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## Keeping Kids First: Trial Court Discretion and the Best Interest of the Child in *Light v. D'Amato*

Stanley W. Abraham  
*University of Maine School of Law*

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KEEPING KIDS FIRST: TRIAL COURT DISCRETION  
AND THE BEST INTEREST OF THE CHILD IN *LIGHT*  
*V. D'AMATO*

*Stanley W. Abraham*

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## KEEPING KIDS FIRST: TRIAL COURT DISCRETION AND THE BEST INTEREST OF THE CHILD IN *LIGHT* *V. D'AMATO*

*Stanley W. Abraham\**

### I. INTRODUCTION

Family dissolution is a difficult ordeal for everyone involved: the parties, their lawyers, and the court. After all, these are not parties engaged in an arm's length dealing, or strangers involved in an accident. On the contrary, the parties are generally intimately involved and often share property and children. Spouses frequently struggle to agree on even the most trivial of property divisions, with the ownership of a simple rocking chair a potential issue for appeal.<sup>1</sup>

As contentious as such property division disputes can be, disputes between divorcing parents regarding the allocation of parental rights and responsibilities are particularly bitter.<sup>2</sup> Most parents recognize, at least in the abstract, what the Maine Legislature demands: children do best when allowed to benefit from the affection and support of both parents.<sup>3</sup> Nonetheless, each parent generally wants to spend as much time with his or her child as possible, and any time gained comes at the expense of the other parent.

This Solomon's Dilemma<sup>4</sup> is aggravated when one parent wishes to relocate. Residency becomes even more important to both sides when visitation will be impinged by geographical distance.<sup>5</sup> A parent may have legitimate reasons for relocation: to benefit from the support of family, to start new employment, or even simply to get a fresh start. Furthermore, the United States Supreme Court has recognized that the Constitution guarantees an individual's right to relocate.<sup>6</sup>

In 2014, the Maine Supreme Judicial Court, sitting as the Law Court, heard an appeal in *Light v. D'Amato*, a highly contentious divorce case in which residency and relocation were at issue.<sup>7</sup> The District Court included a conditional provision ("the Provision") in the divorce judgment granting primary residency to Paola D'Amato, the child's mother, but with residency to automatically transfer to the father, Peter

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\* J.D. Candidate, 2017, University of Maine School of Law. The Notator thanks Professor Deirdre Smith for her helpful guidance and insight.

1. See *Young v. Young*, 2015 ME 89, ¶ 15, 120 A.3d 106.

2. For the sake of convenience, this Note refers to divorcing parents; however, the analysis and conclusions are also applicable when the parents are unmarried. See 19-A M.R.S.A. § 1503 (2012) ("A child born out of wedlock is the child of that child's biological parents and is entitled to the same legal rights as a child born in lawful wedlock. . .").

3. See 19-A M.R.S.A. §§ 1651, 1653 (2012).

4. Two women came before King Solomon, each arguing that a certain child was hers. 1 Kings 3:16-28. "Then the king said, 'Bring me a sword.' So they brought a sword for the king. He then gave an order: 'Cut the living child in two and give half to one and half to the other.'" *Id.* The child's mother spoke up, requesting the child be given to the other woman rather than be slain. *Id.*

5. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.17 cmt. e (2002) [hereinafter PRINCIPLES].

6. See, e.g., *Saenz v. Roe*, 526 U.S. 489, 500 (1999).

7. *Light v. D'Amato*, 2014 ME 134, 105 A.3d 447.

Light, were D'Amato to relocate to Italy, her country of origin.<sup>8</sup> D'Amato appealed the Provision as unconstitutionally interfering with her right to travel.<sup>9</sup>

The Law Court held that the Provision imposed no constraint on D'Amato's freedom to travel.<sup>10</sup> Furthermore, the court held that any collateral effect on D'Amato's freedom to travel was balanced by "various fundamental or constitutionally protected interests."<sup>11</sup> This Note critiques the Law Court's holding that conditional grants of residency, like that in the Provision, do not constrain a parent's freedom to travel. It will also argue that the Law Court should have recognized the best interest of the child as a compelling state interest sufficient to constrain a parent's right to relocate, rather than adopting an amorphous balancing test that family courts will struggle to implement.

In Part II, this Note will provide the legal background for parental relocation cases, including the statutory framework for determining parental rights and responsibilities and the constitutionally protected right to travel and relocate. This discussion will conclude by proposing that the best interest of the child should be determinative when parental relocation is at issue. In Part III, this Note will discuss the factual and procedural background of *Light* as well as the court's holding and reasoning. Part IV begins by analyzing two cases preceding *Light* in which conditional grants of residency were appealed, and concludes by arguing that the best interest of the child is of paramount importance, that protecting that interest should be determinative in future cases where parental relocation is at issue, and should be the standard by which future conditional grants of residency are analyzed.

## II. LEGAL BACKGROUND

### A. *Parental Rights and Responsibilities, Residency, and the Best Interest of the Child*

It is well-documented that divorce can pose significant challenges to the minor children of the marriage.<sup>12</sup> Maine, like other jurisdictions, attempts to mitigate these challenges through procedural and statutory requirements. Recognizing that conflict between parents only exacerbates the adverse impact on their children, Maine law imposes certain requirements on trial courts and parties to encourage resolution through agreement. These include case management conferences, mediation, status conferences, and pre-trial hearings before a contested hearing is scheduled.<sup>13</sup> Generally, the court must respect the parents' agreement, barring "substantial evidence that it should not be ordered."<sup>14</sup> Whether by agreement or order, a divorce judgment will include a determination of parental rights and responsibilities—

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8. *Id.* ¶ 11.

9. *Id.* ¶ 17.

10. *Id.* ¶ 19.

11. *Id.* ¶ 20.

12. Richard A. Warshak, *Social Science and Children's Best Interests in Relocation Cases: Burgess Revisited*, 34 FAM. L.Q. 83, 110 (2000). ("Children's feelings of loss or satisfaction . . . are important for anyone concerned about their welfare, including courts.")

13. 19-A M.R.S.A. §§ 251, 1653(11) (2012).

14. *Id.* § 1653(2)(A).

including primary physical residence, parental-child contact and child support.<sup>15</sup>

When the parents fail to reach an agreement, Maine law provides that, “[t]he court, in making an award of parental rights and responsibilities with respect to a child, shall apply the standard of the best interest of the child.”<sup>16</sup> Maine’s “Best Interest of the Child” standard includes nineteen factors that the court must consider in making such a determination.<sup>17</sup> These factors track the findings the Legislature set out in the parental rights and responsibilities<sup>18</sup> statute: that the public policy of the state is to ensure frequent and continuing contact with both parents,<sup>19</sup> except where the court finds that such an arrangement is not in the best of interest of the child.<sup>20</sup> In practice, the limiting factor for the court in applying these standards is often simply logistics, such as transportation and work or school schedules.<sup>21</sup>

## B. Parental Relocation: Squaring the Circle

### 1. The Problem in Focus

The right to move amongst the states is protected by the Constitution, and recognized as a fundamental right by the Supreme Court.<sup>22</sup> While never explicitly

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15. In Maine, “residence” and “contact” are used in place of the traditional terms of “custody” and “visitation,” respectively. This Note will use the Maine vocabulary. *Id.* § 1653(2)(D)(1).

16. *Id.* § 1653(3).

17. These factors are broad in scope, including fairly obvious factual considerations such as the existence of domestic abuse and less intuitive, more subjective considerations such as the ability of either parent to facilitate coparenting. 19-A M.R.S.A. § 1653(3)(H-I), (L-M) (2014). While the trial court must consider the statutory best interest factors, it is not required to make detailed findings regarding each one. *Aranovitch v. Versel*, 2015 ME 146, ¶ 19, 127 A.3d 542.

18. *Id.* § 1653(1)(C); *see also* 19-A M.R.S.A. § 1651 (2012) (“The father and mother are the joint natural guardians of their minor children and are jointly entitled to the care, custody, control, services and earnings of their children. Neither parent has any rights paramount to the rights of the other with reference to any matter affecting their children.”).

19. In a recent family law appeal, the Law Court expressed in dicta that it was “dismayed . . . that, in nearly two years, [a] child had no visits with his father at his father’s residence.” *Desmond v. Desmond*, 2011 ME 57, ¶ 6, 17 A.3d 1234.

20. *See, e.g.*, 19-A M.R.S.A. § 1653(1)(B) (2012) (recognizing domestic abuse as a serious crime “creating an atmosphere that is not conducive to childhood development”); § 1653(3)(L)-(M) (listing existence of domestic abuse or child abuse as factors to be considered in determining the best interest of the child).

21. One need only read a typical order, or sit in at any family law hearing, to appreciate how much effort goes into merely working around busy schedules and providing for transportation. *See, e.g.*, *Brasier v. Preble*, 2013 ME 109, ¶ 7, 82 A.3d 841 (“the eight-month interval without visits [with the father] was due to Vanessa’s schedule and her lack of money for gas and fares for the ferry . . . He then saw the children for a day and a half . . . but had to send them back to Vanessa because she wanted to take them to a movie at the library and their son had karate practice.”).

22. *Edwards v. California*, 314 U.S. 160, 178 (1941) (“The right to move freely from State to State is an incident of national citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against state interference[.]”); *see also* *Kent v. Dulles*, 357 U.S. 116, 125 (1958) (“The right to travel is part of the ‘liberty’ of which the citizen cannot be deprived without the due process of law under the Fifth Amendment.”); *Shapiro v. Thompson*, 394 U.S. 618, 642 (1969) (“The constitutional right to travel from one State to another has been firmly established and repeatedly recognized . . . This constitutional right . . . of course, includes the right of entering and abiding in any state in the Union[.]”) (citations omitted). *But see* *Jones v. Helms*, 452 U.S. 412, 418-419 (upholding a fundamental right to

mentioned in the Constitution, the Court described the right to move about the country as recognized “before the Fourteenth Amendment . . . as a right fundamental to the national character of our Federal government.”<sup>23</sup> Furthermore, the right is not limited to mere travel through the states, but includes the concurrent right to settle permanently therein.<sup>24</sup>

Relocation incident to divorce is not uncommon.<sup>25</sup> Indeed, it frequently is a logical development following the divorce: Either party may wish to return home to enjoy the support of family, seek employment, join a new partner, or make a fresh start.<sup>26</sup> The Supreme Court, to the extent it recognizes a fundamental right to settle where one chooses, protects that right.<sup>27</sup> In other words, in the absence of some competing fundamental right or compelling government interest, the constitutionally protected right to relocate would control relocation incident to divorce in favor of the relocating parent. However, each parent likewise has a right to raise his or her child.<sup>28</sup> In Maine, both parents are recognized as the natural guardians of their child<sup>29</sup> and the court “may not apply a preference for one parent over the other” in determining residency.<sup>30</sup> If one parent, who has been granted primary residency, wishes to move to a distant state, the right of the other parent to raise his or her child has been compromised.<sup>31</sup> Conversely, prohibiting the parent from relocating restricts his or her fundamental right to relocate. Family matter appeals in the state appellate courts are rife with dicta commenting on the difficulty of the problem.<sup>32</sup> The “solution” proposed by some courts that have forbade residential parents from moving with their child is that such orders may not prohibit the residential parent from moving but merely from moving with their child.<sup>33</sup> In other words, losing primary residency is only a factor to be considered by the relocating parent in their

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relocate amongst the States but recognizing that there are “situations in which a State may prevent a citizen from leaving.”) (1981).

23. *Edwards*, 314 U.S. at 178.

24. *Saenz v. Roe*, 526 U.S. 489, 500 (1999) (“The ‘right to travel’ . . . protects . . . for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.”).

25. PRINCIPLES § 2.17, cmt. a at 402 (2002) (“The relocation of a parent, or both parents, is a circumstance that frequently follows divorce.”).

26. *See id.*, § 2.17(a)(ii) (2002) for a list of widely recognized valid purposes for parental relocation.

27. *See Edwards*, 314 U.S. at 178.

28. *See Stanley v. Illinois*, 405 U.S. 645, 651 (holding that a parent has a fundamental interest in the companionship, care, and management of his or her children).

29. 19-A M.R.S.A. § 1651 (2012 & Supp. 2015).

30. *Id.* § 1653(4).

31. Or, perhaps, to an island accessible only by ferry. *See Braiser v. Preble*, 2013 ME 109, ¶ 5, 82 A.3d 841.

32. *See, e.g., Tropea v. Tropea*, 665 N.E.2d 145, 148 (N.Y. 1996) (“Relocation cases such as the two before us present some of the knottiest and most disturbing problems that our courts are called upon to resolve.”); *Taylor v. Taylor*, 849 S.W.2d 319, 333 (Tenn. 1993).

33. *See Carlson v. Carlson*, 661 P.2d 833, 836 (Kan. Ct. App. 1983) (holding that mother’s right to establish residence elsewhere was limited only by her desire to maintain primary residency with her child.). *But see Taylor*, 849 S.W.2d at 333 (recognizing that an order compelling a mother to remain in Memphis or give up primary residency presented her with “a veritable Hobson’s choice” that was legally inappropriate).

decision to leave or stay.<sup>34</sup>

## 2. *The Best Interest of the Child as a Solution*

In order to balance the competing interests of moving and nonmoving parents, most jurisdictions now allow residential parents to move with their child only if certain factors have been met.<sup>35</sup> Generally, these factors track consistently with The Principles of the Law on Family Dissolution (“Principles”), which provides that courts “should allow a parent who has been exercising the clear majority of custodial responsibility to relocate with the child if that parent shows that the relocation is for a valid purpose, in good faith, and to a location that is reasonable in light of the purpose.”<sup>36</sup> The “reasonable location” factor is the requirement implicated by interstate relocation, or, for that matter, intercontinental relocation.<sup>37</sup>

Determining whether relocation is valid and reasonable is a fact-intensive inquiry, and as such, trial courts are generally allowed broad discretion.<sup>38</sup> This holds true in Maine, where parental relocation cases are reviewed for abuse of discretion.<sup>39</sup> The standard is recited as particularly strict, as “an abuse of discretion will only be found if the award is ‘plainly and unmistakably an injustice that is so apparent as to be instantly visible without argument.’”<sup>40</sup> An important factor to be considered is whether the relocation will be in the best interest of the child.<sup>41</sup>

Although the Supreme Court has held that the Constitution guarantees a fundamental right to relocate, even fundamental rights can be abridged provided there is a compelling state interest.<sup>42</sup> Several states have recognized that protecting the best interests of a child is a compelling state interest.<sup>43</sup> In fact, over the last

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34. *See Light v. D’Amato*, 2014 ME 134, ¶ 19, 105 A.3d 447 (“The court’s decision might affect D’Amato’s decision-making, but it does not impair her right to travel and settle in whatever location she chooses.”).

35. *See Rowland v. Kingman*, 629 A.2d 613, 615 (Me. 1993) (describing parental relocation as a change in circumstances bearing on the best interest of the child); *see also Arnott v. Arnott*, 293 P.3d 440, 458 (Wyo. 2012) (listing factors to be considered, including the “state’s paramount concern for promoting the best interests of the children.”).

36. PRINCIPLES § 2.17(a) (2002).

37. If a parent moves within the same town, or only a few miles away, such relocation would almost always be considered reasonable. Contact with the non-residential parent will be easier to ensure. Indeed, the Law Court has not yet considered an appeal where the issue was a primary residential parent moving within the same city or county, or even within the state of Maine.

38. *E.g.*, *Taylor v. Taylor*, 849 S.W.2d 319, 334 (Tenn. 1993) (O’Brien, J., dissenting) (“[S]uch decisions are primarily factual, not legal.”).

39. *Smith v. Padolko*, 2008 ME 56, ¶¶ 15-16, 955 A.2d 740.

40. *Id.* ¶ 9 (quoting JON D. LEVY, MAINE FAMILY LAW PLEADINGS AND PROCEDURE § 4.13.3 at 61 (5th ed. 2010)); *see also infra* note 104 and accompanying text.

41. 19-A M.R.S.A. § 1653. (2012 & Supp. 2015); *see also Light*, 2014 ME 134, ¶ 22, 105 A.3d 447; *Malenko v. Handrahan*, 2009 ME 96, ¶ 23, 979 A.2d 1269; *Rowland*, 629 A.2d at 616-17.

42. *Carey v. Population Servs. Int’l*, 431 U.S. 678, 686 (1977).

43. *See, e.g.*, *LaChapelle v. Mitten*, 607 N.W.2d 151, 163 (Minn. Ct. App. 2000) (holding that the best interest of the child is a compelling interest sufficient to satisfy strict scrutiny); *In re Custody of D.M.G. and T.J.G.*, 951 P.2d 1377 (Mont. 1998) (holding that constitutional right to interstate travel is “qualified” by the best interests of the child). *But see Clark v. Atkins*, 489 N.E.2d 90, 99-100 (Ind.Ct.App. 1986) (recognizing protecting the interests of children as a “compelling objective” but also holding that an order requiring the mother to return to Indiana from Oklahoma upon finishing schooling “does not impose any necessary burden whatever upon her right to travel.”) (emphasis in original).

several years, at least two states with a contrary rule have changed course and now also recognize the best interest of the child as a compelling state interest sufficient to overcome a parent's right to relocate.<sup>44</sup>

Such a finding is not inconsistent with Supreme Court precedent,<sup>45</sup> nor Law Court precedent<sup>46</sup> narrowly holding that the best interest of the child standard cannot be a compelling interest overriding a parent's fundamental right as natural guardian to their child *as it relates to third parties*.<sup>47</sup> In the case of distant parental relocation, to the extent that either parent's fundamental right to rear their child is infringed, it is to the benefit of the other parent. The best interest of the child can be a logical tiebreaker under such circumstances. Although the Supreme Court has consistently held that a "compelling interest" must be compelling indeed,<sup>48</sup> the best interest of children should meet this test, particularly with an intractable issue such as parental relocation.

### III. *LIGHT V. D'AMATO*

#### A. *Factual Background*

Paola D'Amato and Peter Light were married in Maine in 2000.<sup>49</sup> Their one daughter was born in July 2005.<sup>50</sup> Light filed for divorce in February 2012, and the Portland District Court held a four-day trial in July 2013. The trial court entered a divorce judgment in December of that same year.<sup>51</sup> While D'Amato had primary physical residency during the pendency of the divorce, both parents maintained a positive relationship with their daughter.<sup>52</sup> The court found that the young girl's best interest would be served by maintaining primary physical residence with D'Amato.<sup>53</sup>

The primary residency provision of the judgment was complicated by D'Amato's desire to return to Italy, where she was born and had significant family support.<sup>54</sup> Consistent with Maine law,<sup>55</sup> the court found that the "child's best interest [would be] served by having continued, regular contact with both parents."<sup>56</sup> An

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44. See *Baxendale v. Raich*, 878 N.E.2d 1252 (Ind. 2008) *rev'g* *Clark v. Atkins*, 489 N.E.2d 90 (Ind. Ct. App. 1986) ("[T]he child's interests are powerful countervailing considerations that cannot be swept aside as irrelevant in the face of a parent's claimed right to relocate."); see also *Arnott v. Arnott*, 293 P.3d 440, 458 (Wyo. 2012) (overruling *Watt v. Watt*, 971 P.2d 608 (Wyo. 1999)).

45. See *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

46. *Rideout v. Riendeau*, 2000 ME 198, ¶ 12, 761 A.2d 291.

47. In *Rideout*, the Law Court did hold that "the best interests of the child standard, standing alone, is an insufficient standard for determining when the State may intervene in the decision making of competent parents." 2000 ME 198, ¶ 12, 761 A.2d 291. Nonetheless, the court upheld a state statute allowing for rights of visitation for grandparents under specific circumstances and procedural safeguards. *Id.* ¶ 33; see also 19-A M.R.S.A. § 1801 (2012) *et seq.*

48. See, e.g., *Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 888 (1990) ("[I]f 'compelling interest' really means what it says . . . many laws will not meet the test.").

49. *Light v. D'Amato*, 2014 ME 134, ¶ 2, 105 A.3d 447.

50. *Id.*

51. *Id.*

52. *Id.* ¶¶ 5-8.

53. *Id.* ¶ 9.

54. *Id.* ¶ 8.

55. 19-A M.R.S.A. § 1653 (2012).

56. *Light*, 2014 ME 134, ¶ 24, 105 A.3d 447.



intercontinental move would complicate this goal, and the court found that in the event of a geographical separation, Light would be more likely to foster contact with D'Amato than D'Amato would be if she were to take the child to Italy.<sup>57</sup> As such, the court found that the best interest of the child would be served by granting D'Amato primary physical residency only so long as she stayed in Maine.<sup>58</sup> If she moved to Italy, then residency would automatically switch to Light.<sup>59</sup>

### B. *No Limitation on the Mother's Right to Travel*

D'Amato appealed *inter alia* the conditional grant of residency on the grounds that it “unconstitutionally interfered with her right to travel.”<sup>60</sup> On appeal, the Law Court upheld the Provision.<sup>61</sup> The court found no constraint on D'Amato's freedom to travel to Italy and relocate there.<sup>62</sup> The Law Court explained that the District Court's decision “might affect D'Amato's decision-making, but it does not impair her right to travel and settle in whatever location she chooses.”<sup>63</sup> In other words, the Provision does not constrain D'Amato's right to travel because it does not prohibit her from leaving: she merely forfeits primary physical residency if she does so, and this forfeiture is simply a factor for her to consider in choosing whether to leave.<sup>64</sup>

The Court reached the issue over the concurrence's argument that the issue was moot.<sup>65</sup> Because D'Amato had, in fact, not moved to Italy, the Provision's condition was never met. By the time the appeal was decided, the “imminence” window of the relocation had closed, and the only procedural option for a new order regarding residency would be through a motion to modify pursuant to title 19-A, section 1657 of the Maine Revised Statutes.<sup>66</sup> It is perhaps because it was the second time in five years that the Court had to consider a conditional grant of primary residency that the Court “reached” the issue to provide guidance to family law courts when confronting these cases.

## IV. ANALYSIS

### A. *Setting the Stage: Malenko and Rowland*

Since the late 1990s, *Light v. D'Amato* was the third appeal of a conditional grant of residency heard by the Law Court.<sup>67</sup> In each of these cases, the divorce judgment was upheld, but the constitutionality of the conditional grant of residency was never

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57. *Id.*

58. *Id.* ¶ 9.

59. *Id.* ¶ 10. *See also id.* at ¶ 32 (Hjelm, J., concurring) (for the full text of the Provision).

60. *Id.* ¶ 17.

61. *Id.* ¶ 25. The Court reached the issue over the concurrence's argument that as in *Malenko*, the issue was moot. *See infra* note 100 and accompanying text.

62. *See Light*, 2014 ME 134, ¶ 19, 105 A.3d 447.

63. *Light*, 2014 ME 134, ¶ 19, 105 A.3d 447.

64. *See Carlson v. Carlson*, 661 P.2d 833, 836 (Kan. Ct. App. 1983)

65. *See Light*, 2014 ME 134, ¶ 25, 105 A.3d 447.

66. *Id.* ¶ 31 (Hjelm, J., concurring).

67. *See Malenko v. Handrahan*, 2009 ME 96, 979 A.2d 1269; *Rowland v. Kingman*, 1997 ME 80, 692 A.2d 939 [hereinafter *Rowland II*]; *Rowland v. Kingman*, 629 A.2d 613 (Me. 1993) [hereinafter *Rowland I*].

considered. Nonetheless, the Law Court discussed the constitutionality and statutory validity of those provisions in detail in *dicta*. In all three cases, the court's treatment of the conditional grants of residency was favorable, based largely on the District Court's finding that such provisions were in the best interest of the child.

### 1. *Rowland v. Kingman*

The court confronted a conditional grant of primary physical residency in both *Rowland I*<sup>68</sup> and *Rowland II*.<sup>69</sup> *Rowland I* involved a relocation provision that automatically transferred primary residency from the father to the mother if the mother were to move out of state.<sup>70</sup> Because *Rowland*, the appellant, failed to raise a constitutional challenge at trial, neither case presented the Law Court with the opportunity to consider that issue.<sup>71</sup> The relocation provision was the result of a motion to modify the original order brought by the father in response to the mother's plan to move to Oregon.<sup>72</sup> The Law Court upheld that provision, holding that such action was consistent with the best interest of the two children.<sup>73</sup> Nonetheless, in defiance of the order, the mother moved the children to Oregon, causing the father to travel to Oregon to bring the children back to Maine.<sup>74</sup> The mother then moved back to Maine in order to retain primary physical residency of her children.<sup>75</sup> This was not the end of the matter. In 1994, *Rowland* brought her own modification motion, seeking permission to move to Oregon with the two children.<sup>76</sup> Her motion was granted, and the judgment was affirmed on appeal.<sup>77</sup>

These results may seem inconsistent, but can be reconciled with a mind to procedure. Decisions relating to the parental rights and responsibilities are governed by the best interest of the child at the time that they are contested: they are not subject to the doctrine of *res judicata*, or "final judgment rule."<sup>78</sup> Provided that the moving party can demonstrate sufficiently changed circumstances by a preponderance of the evidence, and that the best interests of the child will be served by a modification to the existing order, any prior modifications are not necessarily controlling.<sup>79</sup> Perhaps

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68. *Rowland I*, 629 A.2d 613.

69. *Rowland II*, 1997 ME 80, 692 A.2d 939.

70. *Rowland I*, 629 A.2d 613 at 615.

71. *Id.* at n.1 (citing *Morris v. Resolution Trust Co.*, 622 A.2d 708, 712 n.2 (Me. 1993)).

72. *Id.* at 615.

73. *Id.* at 616.

74. *Id.* at n.3.

75. See *Rowland II*, 1997 ME 80, ¶ 2, 692 A.2d 939 ("Both parties presently reside in Yarmouth."). *Rowland* did not raise the constitutional and statutory issues raised by D'Amato until the appeal, and as such the Court did not consider these issues. *Rowland I*, 629 A.2d at 615 n.1. Thus the issue was not settled by the time *Handrahan* brought her appeal, and because the Law Court declined to resolve it in her case due to mootness, the issue remained unresolved in Maine. See *infra* Part IV. A. 2.

76. *Rowland II*, 1997 ME 80, ¶ 3, 692 A.2d 939.

77. *Id.* ¶ 1.

78. *Id.* ¶ 3. Hence *Handrahan's* contention that the Provision violated title 19-A, section 1653 of the Maine Revised Statutes because it "determin[ed] the daughter's best interests prospectively and [was] temporally indefinite," a contention without merit once *Malenko* conceded that the Provision's condition was only effective as of the date the judgment was issued. *Malenko v. Handrahan*, 2009 ME 96, ¶ 20, 979 A.2d 1269; see *infra* Part IV.A.2.

79. 19-A M.R.S.A. § 1657 (2012 & Supp. 2015); see also *Rowland II*, 1997 ME 80, ¶ 4, 692 A.2d 939 ("[T]he burden [is] placed on the moving party to establish by a preponderance of the evidence that,

harder to reconcile from an ethical perspective is the mother's disregard for the order in *Rowland I*. But it is important to keep in mind that the role of the court in family matters is to protect the interests of the child, and not to punish parents for acting badly.<sup>80</sup> Revoking a parent's primary physical residency will be just as traumatic for the child regardless of whether the parent and child have been living in a location condoned by the court order.

A final note on the *Rowland* cases is their implicit support for the primacy of the best interest of the child in determining residency. As noted by the dissent, the judgment in *Rowland I* yielded an interesting result where the children were to maintain a residence in the town in which they had been living, despite the fact that neither parent wanted to reside there.<sup>81</sup> The best interest of the child in this case, then, was not even a tie-breaker between the competing interests of two parents, but effectively held to supersede both.

## 2. *Malenko v. Handrahan*

Lori Handrahan and Igor Malenko met in Macedonia in 2005 and lived in Holland until early 2006, when they moved to the United States and married.<sup>82</sup> Their daughter was born later that year.<sup>83</sup> In May 2008, Malenko filed for divorce.<sup>84</sup> A final hearing was held in December 2008.<sup>85</sup> The issue of parental rights and responsibilities relating to the child was hotly contested. Handrahan alleged that Malenko was mentally ill, violent, and abusive, and as such posed a significant risk to their daughter.<sup>86</sup>

The trial court did not find Handrahan's allegations of abuse and mental illness credible.<sup>87</sup> This finding was supported by the guardian *ad litem*'s report<sup>88</sup> and the

since the prior custody order, there has occurred a change in circumstances sufficiently substantial in its effect on the best interests of the children to justify a modification . . . .").

80. 19-A M.R.S.A. § 1653 (2012 & Supp. 2015). For an extreme example, see *Stacey-Sotiriou v. Sotiriou*, 2014 ME 145, ¶ 15, 106 A.3d 417 ("[The] focus [is] not on the past acts of the parents, but on what, going forward, would be in the best interest of the child . . . [T]he court [must] 'make a close examination of the present circumstances and future needs of a minor child, and not just a limited examination of which parent is better suited to accept physical custody.'" (quoting the district court opinion).

81. *Rowland I*, 629 A.2d 613, 617 (Me. 1993) (Clifford, J., dissenting).

82. *Malenko*, 2009 ME 96, ¶ 2, 979 A.2d 1269.

83. *Id.*

84. *Id.* ¶ 4.

85. *Id.*

86. *Id.*

87. *Id.* ¶ 15.

88. The guardian's report highlighted some of the conflict in Malenko and Handrahan's marriage:

[T]he guardian concluded that the episodes of domestic violence were attributable to "situational couple violence" arising from conflicts in the marriage, as opposed to "coercive controlling violence," which is characterized by power and control and often results in serious injuries. She wrote: "While I do not believe Lori is being intentionally misleading, I believe that her experience and perceptions are not the experience and perceptions that others may have of the same event." The guardian also observed, "This is not a typical domestic violence situation, in that the person with the power and control in the relationship was clearly [Handrahan, and that h]er actions in this case are not consistent with those of a battered wife."

*Id.* ¶ 11.

testimony of Dr. Carol Lynn Kabacoff, a clinical psychologist, who evaluated both parents at the request of the guardian *ad litem*.<sup>89</sup> Nonetheless, the court ordered shared parental rights and responsibilities and granted primary physical residency to Handrahan, with rights of parental contact granted to Malenko on a graduated schedule.<sup>90</sup> This was consistent with the recommendation of the guardian *ad litem* that such an order would be in the best interest of the child, despite certain reservations based on Handrahan's pattern of behavior.<sup>91</sup> In particular, the guardian was concerned that Handrahan would be unwilling to foster a relationship between her daughter and Malenko.<sup>92</sup> Sometime after this report was written, the guardian learned that Handrahan planned to relocate to Washington, D.C.<sup>93</sup> Based on this new information, the guardian wrote a second report concluding that primary physical residency should be granted to Malenko if Handrahan relocated.<sup>94</sup> This revised recommendation was a logical extension of her anxieties from the first order—if Handrahan was unlikely to foster a relationship between her daughter and Malenko while they were living in the same state, a distant relocation would “effectively sever the child’s relationship with her father.”<sup>95</sup>

The trial court took the guardian’s recommendation: primary physical residence was allocated to Handrahan, but this grant was conditional on Handrahan’s remaining in Maine.<sup>96</sup> However, if Handrahan were to relocate out of state, primary physical residence would be granted to Malenko.<sup>97</sup>

On appeal, Handrahan contended the Provision was unconstitutional and violated title 19-A, section 1653 of the Maine Revised Statutes, specifically because it “determin[ed] the daughter’s best interests prospectively and [was] temporally indefinite.”<sup>98</sup> The grounds for the constitutional violation largely track the discussion

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89. *Id.* ¶ 7 (“Kabacoff submitted a comprehensive parental capacity evaluation that found, among other things, that Malenko was not mentally ill. Kabacoff also noted that Handrahan's efforts to have Malenko diagnosed with a mental illness had led several providers to suggest that Handrahan herself seek mental health counseling.”).

90. *Id.* ¶ 16.

91. *Id.* ¶¶ 11-12.

92. *Id.* ¶ 12.

93. *Id.* ¶ 13.

94. *Id.*

95. *Id.* The report also noted that such a move would be unduly disruptive to a young child anyway. See, e.g., Janet M. Bowermaster, *Sympathizing with Solomon: Choosing Between Parents in A Mobile Society*, 31 U. LOUISVILLE J. FAM. L. 791, 799-800 (1992).

96. *Malenko*, 2009 ME 96, ¶ 16, 979 A.2d 1269.

97. The pertinent paragraph is included in its entirety:

B. Primary physical residence. Primary physical residence of [the daughter] is allocated to [Handrahan]. There was some indication made at trial that [Handrahan] may intend to relocate to the Washington, D.C. area in a job-related move. The court finds that it is in the best interest of [the daughter] that she has frequent and continuing contact with both of her parents. Therefore, primary physical residence of [the daughter] is allocated to [Handrahan] provided she remains in the State of Maine. If [Handrahan] does in fact relocate out of state, primary physical residence of [the daughter] shall be granted to [Malenko].

*Malenko*, 2009 ME 96, ¶ 16, 979 A.2d 1269.

98. *Id.* ¶ 20. Handrahan listed two other grounds for her appeal: (1) that the court erred in excluding the telephonic testimony of two of her expert witnesses, and (2) that the court’s credibility findings were erroneous. *Id.* In keeping with the particularly broad grant of discretion the Law Court has described in family law appeals, the Court found no error and substantively affirmed the judgment. *Id.* ¶¶ 33, 41.

in Part II of this Note.<sup>99</sup>

The Law Court found Handrahan's challenges moot, and therefore nonjusticiable.<sup>100</sup> The court also noted its hesitancy to further prolong a highly contested matter by issuing a remand.<sup>101</sup> Any further modifications would force the parties back into mediation, though the court noted that, "[t]he prospect of a mediated resolution in this case may prove to be no more than wishful judicial thinking."<sup>102</sup> The moot provision was struck and the judgment otherwise affirmed.<sup>103</sup>

### B. *The Case for Discretion and Best Interest Revisited*

A notable aspect of the Rowland cases and *Malenko* is the reaffirmation of deference to the trial court's findings of fact.<sup>104</sup> The "abuse of discretion" standard for reversing the judgment of the trial court is particularly strict for determinations of parental rights and responsibilities.<sup>105</sup> In *Malenko* the District Court found, as a factual matter, that the best interest of the child could only be served by the conditional grant of residency ordered in the Provision.<sup>106</sup> This pattern continued in *Light*, when the Law Court again deferred to the District Court's findings regarding the best interest of the child.<sup>107</sup>

Deference to the factual findings of the District Court is important because it provides the foundation on which the Law Court based its favorable discussion of

99. *Malenko*, 2009 ME 96, ¶ 20, 979 A.2d 1269 ("Handrahan . . . asserts that the relocation provision is unconstitutional because it infringes on her right to travel [and] right to family integrity. . ."); see *supra* Part II.

100. "Based on Malenko's concession [that the provision is no longer effective], we modify the judgment by striking the automatic relocation provision from the judgment, and, as modified, affirm the court's award of shared parental rights and responsibilities, with primary residential care to Handrahan and rights of parental contact to Malenko." *Malenko*, 2009 ME 96, ¶ 29, 979 A.2d 1269. This is an identical situation to *Light*, and was the basis for the argument raised by the concurrence in that case.

101. *Id.* ¶ 28.

102. *Id.*; see also 19-A M.R.S.A. §§ 1653, 1657 (2012). As it turned out, the Court's thinking was wishful indeed. The parties were back before the Law Court in 2011, when Handrahan appealed the denial of a protection from abuse she had filed on behalf of their daughter based on an allegation that Malenko had sexually abused the daughter. *Handrahan v. Malenko*, 2011 ME 15, ¶ 2, 12 A.3d 79.

103. *Malenko*, 2009 ME 96, ¶¶ 29, 41, 979 A.2d 1269

104. *Rowland I*, 629 A.2d 613, 616-17 (Me. 1993). "Based on the record before us and the best interests considerations mandated in [19-A M.R.S.A. § 1653(3)], we cannot say that the trial court's findings are clearly erroneous or that its amendment of the divorce judgment as it relates to the primary physical residence of the children constitutes an abuse of discretion." Cf. *Malenko*, 2009 ME 96, ¶ 23, 979 A.2d 1269 ("[T]he provision [in *Rowland I*] was not an abuse of discretion because the court was presented with ample evidence establishing that the imminent relocation did not serve the children's current best interests.")

105. "We have recently stated that "[i]n connection with both the original divorce judgment and any motions for a change of the primary physical residence [of minor children] 'the sensitive questions relating to the upbringing of minor children of divorced parents must of necessity be committed to the sound judgment of the trial [court that] hears the witnesses who describe the relevant circumstances of the case.' The court must 'discern, as a wise, affectionate and careful parent,' what custody arrangements will further the child's best interest." *Rowland II*, 1997 ME 80, ¶ 7, 692 A.2d 939 (citing *Cloutier v. Lear*, 1997 ME 35, ¶ 4, 691 A.2d 660).

106. *Malenko*, 2009 ME 134, ¶¶ 13-15, 979 A.2d 1269.

107. *Light v. D'Amato*, 2014 ME 134, ¶¶ 23, 24, 105 A.3d 447. Indeed, D'Amato's other ground for appeal was a denied motion to reopen the evidence, which the Law Court likewise affirmed, finding no abuse of discretion. *Id.* ¶ 29.

the court order in each case. The Law Court upheld the conditional grant of residency when reviewing it only for consistency with the best interest of the child,<sup>108</sup> and commented favorably on the District Court's efforts to find a solution consistent with the best interest of the child.<sup>109</sup> This signaled to family courts the significance of the best interest of the child,<sup>110</sup> and the Law Court's general deference to the trial court's factual findings.

In the two-paragraph discussion of the constitutionality and statutory validity of the conditional grant of residency in *Malenko*, the Law Court would have resolved the statutory question with one sentence, but for it being dictum: "[A] provision for the automatic transfer of a child's primary residence does not violate statutory requirements if it is responsive to an imminent relocation and is supported by a current assessment of the child's best interests."<sup>111</sup> The Law Court has sent a strong signal that statutory challenges to grants of residency conditioned on a parent's relocation will be unlikely to prevail. In other words, such provisions are not a *per se* violation of title 19-A, section 1653 of the Maine Revised Statutes.<sup>112</sup> The Law Court's treatment of the constitutional issue in *Malenko* was more ambiguous.<sup>113</sup>

The court reached the constitutional implications of a conditional grant of residency for the first time in *Light*, holding that there was no constraint on D'Amato's right to travel.<sup>114</sup> The benefit of this holding is simplicity. Where there is no constraint of a fundamental right, there is no need for balancing or a compelling state interest sufficient to outweigh the right. However, simply holding that there is no constraint on a residential parent's right to relocate risks over-simplifying a parent's decision-making process. The trial court's order does not affect D'Amato's decision-making; it effectively makes the decision for her.<sup>115</sup> D'Amato's desire to return to Italy was certainly strong, but regardless of how compelling her reasons, she would be faced with a painful, difficult choice with lifelong consequences: The cost would be to give up primary residency of her child, whom she had been living with, nurturing, and loving for her entire life, and as primary residential parent for over a year.<sup>116</sup>

Furthermore, the holding may have constitutional implications as well because

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108. *Rowland I* at 616-17.

109. *Id.* at 617. *See also Malenko*, 2009 ME 134, ¶ 28.

110. Although, under *Light*, apparently not of controlling importance.

111. *Malenko*, 2009 ME 96, ¶ 23, 979 A.2d 1269. *See also Stacey-Sotiriou v. Sotiriou*, 2014 ME 145, ¶ 15, 106 A.3d 417 (emphasis added) (writing that the court must consider both "the present circumstances and the future needs" of the minor child).

112. *Malenko*, 2009 ME 96, ¶ 23, 979 A.2d 1269.

113. *Id.* ¶ 24. The Law Court cites to a Colorado Supreme Court case which includes a summary of some of the potential solutions considered in Parts II, B and C of this Note. *In re Marriage of Ciesluk*, 113 P.3d 135, 143-47 (Colo. 2005). Notably, the Court's dicta on the treatment of parental relocation focuses more on the impact it will have on the other parent's rights than the relocating parent's right to relocate. *Id.*

114. *See Light v. D'Amato*, 2014 ME 134, ¶ 19, 105 A.3d 447. Maine is not the only state to hold that prohibitions on a primary residential parent's right to relocate with her child does not constrain her right to travel. *See Carlson v. Carlson*, 661 P.2d 833, 836 (Kan. Ct. App. 1983) (holding that mother's right to establish residence elsewhere was limited only by her desire to maintain primary residency with her child).

115. *See Taylor v. Taylor*, 849 S.W.2d 319, 333 (Tenn. 1993) ("[The lower court's holding] presented [the child's] mother with a veritable Hobson's choice . . .").

116. *See Light*, 2014 ME 134, ¶¶ 2, 8, 105 A.3d 447.

it ignores the constitutionally protected right to familial privacy and autonomy.<sup>117</sup> Future grants of residency conditioned on parental relocation could still be appealed on these grounds. The trial court must not only force the parent to make a decision of extreme personal and emotional importance, but also to make a decision that will have far-reaching and fundamental effects on her family. This cannot be the end of the analysis. The effect of such an order on the family's privacy and autonomy cannot be sidestepped simply because the parent's right to travel has not been technically constrained.

Perhaps recognizing these concerns, the Law Court provides a follow-up argument: assuming *arguendo* that the provision constrained D'Amato's right to travel, such a constraint would be proper because "the [District Court] appropriately considered and balanced the various fundamental or constitutionally protected interests at stake in reaching its decision."<sup>118</sup> The court frames the balancing test as "between 'a custodial parent's right to engage in interstate travel and to decide where the parent and child will reside, and a non-custodial parent's right to have continuing and meaningful parent/child contact with the child.'"<sup>119</sup>

As noted above, this balancing test does not provide significant value to a meaningful analysis: this is because both rights to be balanced are fundamental and constitutionally protected.<sup>120</sup> The Law Court provides more guidance by reframing the balancing test as requiring "full consideration of the child's best interest," prefacing its discussion of the District Court's findings relating to the best interest of the child.<sup>121</sup> Indeed, despite references to a more comprehensive balancing test, the grounds on which the Law Court affirms the Provision rest entirely on findings relating to the best interest of the child.<sup>122</sup>

## V. CONCLUSION

The Law Court reached the right result in *Light*, but not for the best reason. Holding that the constraint of a parent's right to travel with his or her child is not at all a constraint on his or her comprehensive right to travel is somewhat artificial. Regardless of how compelling a parent's reason for relocating may be, forcing that parent to choose between leaving—thereby losing primary residency—or staying in

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117. See generally, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

118. *Light*, 2014 ME 134, ¶ 20, 105 A.3d 447.

119. *Id.* (citing *Malenko v. Handrahan*, 2009 ME 96, ¶ 24, 979 A.2d 1269). In a separate footnote, the Law Court explicitly rejects "protecting the welfare of children" as "providing the required justification" to constrain a parent's right to travel, instead adopting the "balancing approach," "balancing the needs of the child against the rights of the parents." *Id.* n.1, (citing *In re Marriage of Fedorov*, 206 P.3d 1124, 1134 (Or. Ct. App. 2009); *Malenko*, 2009 ME 96, ¶ 24, 979 A.2d 1269).

120. See PRINCIPLES § 2.17, cmt. a at 402 (2002) ("The ability to change one's area of residence is an important individual right. So is having access to one's child. When two parents have been exercising continuing care and responsibility for a child, the relocation of one of them puts these two interests in sometimes irreconcilable conflict.")

121. *Light*, 2014 ME 134, ¶¶ 22-24, 105 A.3d 447.

122. See *id.* ¶ 24 ("Given the factual record; the court's determination that the child's best interest is served by having continued, regular contact with both parents; and the court's finding that *Light* is more likely to foster contact with the other parent in the event of geographic separation, the court's judgment does not violate the balance of the parents' and the child's constitutional and fundamental rights.")

order to retain residency is to give that parent no choice at all. This is a true Hobson's Choice.<sup>123</sup>

The Law Court may have recognized these potential concerns, and as such in dicta has explained that even if there were a constraint on D'Amato's right to travel to Italy, this collateral effect was balanced by other fundamental or constitutionally protected interests.<sup>124</sup> However, these "other interests" eventually boil down to one pivotal standard: The best interest of the child. No one parent's interest in raising his or her child trumps the other, and by statute, Maine courts must order arrangements that allow for continuing contact with both parents, provided such an arrangement is in the best interests of the child.<sup>125</sup> Functionally, in each case where the trial court has considered a grant of residency conditioned on the residential parent's remaining in the state, the Law Court has considered the best interest of the child in upholding such a provision.<sup>126</sup> The Law Court can simplify the standard by recognizing the best interest of the child as a compelling state interest sufficient to overcome a parent's fundamental right to travel and relocate. In *Light*, the result would be the same with such a standard, but the Law Court would instead have relied on the trial court's factual finding that the residential arrangement in the order was consistent with the best interest of the child.<sup>127</sup> Recognizing that protecting the child's best interest is a compelling state interest would empower the trial court to uphold the conditional grant of residency despite D'Amato's fundamental right to relocate, rather than holding that this right was not at all constrained.<sup>128</sup>

The current approach in Maine fails to recognize that for most residential parents, a prohibition on relocating with their child will be a functional, if not technical, constraint on their decision to relocate. The follow-up argument suggests that a balancing test of the "various fundamental or constitutionally protected interests" would resolve the issue even if a parent's right to travel were constrained.<sup>129</sup> Yet, because the only other fundamental rights implicated are a parent's right to raise his child and a general right to family autonomy and privacy, such a balancing test becomes indistinguishable from merely holding that the outcome is in the best interest of the child. Holding the best interest of the child as

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123. See *Taylor v. Taylor*, 849 S.W.2d 319, 333 (Tenn. 1993). Such a holding may also have constitutional implications for a parent's right to family autonomy. See cases cited *supra* note 117 and accompanying text.

124. *Light*, 2014 ME 134, ¶ 20, 105 A.3d 447

125. 19-A M.R.S.A. § 1653(1)(C) (2012).

126. See 19-A M.R.S.A. § 1653 (2012 & Supp. 2015); see also *Light*, 2014 ME 134, ¶ 22, 105 A.3d 447; *Malenko v. Handrahan*, 2009 ME 96, ¶ 23, 979 A.2d 1269; *Rowland I*, 629 A.2d 613, 616-17 (Me. 1993). In *Malenko*, the provision was struck, but only for mootness. *Malenko*, 2009 ME 96, ¶¶ 27-28, 979 A.2d 1269. In its analysis, the Law Court was still supportive of the District Court's findings that the provision was in the best interest of the child. *Id.*

127. See, e.g., *Lachapelle v. Mitten*, 607 N.W.2d 151, 163 (Minn. Ct. App. 2000). The Court of Appeals of Minnesota recognized that a young girl's mother had a fundamental right to relocate, but its holding was still beautifully simple: "The deprivation of fundamental rights is subject to strict scrutiny and may only be upheld if justified by a compelling state interest. The compelling state interest in this case is the protection of the best interests of the child."

128. See *Light*, 2014 ME 134, ¶ 19, 105 A.3d 447. For an analogous result in another jurisdiction, see *In re Custody of D.M.G. and T.J.G.*, 951 P.2d 1377, 1383 (Mont. 1998) (requiring that the party requesting a travel restriction provide sufficient evidence that such a restriction be in the best interest of the child).

129. See *Light*, 2014 ME 134, ¶ 20, 105 A.3d 447.



a compelling government interest would recognize this reality. Such a standard would have supported the same result in *Rowland I* and *Malenko*, where the district courts found the conditional grants of residency to be consistent with the best interest of the child, and the Law Court upheld such findings.<sup>130</sup> This standard has provided consistent results in analogous cases in other jurisdictions.<sup>131</sup>

While the Law Court reached the right result in *Light*, it should have gone further and recognized that protecting the best interest of the child is a compelling interest. Divorce will always present challenges for the children affected, but family law courts can endeavor to mitigate these challenges by making the interest of the affected children determinative in deciding issues with a bearing on their livelihood.

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130. See *Rowland I*, 629 A.2d 613 at 615.

131. See, e.g., *LaChapelle*, 607 N.W.2d at 163 (holding that the best interest of the child is a compelling interest sufficient to satisfy strict scrutiny); *In re Custody of D.M.G.*, 951 P.2d 1377, 1381 (holding that constitutional right to interstate travel is "qualified" by the best interests of the child); *Clark v. Atkins*, 489 N.E.2d 90, 100 (Ind.Ct.App.1986) (recognizing protecting the interests of children as a compelling objective).