210(2), C.R.S. (2004) ("If a party to a childcustody proceeding whose presence is desired by the court is outside this state, the court may order that a notice given pursuant to section 14-13-108 [C.R.S. (2004)] include a statement directing the party to appear in person with or without the child and informing the party that failure to appear may result in a decision adverse to the party."); § 14-13-210(3) ("The court may enter any orders necessary to ensure the safety of the child and of any person ordered to appear in this section.").

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ATTACHMENT 4

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In re the Marriage of Ciesluk

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In Re the Marriage of: MICHELLE A. CIESLUK, and CHRISTOPHER J. CIESLUK.

Colorado Supreme Court Opinions

SUPREME COURT, STATE OF COLORADO Two East 14th Avenue Denver, Colorado 80203

Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 03CA2047

Case No. 04SC555

JUDGMENT REVERSED AND CASE REMANDED

EN BANC

June 6, 2005

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Ann Whalen Gill, PC Ann Whalen Gill Castle Rock, Colorado Attorney for Michelle A. Ciesluk

Willoughby Law Firm, LLC Kimberly R. Willoughby Alisa Campbell Denver, Colorado Attorneys for Christopher J. Ciesluk

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JUSTICE RICE delivered the Opinion of the Court.

In this postdissolution proceeding between Michelle A. Ciesluk (Mother) and Christopher J. Ciesluk (Father), Mother appeals the trial court order denying her motion to modify parenting time pursuant to section 14-10-129, C.R.S. (2004). We hold that section 14-10-129, as amended, eliminates the threepart test set forth in *In re Marriage of Francis*, 919 P.2d 776, 784-85 (Colo. 1996), including the presumption in favor of the majority time parent who is seeking to relocate. Instead, both parents share equally the burden of demonstrating what is in the child's best interests. Ultimately, it is incumbent upon the trial court to consider all of the relevant factors under subsection 14-10-129(2)(c) and to decide what arrangement will serve the child's best interests.

In light of this conclusion, we hold that the trial court abused its discretion because it improperly created a presumption in favor of Father in applying section 14-10-129 to the facts of this case. Accordingly, we reverse the court of appeals'holding and remand with instructions to return the case to the trial court for proceedings consistent with this opinion.

Mother and Father met and married in Nebraska in 1995. One child, Connor, was born to them on February 27, 1997. In September 2002, the parties amicably divorced. Pursuant to the separation agreement incorporated into the decree of dissolution, Mother is the primary residential parent for school residency and other legal residential requirements; Father has parenting time on two weekends and two weekday evenings per month. Mother and Father have joint parental responsibility and decisionmaking authority.

In February 2003, Mother, a Sprint employee for seven years, was laid off as a result of Sprint's workforce reduction in Colorado. She sought alternative employment in Colorado and in Arizona, where her father, brother, sisterinlaw, and nephew reside. Though she was unable to find a comparable job in Colorado, Sprint interviewed her for a position in Arizona. However, Sprint refused to extend her an offer until she committed to relocating to Arizona.

Consequently, in March 2003, Mother filed a motion to modify parenting time(fn1) pursuant to section 14-10-129 to allow her to relocate to Arizona with Connor. Mother included with her motion a proposed parenting time schedule giving Father four unscheduled visits per year with thirty days notice, one week at Christmas, two weeks during the summer, and one week at spring break.(fn2) Mother proposed to pay half the airfare costs associated with these visits. When Mother and Father were unable to agree on these terms, Father opposed the motion and moved for the appointment of a special advocate to determine Connor's best interests.

The special advocate met with both parties together and individually, visited both parties at their respective homes, and met individually with Connor. She also interviewed the parties'respective friends and extended family, as well as Connor's teachers and principal. Based on her observations, she prepared a report using the factors in subsection 14-10-129(2)(c) to determine Connor's best interests. In her analysis, she concluded that, as a result of the relocation, Father's presence in Connor's life would be greatly reduced and that such reduction would have a negative impact on Connor. As a result, she recommended that it was in Connor's best interests to stay in close proximity to both Mother and Father.

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At the subsequent hearing to modify parenting time, at which Mother, Father, and the special advocate testified, the trial court first held that section 14-10-129

eliminates the threepart test set forth in *Francis*, including the presumption in favor of the majority time parent who is seeking to relocate. Instead, the trial court held that it was required to determine whether modification of parenting time is in the best interests of the child, taking into account all relevant factors in subsection 14-10-129(2)(c).

In applying this standard, the trial court adopted the special advocate's analysis, incorporated her recommendation into its order, and denied Mother's motion to modify parenting time, holding that "parenthood results in some sacrifice and it is better off for parents to remain in close proximity."In making this determination, the trial court gave substantial weight to the impact of the move on Connor's relationship with Father and to Mother's failure to establish how the move would "enhance"Connor. Mother appealed.

In *In re Marriage of Ciesluk*, 100 P.3d 527, 530 (Colo. App. 2004), the court of appeals affirmed the trial court order in its entirety, holding that the legislature intended section 14-10-129 to overrule *Francis* and to eliminate the presumption favoring a majority time parent. The court of appeals further held that the trial court did not abuse its discretion in giving substantial weight to the impact of Mother's relocation on Connor's relationship with Father. *In re Marriage of Ciesluk*, 100 P.3d at 530.

On certiorari, Mother contends that the trial court misapplied section 14-10-129 in determining that it was not in Connor's best interests to modify parenting time. First, Mother argues that the trial court wrongly interpreted section 14-10-129 to eliminate the presumption in favor of the majority time parent articulated in *In re Marriage of Francis.* As a corollary, Mother argues that if section 14-10-129, as amended, discourages her from relocating, it unconstitutionally infringes upon her right to travel.

Mother next argues that the trial court abused its discretion in applying the statutory factors contained in subsection 14-10-129(2)(c) to the facts of this case. Specifically, Mother contends that the trial court (1) improperly required her to show that the modification of parenting time would "enhance"Connor and (2) improperly relied upon a *Journal of Family Psychology* article in concluding that "it is better off for parents to remain in close proximity." Mother asserts that the effect of this abuse of discretion was to create an unconstitutional presumption in favor of Father and an insurmountable burden for majority time parents to overcome.

We hold that the trial court properly concluded that section 14-10-129 eliminates the *Francis* test, including the presumption in favor of the majority time parent. However, we conclude that the trial court abused its discretion in applying section 14-10-129 to the facts of this case, and that such abuse of discretion unconstitutionally infringed upon Mother's right to travel. Accordingly, we remand to the trial court for proceedings consistent with this opinion.

We first address whether the threepart test articulated in *Francis* remains viable in light of the General Assembly's recent amendments to section 14-10-129. Mother argues that section 14-10-129, as amended, simply modifies the best interests analysis set forth in *Francis*, but does not affect the presumption in favor of the majority time parent in relocation cases.(fn3) We disagree and conclude that section 14-10-129 eliminates the Francis test.

In *Francis*, we established a threepart test to determine whether a sole residential custodian's(fn4) proposed move was in the best

interests of the child. 919 P.2d at 784-85. First, a custodial parent had to present a prima facie case showing that there was a sensible reason for the move. *Id.* Once the custodial parent had presented a prima facie case, a presumption in favor of allowing the child to move with the custodial parent arose; the burden then shifted to the noncustodial parent to show that the move was not in the child's best interests.(fn5) The noncustodial parent could establish that the move was not in the child's best interests and overcome the presumption by showing that one of three factors had been met; namely, that (1) the custodial parent had consented to the modification of custody to the noncustodial parent; (2) the child had been integrated into the noncustodial parent's family with the custodial parent's consent; or (3) the child's present environment endangered his physical health or significantly impaired his emotional development ("the endangerment standard"). *Id.* at 785. If no credible evidence of endangerment existed, the noncustodial parent alternatively could overcome the presumption by establishing by a preponderance of evidence that the negative impact of the move cumulatively outweighed the advantages of remaining with the primary caregiver. *Id.*

In response to dissatisfaction with the *Francis* test, the General Assembly amended section 14-10-129, effective September 1, 2001, to set forth a new procedure for determining whether modification of a parenting time order due to a majority time parent's relocation is in a child's best interests. *See* ch. 222, sec. 1, § 14-10-129, 2001 Colo. Sess. Laws 761, 761-763; *see also* Audio Tape: Hearing on S.B. 01-029 Before the Senate Judiciary Comm., 63d Gen. Assem., 1st Reg. Sess. (Colo. Feb. 12, 2001)(on file with Colorado State Archives)(hereinafter Feb. 12 Hearing)(statements of Senator Gordon, Chairman, Senate Judiciary Committee; Beth Henson, family law attorney; Dr. Bill Austin, licensed Colorado psychologist in consultation with Colorado Interdisciplinary Committee on Children and

Family; and Frances Fontana, President, Colorado State Interdisciplinary Committee) .

The new legislative scheme retained the language set forth in subsection 14-10-129(2), which provides that:

"the court shall not modify a prior order concerning parenting time that substantially changes the parenting time as well as changes the party with whom the child resides a majority of the time unless it finds ... that a change has occurred in the circumstances of the child or the party with whom the child resides the majority of the time ....

In addition, the General Assembly retained the language in subsection 14-10-129(2) which requires that any modification be in the best interests of the child.

The General Assembly also chose to preserve the language of subsection 14-10-129(2) which provides that the court shall retain the parenting time schedule established in the prior decree unless there is an agreement between the parties to modify,(fn6) there is consent to allow the child to be integrated into the family of the moving party,(fn7) or the child's present environment is

dangerous.(fn8)

The General Assembly, however, elected to add a fourth situation in which a modification of an existing parenting time schedule is permitted, namely when a majority time parent intends to relocate with the child to a different geographical area.(fn9) § 14-10-129(2)(c). Thus, in the language of the statute, if a majority time parent "is intending to relocate with the child,"a"change has occurred in the circumstances of the child or the party with whom the child resides the majority of the time"sufficient to cause the court to consider modifying a prior order concerning parenting time. § 14-10-129(2).

However, before a court may allow a majority time parent to relocate with the child, the new statutory language in subsection 14-10-129(2)(c) dictates that the court shall consider twentyone relevant factors, including eleven factors listed in subsection 14-10-124(1.5)(a), C.R.S. (2004),(fn10) and nine(fn11) entirely new factors specifically tailored to modification proceedings arising out of a majority time parent's desire to relocate. § 14-10-129 (2) (c) (I) -(IX).(fn12)

C. Section 14-10-129 Eliminates the *Francis* Presumption

We now address whether the presumption set forth in *Francis* survived these amendments to section 14-10-129. As is apparent from the above analysis of the statute before and after *Francis*, the General Assembly has created a new methodology by which courts are to evaluate relocation cases. *See* § 14-10-129(2)(c). This statutory scheme eliminates the *Francis* presumption in favor of the majority time parent and substitutes in its place a specific factual analysis designed

to aid the trial court in determining whether modification of parenting time in relocation cases is in the child's best interests. *See* § 14-10-129(c)(I)-(IX); § 14-10-124(1.5).

Interpretation of a statute is a question of law that we review de novo. *E.g., United Airlines, Inc. v. Indus. Claim Appeals Office*, 993 P.2d 1152, 1157 (Colo. 2000). In construing a statute, we strive to give effect to the intent of the legislature and adopt the statutory construction that best effectuates the purposes of the legislative scheme, looking first to the plain language of the statute. *E.g., People v. Yascavage*, 101 P.3d 1090, 1093 (Colo. 2004).

Here, the General Assembly's intent to eliminate the *Francis* presumption is readily apparent on the face of the statute. Though we need not look beyond the plain language of the statute, we nonetheless note that this reading of the statute is equally consistent with the legislative history of the statute, which indicates that legislators proposed the amendments in an effort to eliminate the *Francis* test. *See* Feb. 12 Hearing (statements of Senator Gordon, Beth Henson, Bill Austin, and Frances Fontana). For example, Senator Gordon, Chairman of the Senate Judiciary Committee and the bill's sponsor, opined that the *Francis* standard was simply too difficult for noncustodial parents to meet, stating that "what this bill is doing is changing the proof, the burden of proof in terms of who has to prove that the move is appropriate and by what level of proof."Feb. 12 Hearing.

Mother's arguments to the contrary are unpersuasive. Mother first argues that amended section 14-10-129 simply codifies the *Francis* analysis. As support for this argument, Mother notes that the list of factors in subsection 14-10-129(2)(c) parallels those laid out in *Francis. See* 919 P.2d at 785.(fn13) This argument is not accurate. The General Assembly codified three of the *Francis* factors(fn14) into subsection 14-10-129(2)(c), but did not incorporate the factor requiring a parent to show that "the proposed move will enhance the quality of life for the child."

Even still, the approved use of three of the four *Francis* factors in relocation cases has no effect on the plain language of the statute, which replaces the presumption in favor of the majority time parent with a liberal factdriven analysis.

Mother also argues that our holding is contrary to the court of appeals'decision in *In re Marriage of Donovan*, 36 P.3d 207, 210 (Colo. App. 2001), which upheld application of the *Francis* test in a relocation case even

after the legislature amended section 14-10-129. Although this Court is not bound by court of appeals'decisions, we note that the court of appeals in *In re Marriage of Donovan* did not address section 14-10-129 because the parties in that case filed the motion to relocate in the year 2000. *See* 36 P.3d at 208. Amended section 14-10-129 did not become effective until September 1, 2001, and only applies to relocation motions filed after that date. *See* ch. 222, sec. 2, § 14-10-129, 2001 Colo. Sess. Laws 761, 763 ("The provisions of this act shall apply to all motions concerning modification of parenting time filed on or after the applicable effective date of this act."). Accordingly, the court of appeals decided *In re Marriage of Donovan* under *Francis,* the preamendment scheme. *See In re Marriage of Donovan,* 36 P.3d at 209-10. As a result, our conclusion is not contrary to the holding in *In re Marriage of Donovan.*

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In conclusion, in amending section 14-10-129, the General Assembly intended to eliminate the *Francis* test in relocation cases, including the presumption in favor of the majority time parent seeking to relocate.

Having determined that the *Francis* presumption in favor of the majority time parent no longer applies in relocation cases, we turn next to Mother's alternative argument, namely that section 14-10-129, absent a presumption in favor of allowing her to move, discourages her from relocating, and unconstitutionally infringes upon her right to travel.

It is well established that a citizen has the right to travel between states. *See, e.g., Shapiro v. Thompson,* 394 U.S. 618, 629-31 (1969) *overruled on other grounds by Edelman v. Jordan,* 415 U.S. 651, 671 (1974). This right encompasses the right to "migrate, resettle, find a new job, and start a new *life."Id.* at 629. "[I]t makes no difference that the parent who wishes to relocate is not prohibited outright from doing so; a legal rule that operates to chill the exercise of the right, absent a sufficient state interest to do so, is as impermissible as one that bans exercise of the right *altogether."Jaramillo v. Jaramillo,* 823 P.2d 299, 306 (N.M. 1991)(citing *Shapiro,* 394 U.S. at 631). Here, though section 14-10-129 does not prohibit outright a majority time parent from relocating, it chills the exercise of that parent's right to travel because, in seeking to relocate, that parent risks losing majority parent status with respect to the minor child.

However, a majority time parent's right to travel is not the sole constitutional right at issue in relocation cases. In addition, a minority time parent has an equally important constitutional right to the care and control of the child. *See Troxel v. Granville,* 530 U.S. 57, 65 (2000)("The liberty interest at issue in this caseùthe interest of parents in the care, custody, and control of their childrenùis perhaps the oldest of the fundamental liberty interests recognized by this Court."); *Santosky v. Kramer,* 455 U.S. 745, 754 (1982)(discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944)("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. ") .

Though consideration of the parents'competing constitutional interests is important in relocation cases, the conflict is not simply between the parents'needs and desires. *See Baures v. Lewis,* 770 A.2d 214, 229 (N.J. 2001). Rather, the issue in relocation cases is the extent to which the parents' needs and desires are intertwined with the child's best interests. *See id.* Thus, relocation disputes present courts with a unique challenge: to promote the best interests of the child while affording protection equally between a majority time parent's right to travel and a minority time parent's right to parent.

The interplay of a parent's right to travel and a parent's right to the care and control of his or her child in the context of a best interests analysis is a matter of first impression for this Court. However, as discussed below, we find the decisions of other courts that have encountered this issue to be instructive, including those of our own court of appeals. *See In re Marriage of Graham & Swim,* No. 03-1922, 2005 WL 774412, at *3-4 (Colo. App. Apr. 7, 2005); *LaChappelle v. Mitten,* 607 N.W.2d 151 (Minn. Ct. App. 2000); *Watt v. Watt,* 971 P.2d 608 (Wyo. 1999); *Jaramillo v. Jaramillo,* 823 P.2d 299 (N.M. 1991).

Though most courts that have considered this question have acknowledged that the right to travel is implicated when a child's

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majority time parent seeks to remove the child from the state,(fn15) these courts cannot agree on how to balance the right to travel with the rights of the minority time parent in a best interests of the child analysis. Instead, three distinct approaches have developed. The first, Wyoming's, elevates the relocating parent's right to travel over the other competing interests. *See Watt,* 971 P.2d at 615-16. The second approach, adopted in Minnesota, eliminates the need to balance the parents'competing constitutional rights in favor of elevating the child's welfare to a compelling state interest. *See LaChappelle,* 607 N.W.2d at 163-64. The third approach, New Mexico's, treats all the competing interests as equal, holding that both parents'constitutional interests, as well as the best interests of the child, will be best protected if each parent shares equally in the burden of demonstrating how the child's best interests will be impacted by the proposed relocation. *See Jaramillo,* 823 P.2d at 307-09.

1. Wyoming's Approach -Right to Travel is Absolute

The Wyoming Supreme Court's decision in *Watt* represents one approach to this problem. 971 P.2d at 615-16. Pursuant to Wyoming state law, a parent seeking a modification of custody has the burden of establishing that "a material and substantial change in circumstances [has] occurred, following the entry of the initial divorce decree, which outweigh[s] societal interest in supporting the doctrine of res judicata."Id. at 613. In deference to the custodial parent's right to travel, the court in *Watt* held that this burden could not be met merely by proving relocation of the custodial parent. *Id.* at 616. In reaching this conclusion, the court placed a higher priority on the constitutional right to travel than other states:

The constitutional question posed is whether the rights of a parent and the duty of the courts to adjudicate custody serve as a premise for restricting or inhibiting the freedom to travel of a citizen of the State of Wyoming and of the United States of America. We hold this to be impossible. The right of travel enjoyed by a citizen carries with it the right of a custodial parent to have the children move with that parent. This right is not to be denied, impaired, or disparaged unless clear evidence before the court demonstrates another substantial and material change of circumstance and establishes the detrimental effect of the move upon the children. While relocation certainly may be stressful to a child, the normal anxieties of a change of residence and the inherent difficulties that the increase in geographical distance between parents imposes are not considered to be ædetrimental'factors.

Id. at 615-16 (citations omitted).

This approach is no different in practice than the approach in *Francis* that we now reject because it effects a presumption in favor of a custodial parent seeking to relocate.

Furthermore, it is contrary to Colorado's preferred state policy emphasizing a factdriven approach in relocation cases. *See* § 14-10-129(2)(c). Finally, it ignores the rights of the minority time parent. For these reasons, we decline to adopt this approach in Colorado.

Another approach to this problem is to elevate the child's welfare to a compelling state interest, thereby obviating the need to balance the parents'competing constitutional rights. *LaChappelle*, 607 N.W.2d at 163. In adopting this approach, the Minnesota court of appeals in *LaChappelle* recognized that the right to travel is qualified, and the depriva-

tion thereof justified, where the state acts to promote a compelling state interest. *Id.* at 163-64. Because the court deemed the promotion of a child's welfare to be a compelling state interest, the child's best interests effectively subjugated the relocating parent's right to travel. *Id.* at 164.

The United States Supreme Court frequently has emphasized the stringent nature of the compelling interest test, holding that "if æcompelling interest'really means what it says (and watering it down ... would subvert its rigor in the other fields where it is applied), many laws will not meet the test." *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 888 (1990). The Supreme Court also has stressed that "in this highly sensitive constitutional area *æ[o]nly the gravest abuses, endangering paramount interests*, give occasion for permissible limitation [of fundamental *rights].'"Sherbert v. Verner*, 374 U.S. 398, 406 (1963)(emphasis added)(quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)); *see also Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)("[O]nly those interests of the highest order and not those otherwise served can overbalance legitimate claims to the free exercise of religion.").

In heeding these cautionary instructions from the Supreme Court, many state courts have held that "[s]hort of preventing harm to the child, the standard of æbest interest of the child' is insufficient to serve as a compelling state interest overruling a parent's fundamental rights."In *re Parentage of C.A.M.A.*, 109 P.3d 405, 410 (Wash. 2005)(quoting *In re Custody of Smith*, 969 P.2d 21, 30 (Wash. 1998)); *see also Rideout v. Riendeau*, 761 A.2d 291, 297 (Me. 2000)(citing *Troxel*, 530 U.S. at 68-69)(holding that the best interests of the child standard, standing alone, is insufficient for determining when the state may intervene in the decisionmaking of competent parents with respect to a third party's request for visitation with the children); *Mizrahi v. Cannon*, 867 A.2d 490, 497 (N.J. Super. App. Div. 2005)(holding that absent threatening harm to a child's welfare, the state lacks a sufficiently compelling justification for infringing on the fundamental right of parents to raise their children as they see fit).

Despite this stringent standard, the Minnesota court of appeals in *LaChappelle* relied on earlier Minnesota decisions which held only that the "the *paramount nature* of a child's best interests is a principle that has been part of Minnesota child welfare law for at least 100 years."In *re Welfare of M.P.*, 542 N.W.2d 71, 74 (Minn. Ct. App. 1996)(emphasis added)(citing *In re Welfare of J.J.B.*, 390 N.W.2d 274, 279 (Minn. 1986), which noted that the best interests doctrine "has long been recognized as the common thread in cases determining ... the circumstances in which children are required to live"and adopted the best interests doctrine "as a paramount consideration"in termination of parental rights cases), *overruled in part on other grounds by In re Welfare of J.M.*, 574 N.W.2d 717, 722-24 (Minn. 1998).

In addition, the Minnesota court of appeals relied on Minnesota case law, which allowed it to consider the "paramount question"of the child's best interests without

reference to Minnesota's statutes on child custody. *LaChappelle*, 607 N.W.2d at 163 (citing *State ex rel. Flint v. Flint*, 65 N.W. 272, 272 (1895) for the proposition that "in a custody dispute, in spite of other considerations, *including application of statutory law*, æ[t]he paramount question was ... what would be most for the benefit of the infant'"(emphasis added)).(fn16)

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Citing the holding in *LaChappelle*, our court of appeals adopted this approach in *In re Marriage of Graham & Swim*, 2005 WL 774412, at *3-4, holding that "a parent's right to travel yields to the state's compelling interest in protecting a child through application of the best interests standard."

We decline to adopt this approach in Colorado.(fn17) First, in the absence of demonstrated harm to the child, the best interests of the child standard is insufficient to serve as a compelling state interest overruling the parents'fundamental rights. *See In re Parentage of C.A.M.A.*, 109 P.3d at 410 (quoting *In re Custody of Smith*, 969 P.2d at 30); *see also Rideout*, 761 A.2d at 297 (citing *Troxel*, 530 U.S. at 68-69); *Mizrahi*, 867 A.2d at 497.

Second, this approach is not consistent with the plain language of section 14-10-129, which expressly requires a trial court to balance the competing constitutional rights of the parents. Specifically, factors (I) and (II) of subsection 14-10-129(2)(c) require a trial court to consider the reasons in support of a party's wish to relocate with the child and the reasons in support of a party's opposition to a relocation. *See* § 14-10-129(c)(I)(directing the court to consider "the reasons why the party wishes to relocate with the child"); § 14-10-129(c)(II)(directing the court to consider "the reasons why the opposing party is objecting to the proposed relocation)."These factors are undoubtedly "weighing factors"because they require the court to balance the rights of the majority and minority time parents in the context of a best interests determination.

In addition, factor (VIII) in subsection 14-10-129(2)(c) requires that the court determine "whether the court will be able to fashion a reasonable parenting time schedule if the change requested is permitted."This factor also contemplates that the court will balance the interests of the parents and the best interests of the child. Thus, the language of the statute requires a balancing of the parental interests.

Finally, from a practical standpoint, adopting the best interests of the child as a compelling state interest to the exclusion of balancing the parents'rights could potentially make divorced parents captives of Colorado. This is because a parent's ability to relocate would become subject to the changing views of social scientists and other experts who hold strong, but conflicting, philosophical positions as to the theoretical "best interests of the child."(fn18) For these reasons, we decline to adopt this approach.

3. NewMexico's Approach: Parents'and Child's Interests Are Best Protected Through An Equal Sharing of Burden

The third approach that we consider today is illustrated in the New Mexico Supreme Court's decision in *Jaramillo v. Jaramillo*, 823 P.2d at 307-09, and was later adopted by the Maryland court of appeals in *Braun v.*

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Headley, 750 A.2d 624, 635 (Md. Ct. App. 2000). The court in *Jaramillo* considered not only the majority time parent's right to travel and the state's concerns in protecting the best interests of the child, but also the minority time parent's right to maintain close association and frequent contact with the child. 823 P.2d at 304-06.

In addressing how to allocate burdens to protect these competing concerns, the court first recognized the constitutional right to travel, holding that "the protection afforded the right to travel in the childcustody context has been explicitly recognized by ... this *Court."Id.*

However, the New Mexico court also acknowledged the equal right of a parent to maintain a close association with his or her child.

By the same token, we believe that the other parent's right to maintain his or her close association and frequent contact with the child should be equally free from any unfavorable presumption that would place him or her under the burden of showing that the proposed removal of the child would be contrary to the child's best interests. æ[F]reedom of personal choice in matters of family life is a fundamental liberty interest.'

Id. at 305-06 (citing *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)); *see also Troxel*, 530 U.S. 57, 65-66 (2000)(holding that parents have a fundamental right to make decisions as to care, custody, and control of their children).

In discussing whether to adopt a presumption in favor of either parent, the court noted that "[n]either presumption, except by happenstance, serves the statutory goal ... of determining and implementing the best interests of the child." *Id.* at 307. The court also discussed criticisms of procedure by presumption:

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

ATTACHMENT 5

Id. (citations omitted)(citing *Stanley v. Illinois*, 405 U.S. 645 (1972)). As a result, the court held that:

[A]llocating burdens and presumptions in this context does violence to both parents'rights, jeopardizes the true goal of determining what in fact is in the child's best interest, and substitutes procedural formalism for the admittedly difficult task of determining, on the facts, how best to accommodate the interests of all parties before the court, both parents and children.

Id. at 305.

Based on this conclusion, the court in *Jaramillo* adopted a rule that "neither party is under a burden to prove which arrangement will best promote the child's interests; both parents share equally the burden of demonstrating how the child's best interests will be served."Id. at 308.

B. The NewMexico Approach in *Jaramillo* Best Comports with Colorado Law

For the reasons set forth below, we adopt the reasoning set forth in *Jaramillo* for relocation disputes in Colorado. Thus, we hold that both parents'constitutional interests, as well as the best interests of the child, will be best protected if each parent shares equally in the burden of demonstrating how the child's best interests will be impacted by the proposed relocation.

In so holding, we are attempting to interpret the statute in a manner which is consistent with the plain language and with our understanding of the General Assemblies intentions.(fn19) *Braun*, 750 A.2d at 635. In ad-

dition, we are adopting a statutory interpretation that both effectuates the preferred legislative procedure and protects the rights of the parties before the court. *See People v. Gallegos*, 692 P.2d 1074, 1078 (Colo. 1984)("Such an allocation of burdens ensures in each case an affirmative demonstration that the legislatively preferred policy ... is being carried out.").

We conclude that, ultimately, it is incumbent upon the trial court to consider all the relevant factors to determine what arrangement will serve the child's best interests. Though the best interests of the child are of primary importance in making this determination, they do not automatically overcome the constitutional interests of the parents, which must be weighed against each other in the best interests analysis.

Child parenting disputes present agonizing decisions for trial court judges. However, as this case demonstrates, such cases are increasingly common before the courts. According to the U.S. Census Bureau, about 1 in 6 Americans moves each year. Kristin A. Hansen, U.S. Census Bureau, *Geographic Mobility*, (last revised 2001) *at http://www.census.gov/population/www/popprofile/geomob.html* (last visited May 24, 2005). Approximately 7 million people a year move from state to state. *Id.* The "average American"makes 11.7 moves in a lifetime. *Id.* Because of the ordinary needs of both parents after a marital dissolution to secure or retain employment, pursue educational or career opportunities, or reside in the same location as a new spouse or other family or friends, it is unrealistic to assume that divorced parents will permanently remain in the same location.

Neither the child nor the parents benefit from repeated appearances before the court or from the uncertainty caused by such appearances. Thus, the General Assembly rightly emphasized the necessity to review and decide relocation hearings promptly by giving such cases priority on the docket.(fn20)

Because neither party is under a burden to prove which arrangement will best promote the child's interests, both parents share equally the burden of demonstrating how the child's best interests will be served. As a result, it is incumbent on the trial court to consider each of the twentyone factors set forth by the General Assembly. In so doing, the court shall consider as much information as the parties choose to submit and may elicit further information on its own motion from other sources, including special advocates.

As demonstrated by this case, however, one of the biggest concerns for the judge is the starting point for analysis. Often a parent who intends to relocate will do so only if the revised parenting plan ordered by the judge is acceptable. Consequently, relocation hearings may resemble a negotiation between the majority time and the minority time parent, with no clearcut details or particulars upon which the judge can base findings.

Consistent with the holding in this case, a court must begin its analysis with each parent on equal footing; a court may not presume either that a child is better off or disadvantaged by relocating with the majority time parent. Rather, the majority time parent has the duty to present specific, nonspeculative information about the child's proposed new living conditions, as well as a concrete plan for modifying parenting time as a result of the move. The minority time parent may choose to contest the relocation in its totality, and thus seek to become the majority time or primary residential parent. Alternatively, the minority time parent may choose not to contest the relocation, but rather object to the revised parenting plan proposed by the majority time parent. In such a circumstance, the minority time parent has the responsibility to propose his or her own

parenting plan. Thus, each parent has the burden to persuade the court that the relocation of the child will be

in or contrary to the child's best interests, or that the parenting plan he or she proposes should be adopted by the court.

The focus of the court, however, should be the best interests of the child. The court may decide that it is not in the best interests of the child to relocate with the majority time parent. Then, if the majority time parent still wishes to relocate, a new parenting time plan will be necessary.

Alternatively, the court may decide that it is in the best interests of the child to relocate with the majority time parent. In that situation, the court must fashion a parenting time plan which protects the constitutional right of the minority time parent to care for and control the child.

In either event, the court must thoroughly disclose the reasons for its decision and make specific findings with respect to each of the statutory factors.

Having clarified that both parents share equally the burden of demonstrating what arrangement will serve the child's best interests in a modification proceeding, we now address the trial court's application of subsection 14-10-129(2)(c) to the facts of this case.

A best interests determination under subsection 14-10-129(2)(c) is a matter within the sound discretion of the trial court. *In re Marriage of Finer*, 920 P.2d 325, 328 (Colo. App. 1996). Accordingly, we review the trial court's findings for an abuse of discretion.

Here, the trial court committed an abuse of discretion where it prematurely concluded that it would be in Connor's best interests to remain in close proximity to both parents. The effect of this conclusion was to create a presumption in Father's favor contrary to the legislative intent of subsection 14-129 (2) (c).

First, the trial court erred when it failed to properly address whether remaining with his primary caregiver would provide Connor any advantages pursuant to subsection 14-10-129(2)(c)(VI). The term "primary caregiver"is not defined in the statute, so we must give the term its plain and ordinary meaning. *See e.g., Weld County Sch. Dist. RE-12 v. Bymer*, 955 P.2d 550, 554 (Colo. 1998). The plain meaning of the term "primary"is "first in importance; chief; principal; main"; the plain meaning of "caregiver"is "a person who takes care of someone requiring close attention, as a young child or invalid." *Webster's New World College Dictionary* 222, 1140 (MacMillan 4th ed. 1999). In this case, Mother's larger share of parenting time and her status as primary residential parent suggest that she is the "primary caregiver."Accordingly, to properly analyze this factor, a court must determine whether Connor would enjoy any advantages in remaining with Mother if she were to relocate to Arizona.

Based on the evidence, a court reasonably could have concluded that Connor would benefit directly and indirectly by remaining with Mother if she were to relocate to Arizona. As a direct benefit, Connor would enjoy the stability of remaining with his majority time parent. Connor also would benefit from having daytoday relationships with his grandfather, uncle, aunt, and nephew. Finally, Mother's increased financial stability and family support would undoubtedly increase her own happiness, which would benefit Connor by giving him a more stable home life. This indirect benefit to Connor is not diminished simply because it primarily benefits Mother.

The trial court, however, failed to consider any of these potential advantages to Connor, and instead discussed Mother and Father's parenting styles, stating:

Connor is close to his mother and is also close to his father. Both parents are somewhat controlling in their parenting style father being more so. Neither parent seems to be very successful in eliciting Connor's view on the important issues; rather they approach him by having him understand what they would like him to

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believe about certain issues. The school states that they cannot tell any difference in Connor when he has been with his mother or his father. It is a positive sign that where Connor resides is not affecting him at school.

This is a situation where both parents could benefit from expanding their parenting style. It would be important for both households to agree on some basic rules and guidelines, and ways of approaching discipline. This would be in Connor's best interests.

Having failed to discuss advantages to Connor in relocating with Mother, the trial court then proceeded to relate its concern that Mother:

"continues to believe that whatever is in her best interest is also in Connor's best interest. The Court notes her reasons to relocate. They are all from her point of view and her benefit, job, help from her family which then, I guess, are indirect benefits to Connor but there was nothing directly about how this would *enhance* Connor."(emphasis added).

As discussed in Part II.C, *supra*, requiring a parent to show that a move will "enhance the quality of life for the child"is a remnant of the *Francis* test that the General Assembly did not adopt in amending section 14-10-129. *See* § 14-10-129(2)(c); *Francis*, 919 P.2d at 785. Furthermore, none of the factors listed in subsection 14-10-129(2)(c) requires the majority time parent to establish that the move will directly benefit the child. Most importantly, the trial court did not impose an equal burden on Father to demonstrate the benefits to Connor using the subsection 14-10-129(2)(c) factors. Thus, the

trial court improperly required Mother to show "enhancement,"it improperly ignored indirect benefits in its subsection 14-10-129(2)(c) analysis, and it erroneously imposed a burden on Mother that it did not impose on Father. As a result, Mother was required to carry an unequal share of the burden in demonstrating Connor's best interests.

The trial court aggravated these errors in its subsection 14-10-129(2)(c) analysis by relying on a general conclusion that parents should remain in close proximity to the child. In reaching this conclusion, the trial court cited an article from the *Journal of Family Psychology*. Braver, *supra* note 18. Though the article's authors stated, "our data cannot establish with certainty that moves cause children substantial harm,"(fn21) the trial court nevertheless interpreted the article as concluding that "a child is generally not benefited by moving away with the custodial parent from a noncustodial parent."Presumably based upon the Braver's article, the court then concluded that "[p]arenthood results in some sacrifice and it is better off for parents to remain in close proximity."

The only way for a trial court to adhere to this generalization in relocation disputes would be to categorically deny the majority time parent's request to modify parenting time. The trial court ostensibly tempered this hardline approach by suggesting that Mother could overcome this presumption by showing that the move would "enhance" Connor.

However, as discussed above, this was also in error because "enhancement"should not be part of the analysis, and because the trial court would not accept evidence of indirect benefits to Connor. As a result, the effect of this generalization was to create a presumption in favor of the minority time parent opposing relocation.

Moreover, Braver's article represents only one of many schools of thought on how parenting time affects children. *See supra* note 18. One theory provides that a child's interests are so aligned with the wellbeing of the majority time parent that that person's decision on behalf of the child should be honored unless there is proof that the decisions are bad ones. *See e.g.*, Wallerstein & Tanke, *supra* note 18. Another theory suggests that both parents are entitled to raise the child and that it is extremely important for a child to develop a relationship with both parents. *See e.g.*, Kelly & Lamb, *supra* note 18.

A court's duty is not to determine which of these theories is correct. Rather, a court's sole duty in relocation cases is to determine

the best interests of a child based upon the facts of each individual case. In performing this duty, the court shall specifically set forth its considerations with respect to all relevant factors, including any benefits the child may enjoy by relocating with the majority time parent.

The trial court in this case failed to perform its duty in accordance with the statute because it imposed an unequal burden on Mother and created a presumption in favor of Father that was potentially contrary to Connor's best interests. We therefore reverse the court of appeals'holding and remand with instructions to return the case to the trial court for proceedings consistent with this opinion.

Footnote:

1 Though Mother entitled the motion "Motion to Relocate with Child pursuant to C.R.S. 14-10-129(1)(a)(I,II),"the motion was the procedural and practical equivalent of a motion to modify parenting time.

2 At the subsequent hearing to modify parenting time, Mother submitted a new proposed parenting time schedule giving Father two overnights per month, one week at Christmas, one week at spring break, and four weeks during the summer, not including three day weekends such as President's day, Memorial Day, Labor Day, and conferences for school. This amounts to sixtysix overnights; significantly less than the 114 overnights Father has under the current parenting time schedule.

3 The terms "majority time parent"and "minority time parent" have no legal significance. We use them merely to reflect that Mother, not Father, is "the parent with whom the child resides a majority of the time"pursuant to subsections 14-10-129 (1) (b) (II) , (2) (c) .

4 As of February 1, 1999, the term "custody"in Colorado's Uniform Dissolution of Marriage Act has been replaced with the term "parental responsibilities."§ 14-10-103(4), C.R.S. (2004). The term "parental responsibilities"includes two separate legal concepts: parenting time and decisionmaking responsibility. See § 14-10-124(1.5), C.R.S. (2004). A court is required to allocate parental responsibilities, including parenting time and decisionmaking responsibility, in accordance with the best interests of the child. § 14-10-124(1.5). Thus, the term "sole residential custodian"is no longer viable and has no meaning in the context of this case. As explained in the facts, Mother has twice as much parenting time as Father, and Mother and Father have joint parental and decisionmaking responsibilities. Mother is referred to as the primary residential parent for purposes of school residency; however this term is not the legal equivalent of a sole residential custodian.

5 We noted that "[s]uch presumption is necessarily weakened to the extent parents share both residential and legal custody and we decline here to resolve the issue of how removal should be evaluated in a circumstance in which both parents truly share joint residential

custody."Francis, 919 P.2d at 785.

6 § 14-10-129(2)(a).

7 § 14-10-129(2)(b).

8 § 14-10-129 (2) (d).

9 "The party with whom the child resides a majority of the time is intending to relocate with the child to a residence that substantially changes the geographical ties between the child and the other party."§ 14-10-129(2)(c).

10 Subsection 14-10-124(1.5)(a) codifies the best interests of the child standard. The factors listed are:

The wishes of the child's parents as to parenting time; The wishes of the child if he or she is sufficiently mature to express reasoned and independent preferences as to the parenting time schedule; The interaction and interrelationship of the child with his or her parents, his or her siblings, and any other person who may significantly affect the child's best interests; The child's adjustment to his or her home, school, and community; The mental and physical health of all individuals involved, except that a disability alone shall not be a basis to deny or restrict parenting time; The ability of the parties to encourage the sharing of love, affection, and contact between the child and the other party;

Whether the past pattern of involvement of the parties with the child reflects a system of values, time commitment, and mutual support; The physical proximity of the parties to each other as this relates to the practical considerations of parenting time; Whether one of the parties has been a perpetrator of child abuse or neglect under section 18-6-401, C.R.S. or under the law of any state, which factor shall be supported by credible evidence; Whether one of the parties has been a perpetrator of spouse abuse as defined in subsection (4) of this section, which factor shall be supported by credible evidence; The ability of each party to place the needs of the child ahead of his or her own needs.

11 The factors listed in subsection 14-10-129(2)(c) are:

The reasons why the party wishes to relocate with the child; The reasons why the opposing party is objecting to the proposed relocation; The history and quality of each party's relationship with the child since any previous parenting time order; The educational opportunities for the child at the existing location and at the proposed new location; The presence or absence of extended family at the existing location and at the proposed new location; Any advantages of the child remaining with the primary caregiver; The anticipated impact of the move on the child; Whether the court will be able to fashion a reasonable parenting time schedule if the change requested is permitted; and Any other relevant factors bearing on the best interests of the child.

12 The endangerment statute enunciated in part three of the Francis test and listed as a factor in the current statute no longer applies when a majority time parent seeks to relocate. § 14-10-129 (1) (b) (II) .

13 We held that when determining whether the disadvantages of moving are great enough to outweigh the advantages of staying with the same parent, "the trial court may consider: 1) whether there is a reasonable likelihood the proposed move will enhance the quality of life for the child and the custodial parent, including the short and long term effects of the move on the custodial parent's ability to support the child; 2) whether the court is able to fashion a reasonable visitation schedule for the noncustodial parent after the move and the extent of the noncustodial parent's involvement with the children at the old location; 3) whether there is a support system of family or friends, either at the new or old location; and 4) educational opportunities for the children at the new and old locations." Francis, 919 P.2d at 785. We held that if the cumulative weight of these factors together with others the trial court may find relevant outweighs the presumption favoring the custodial parent, then the removal petition should be denied. Id.

14 See § 14-10-129(2)(c)(IV), (V), (VIII).

15 Some courts have held that removal cases do not implicate a parent's right to travel because removal statutes do not prohibit outright a parent's right to travel, but rather prohibit only a parent's right to travel with a child. See, e.g., Lenz v. Lenz, 40 S.W.3d 111, 118 n.3 (Tex. App. 2000) rev'd on other grounds by Lenz v. Lenz, 79 S.W.3d 10 (Tex. 2002). However, as we observed above, "a legal rule that operates to chill the exercise of the right, absent a sufficient state interest to do so, is as impermissible as one that bans exercise of the right altogether." Jaramillo, 823 P.2d at 306.

16 The Minnesota court of appeals also relied on the Idaho court of appeals'opinion in Ziegler v. Ziegler, 691 P.2d 773, 780 (Idaho App. 1985), in concluding that the best interests of the child is a compelling state interest. However, the court in Ziegler merely held that "providing and assuring the maximum opportunities for parental love, guidance, support and companionship is a compelling state interest that warrants ... reasonable interference with the constitutional right to travel when necessary." 691 P.2d at 780 (emphasis added). Because the facts in Ziegler supported the trial court's conclusion that "there was danger that either of the parties might take the children and flee thus depriving the other parent of reasonable visitation and depriving the children of the parental love, affection, support, guidance and companionship to which they were entitled,"the court of appeals held that interference with the mother's right to travel was necessary. Id. at 780-81. Hence, the holding in

17 With the exception of the recent decision in In re Marriage of Graham & Swim, no Colorado court has held that the best interests of the child is a compelling state interest that obviates the need to balance the competing constitutional rights of parents. To the extent that In re Marriage of Graham & Swim does so, we overrule it.

18 See generally Sanford L. Braver et. al., Relocation of Children after Divorce and Children's Best Interests: New Evidence and Legal Considerations, J. Fam. Psychol., June 2003, at 206 (concluding that "there is no empirical basis on which to justify a legal presumption that a move by a custodial parent . .. will necessarily confer benefits on the children she takes with her"); Joan B. Kelly & Michael E. Lamb, Using Child Development Research to Make Appropriate Custody and Access Decisions For Young Children, 38 Fam. & Conciliation Cts. Rev. 297, 309 (2000)(concluding that "[r]egardless of who has been the primary caretaker ... children benefit from the extensive contact with both parents that fosters meaningful fatherchild and motherchild relationships"); Judith S. Wallerstein & Tony J. Tanke, To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce, 30 Fam. L.Q. 305, 318 (1996)(concluding that "[w]hen a child is de facto in the primary residential or physical custody of one parent, that parent should be able to relocate with the child, except in unusual circumstances").

19 The legislative history of section 14-10-129 is contradictory on this point. Compare Feb. 12 Hearing (statement of Beth Henson, a family law attorney who helped draft the bill, that section 14-10-129 "places the burden equally on both parents to prove their case as to what is in the child's best interests"), with Audio Tape: Hearing on S.B. 01-029 Before the House Civil Justice and Judiciary Comm., 63d Gen. Assem., 1st Reg. Sess. (Colo. Apr. 26, 2001)(on file with Colorado State Archives) (statements of Senator Gordon, Chairman of the Senate Judiciary Committee; and Steve Lass, representative of the Colorado Bar Association, that the parent wishing to move has the burden of proving that the move is in the best interests of the child).

20 "A court hearing on any modification of parenting time due to an intent to relocate shall be given a priority on the court's docket."§ 14-10-129(2)(c).

21 The Braver Study, supra note 18, at 215.

ATTACHMENT 5

SAMPLE LANGUAGE FOR SCRA MOTION

THE PETITIONER, by and through his undersigned attorney, hereby requests a stay of all proceedings in the above-captioned case, and as grounds, states the following:

1. Statement of Compliance. On _____, counsel for the moving party discussed this issue with opposing counsel, who indicated that ***he/she does not oppose this motion.

2. A Permanent Orders hearing is currently scheduled for *******.

3. The Respondent is a ****** on active duty with the U.S. Army. On or about *****, he was deployed to Iraq (Deployment Order attached as Attachment 1). The deployment is open-ended, with no termination date yet set, but is expected to last about a year. Counsel for the Respondent will advise the Petitioner and the Court upon learning of a return date.

4. This deployment materially affects the Respondent's ability to participate in the proceedings in that while he is deployed, he is prohibited from taking leave to appear, and his ability to communicate with his attorney is severely curtailed. A letter from his commander is attached as Attachment 2.

5. The pertinent portions of the Servicemembers Civil Relief Act, 50 U.S. Code App. § 202, read:

(a) APPLICABILITY OF SECTION- This section applies to any civil action or proceeding in which the defendant at the time of filing an application under this section--

(1) is in military service or is within 90 days after termination of or release from military service; and

(2) has received notice of the action or proceeding.

(b) STAY OF PROCEEDINGS-

(1) AUTHORITY FOR STAY- At any stage before final judgment in a civil action or proceeding in which a servicemember described in subsection (a) is a party, the court may on its own motion and shall, upon application by the servicemember, stay the action for a period of not less than 90 days, if the conditions in paragraph (2) are met.

(2) CONDITIONS FOR STAY- An application for a stay under paragraph (1) shall include the following:

(A) A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear.

(B) A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter.

6. The Respondent has met the SCRA requirements for a mandatory stay: he is on active duty, he submitted this written motion which sets out how his military duties materially affect his ability to appear, and he has attached the required letter from his commanding officer.

WHEREFORE, the moving party requests that the ***** hearing be vacated, and that all further proceedings in this case stayed until such time that has redeployed back to the United States and his ability to participate in the case is not materially affected.

ATTACHMENT 6

SAMPLE LANGUAGE FOR SCRA STAY ORDER

THIS MATTER came before the Court on the Petitioner's Motion For Stay Of Proceedings Pursuant To Servicemembers Civil Relief Act. The Court, having reviewed the file, considered the motion and any response which may have been filed, and being fully advised in the matter, hereby:

FINDS that the Respondent's ability to participate in proceedings is materially affected by his military deployment, and that the Respondent has satisfied the requirements for a mandatory stay of proceedings contained in 10 U.S.C. § 202.

The Court therefore ORDERS that all proceedings in this matter are stayed until the Respondent's redeployment back to the United States. Counsel for the Respondent shall advise the Petitioner and Court upon learning of the Respondent's redeployment date.