

IN RE MARRIAGE OF MATCHEN, 866 N.E.2D 683 (ILL. APP. CT. 2007): ILLINOIS REMOVAL STANDARDS DO NOT MATCH UP WITH THE CURRENT NATIONAL TREND

Misty Edwards*

I. INTRODUCTION

Between 1995 and 2000, twenty-two million Americans relocated to different states.¹ Of these, more than one million were Illinois residents.² Many were divorced parents.³ Custodial parents that reside in Illinois are not free to move out of the state at their will. They are governed by the Illinois Marriage and Dissolution of Marriage Act, specifically section 609.⁴ It states:

The court may grant leave, before or after judgment, to any party having custody of any minor child or children to remove such child or children from Illinois whenever such approval is in the best interests of such child or children. The burden of proving that such removal is in the best interests of such child or children is on the party seeking removal.⁵

Courts decide whether a child may be removed on a case-by-case basis.⁶ A custodial parent who fails to seek permission from the court before moving out of state with the child could be found in contempt of court.⁷

In the case *In re Marriage of Matchen*, a mother filed a petition to move from McHenry County in northern Illinois to the Wisconsin Dells area.⁸ The trial court denied the petition to remove the children from Illinois, citing ties

* Misty Edwards is a third-year law student, expecting her J.D. from Southern Illinois University School of Law in May of 2009. She would like to thank Professor Sheila Simon for her guidance in preparation of the article. Misty would also like to thank her husband, Brian, and son, Brenden, for all of their support.

1. RACHEL S. FRANKLIN, DOMESTIC MIGRATION ACROSS REGIONS, DIVISIONS, AND STATES: 1995 TO 2000, CENSUS 2000 SPECIAL REPORTS (2003), <http://www.census.gov/prod/2003pubs/censr-7.pdf>.

2. *Id.*

3. 65 AM. JUR. *Trials* 127 § 1 (2007).

4. 750 ILL. COMP. STAT. 5/609 (West 2007).

5. *Id.*

6. *In re Marriage of Matchen*, 866 N.E.2d 683, 690 (Ill. App. Ct. 2007).

7. *Fisher v. Waldrop*, 849 N.E.2d 334, 342 (Ill. 2006).

8. *Matchen*, 866 N.E.2d at 685.

to family in Illinois, visitation difficulties for the father, the children's preference, and no general enhancement of the children's lives if they lived in Wisconsin.⁹ The appellate court affirmed this decision, although one justice dissented.¹⁰ The dissent argued that the new stable family unit should be considered.¹¹ In addition, the children could maintain their relationships to family in Illinois, and the move would not substantially frustrate visitation since the drive between McHenry County and the Wisconsin Dells was only three hours.¹² Also, non-custodial parents could move out of state and re-marry.¹³

This case illustrates the difficulty in applying the "best interests of the child" standard. Illinois removal cases are so fact-intensive, there is really no uniformity in the decisions.¹⁴ Additionally, it is nonsensical that a custodial parent may move from the southern tip of Illinois to Chicago, almost 385 miles, yet a parent living in a town bordering another state may not move two miles across the border. Although each individual state has its own standards for removal of children out of state, the present national trend favors the custodial parent's ability to move unless motivated by bad faith.¹⁵ This recognizes a parent's constitutional right to travel, and a custodial parent's ability to determine the best interests of the child.¹⁶ Because the "best interests of the child" analysis creates such varied results, this Casenote advocates that Illinois abandon that standard and adopt guidelines that reflect the present national trend.

In this article, Section II examines the development of removal rules in Illinois. Section III includes the facts, procedure, and the majority and dissenting opinions in *Matchen*. Next, Section IV examines the decision in *Matchen*, and explores the national trend in removal cases, other states' approaches to removal, and the American Academy of Matrimonial Lawyers Model Relocation Act. In addition, a proposed model act for Illinois will be presented.

9. *Id.* at 693.

10. *Id.* at 695–96.

11. *Id.* at 698 (Bowman, J. dissenting).

12. *Id.*

13. *Id.*

14. Lance Cagle, Comment, *Have Kids, Might Travel: The Need for a New Roadmap in Illinois Relocation Cases*, 25 N. ILL. U. L. REV. 255, 258 (2005).

15. 65 AM. JUR. *Trials* 127 § 3 (2007).

16. *Id.*

II. BACKGROUND

In order to understand *Matchen*, the history of removal in Illinois must be examined. First, this section reviews early case law. Then, it discusses the codification of the best interests standard. In addition, the landmark cases of *In re Marriage of Eckert* and *In re Marriage of Collingbourne* will be examined. Lastly, this section discusses the cases that followed these two decisions.

A. Early Case Law

In 1849, Illinois courts first addressed the issue of removal in *Miner v. Miner*.¹⁷ In that case, the divorcing parents sought custody of their daughter.¹⁸ The trial court awarded custody to the mother, and the Illinois Supreme Court affirmed.¹⁹ However, the mother intended to move out of the state.²⁰ The court did not allow the mother to move out of state, because the father must have reasonable access to the child, and any attempt to alienate the child “would be held to be an abuse of the child,” and “would be a contempt of the court.”²¹ Illinois courts followed this precedent until 1952, when *Schmidt v. Schmidt* was decided.²²

In *Schmidt*, the mother filed a petition for an increase in child support and permission to relocate to New York with her son upon her remarriage.²³ Her future husband was employed in New York, willing to care for her son, and had a substantial income and a suitable home.²⁴ The trial court held it was in the best interest of the child to relocate with his mother.²⁵ The court also gave the father custody at his Illinois home for periods in July and August, for spring break, and for Christmas break.²⁶ The court ordered the mother to pay the costs of transportation for visitation and a bond conditioned on her

17. Cagle, *supra* note 14, at 262.

18. *Miner v. Miner*, 1849 WL 4253, 1 (Ill. Dec. Term).

19. *Id.* at 3–6.

20. *Id.* at 7.

21. *Id.*

22. *Schmidt v. Schmidt*, 105 N.E.2d 117, 120–21 (Ill. App. Ct. 1952).

23. *Id.* at 118.

24. *Id.*

25. *Id.* at 119.

26. *Id.*

compliance with the court's order.²⁷ The father appealed this order, stating it was contrary to *Miner*²⁸ and the cases that followed.²⁹

The appellate court upheld the trial court's order.³⁰ The court noted that times had changed since *Miner* was decided more than one hundred years prior.³¹ Since methods of transportation changed, people often commuted long distances to work, and often worked in one state and lived in another.³² Further, the court stated, "in view of modern living conditions to say that as a fixed rule of law, without exception, the child may never be taken from the State out of the jurisdiction of the court seems harsh and absurd."³³ The court also pointed to decisions in other states that allowed removal of children when in the best interests of the child.³⁴ Ultimately, the court declined to follow *Miner*, and held "where circumstances demand it for the best interests of the child, it should be that he be taken outside of the State and the jurisdiction of the court."³⁵

B. Codification of the Best Interests Standard

In 1959, the Illinois General Assembly codified the best interests test described in *Schmidt*.³⁶ The statute stated "the court may grant leave, before or after decree, to any party having custody of the minor child or children to remove such child or children from Illinois whenever such removal is in the best interests of such child or children."³⁷ It also provided that the removing party may have to give "reasonable security guaranteeing return" of the children.³⁸ As in *Schmidt*, the Illinois General Assembly did not provide any guidance in applying the standard.³⁹ Nor did the statute state which parent had the burden of proof in determining whether removing the child from Illinois was in the best interests of the child.⁴⁰

27. *Id.*

28. *Id.*

29. See *Hewitt v. Long*, 76 Ill. 399 (Ill. 1875); *Chase v. Chase*, 70 Ill. App. 572 (Ill. App. Ct. 1896); *Stafford v. Stafford*, 132 N.E. 452 (Ill. 1921); *Seaton v. Seaton*, 86 N.E.2d 435 (Ill. App. Ct. 1949).

30. *Schmidt*, 105 N.E.2d at 122.

31. *Id.* at 121.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 122.

36. ILL. REV. STAT. Ch. 40, Para. 14 (1959).

37. *Id.*

38. *Id.*

39. Cagle, *supra* note 14, at 265.

40. *Id.*

In 1977, the Illinois Marriage and Dissolution of Marriage Act (IMDMA) was passed.⁴¹ The removal section described above was included in the Act in section 609.⁴² This section was not amended until 1981, when the Illinois General Assembly provided “the burden of proving that such removal is in the best interests of the child or children is on the party seeking removal.”⁴³ Again, the statute failed to give guidance as to what the courts should consider in deciding the best interests of the child.

C. In re Marriage of Eckert: Guidelines for Interpreting the Best Interest Standard

In the case *In re Marriage of Eckert*, the Illinois Supreme Court set out guidelines for the courts to consider when deciding the best interests of the children in removal cases.⁴⁴ In *Eckert*, the custodial parent filed a petition to remove her child to Arizona.⁴⁵ The trial court denied the petition, reasoning it would be in the child’s best interest to stay near his father and extended family.⁴⁶ The mother appealed.⁴⁷ The appellate court reversed and remanded, citing the mother’s advancement of her career, and the fact that her other son’s asthmatic condition would improve.⁴⁸ Also, her two sons had a strong attachment, and would continue to live together in Arizona.⁴⁹ Additionally, the appellate court stated the only detriment would be the decreased visitation of the father, which did not control.⁵⁰ The non-custodial parent then appealed to the Illinois Supreme Court.⁵¹

The Illinois Supreme Court rejected the appellate court’s reasoning that the custodial parent only had to show a sensible reason for moving, and generally show the move was in the child’s best interest.⁵² The court reasoned that the standard diluted the IMDMA’s burden of proof on the custodial parent

41. *Id.*

42. ILL. REV. STAT. Ch. 40, Para. 609 (1983).

43. *Id.*

44. *In re Marriage of Eckert*, 518 N.E.2d 1041, 1045–46 (Ill. 1988).

45. *Id.* at 1042.

46. *Id.*

47. *Id.*

48. *Id.*

49. *In re Marriage of Eckert*, 499 N.E.2d 627, 631 (Ill. App. Ct. 1986), *rev’d*, 518 N.E.2d 1041 (1988).

50. *Id.*

51. *Eckert*, 518 N.E.2d at 1042.

52. *Id.* at 1045.

seeking removal.⁵³ The court then set out a series of factors largely based on a New Jersey case, *D'Onofrio v. D'Onofrio*.⁵⁴

First, courts should consider the likelihood of enhancement of the general quality of life for both the parent and the child.⁵⁵ Next, the motives of the custodial parent seeking to move should be considered, in order to examine whether the custodial parent was trying to frustrate the non-custodial parent's visitation with the child.⁵⁶ Courts should also consider the motives of the non-custodial parent.⁵⁷ Lastly, courts should consider whether a reasonable visitation schedule can be arranged.⁵⁸ The court elaborated that "a reasonable visitation schedule is one that will preserve and foster the child's relationship with the non-custodial parent," and when a parent faithfully asserted their visitation rights, a court should not allow removal for "frivolous or unpersuasive or inadequate reasons."⁵⁹

Applying these standards, the court reversed the decision of the appellate court, and affirmed the decision of the trial court to deny the removal petition.⁶⁰ The court questioned the custodial parent's advancement, since her new job would not be earning more.⁶¹ Additionally, she did not look for comparable work near her home in Illinois.⁶² The court stated that no evidence showed the move would improve her son's asthmatic condition.⁶³ Additionally, evidence did show that the non-custodial parent was a good father, and the custodial parent was not always cooperative in visitation arrangements.⁶⁴ The court also noted that the child's extended family was in the Belleville area where he currently resided.⁶⁵

D. Post-*Eckert* decisions: Variance in Application of the *Eckert* Factors

After the *Eckert* decision, Illinois courts used the five factors to determine whether a child could be removed from the state.⁶⁶ However,

53. *Id.*

54. *Id.* at 1045-46 (citing *D'Onofrio v. D'Onofrio*, 365 A.2d 27 (N.J. Super. Ct. Ch. Div. 1976)).

55. *Id.* at 1045.

56. *Id.*

57. *Id.*

58. *Id.* at 1045-46.

59. *Id.* at 1046.

60. *Id.* at 1047.

61. *Id.* at 1046.

62. *Id.*

63. *Id.*

64. *Id.* at 1046-47.

65. *Id.* at 1047.

66. Carl W. Gilmore & Gunnar J. Gitlin, *Post-Eckert Trends in Child Removal: A Review of Appellate Cases*, 84 ILL. B.J. 76, 76 (1996).

application of the factors varied by district.⁶⁷ The First, Fourth, and Fifth Districts allowed removal if the custodial parent could show economic necessity, which was not an *Eckert* factor.⁶⁸ The court considered economic necessity because it provided direct benefits to the custodial parent, and indirect benefits to the child.⁶⁹ The Third District almost always allowed removal, and the Second District almost always denied removal.⁷⁰ The Second District did not consider the indirect benefits to the child.⁷¹

In 1996, *In re Marriage of Smith* expanded on how the *Eckert* factors should apply.⁷² The court held the *Eckert* factors were not exclusive, and the weight given to the individual *Eckert* factors depended on the circumstances of the case.⁷³ In that case, the court considered how the child's mental health would be affected when denying the removal petition.⁷⁴ The case *In re Marriage of Collingbourne* confirmed that the *Eckert* factors were not exclusive, nor was any individual factor controlling in determining the best interests of child.⁷⁵

E. *In re Marriage of Collingbourne*: An Attempt to Reconcile the Variance in Application of the *Eckert* Factors

In *Collingbourne*, the custodial parent filed a petition to remove her son to Massachusetts to live with her fiancé who owned a business there.⁷⁶ The trial court granted the removal petition, stating that the mother met the burden of proof by showing the benefits of the move outweighed the initial disruption caused by the move.⁷⁷ The court noted that the mother would be able to marry her fiancé, and her salary and work schedule would improve.⁷⁸ Additionally, the child would have better opportunities at the new school.⁷⁹ According to the court, the siblings already lived in two separate households, and were five years apart in age.⁸⁰ Visitation would be reasonable, since the child would

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 81.

72. *In re Marriage of Smith*, 665 N.E.2d 1209 (Ill. 1996).

73. *Id.* at 1213.

74. *Id.*

75. *In re Marriage of Collingbourne*, 791 N.E.2d 532, 554–56 (Ill. 2003).

76. *Id.* at 534.

77. *Id.* at 541.

78. *Id.*

79. *Id.*

80. *Id.* at 541–42.

spend more extended periods of time with his father.⁸¹ The father appealed the decision.⁸²

On appeal, the court reversed the trial court's decision granting removal.⁸³ The court said the child would not experience a substantial direct benefit by moving to Massachusetts.⁸⁴ The court held that "an increased standard of living will occur in almost every case of remarriage . . . [and] cannot alone be determinative."⁸⁵ Additionally, it is "insufficient to focus only on the improvement of the custodial parent's life."⁸⁶ The court also held the new visitation schedule was not in the child's best interest.⁸⁷ Overall, the move to Massachusetts was not in the child's best interest.⁸⁸ The mother then appealed to the Illinois Supreme Court.⁸⁹

The Illinois Supreme Court reversed the appellate court, and affirmed the trial court's decision to grant removal.⁹⁰ The court held that a distinction between direct and indirect benefits to the child was not helpful.⁹¹ Ultimately, "what is in the best interests of the child cannot be considered without assessing the best interests of the other members of the household in which the child resides, most particularly the custodial parent."⁹² In effect, there is a connection between a parent and child's general quality of life.⁹³ Additionally, holding otherwise would mean that moving for the purpose of remarriage would almost never provide a basis for removal, and would essentially "eliminate the balancing process set forth in *Eckert*."⁹⁴ Overall, the court found the indirect benefits and reasonable visitation schedule described by the trial court warranted approval of the removal petition sought by the mother.⁹⁵

81. *Id.* at 542.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* (quoting *In re Marriage of Collingbourne*, 774 N.E.2d 448, 454 (Ill. App. Ct. 2002)).

86. *Id.* (quoting *In re Marriage of Collingbourne*, 774 N.E.2d 448, 454 (Ill. App. Ct. 2002)).

87. *Id.* at 543.

88. *Id.*

89. *Id.* at 544.

90. *Id.* at 552.

91. *Id.* at 547.

92. *Id.*

93. *Id.*

94. *Id.* at 548.

95. *Id.* at 549.

F. Post-*Collingbourne* Decisions

Since *Collingbourne* allowed removal on the basis of indirect benefits to the child, many courts have readily approved removal.⁹⁶ The first appellate case after *Collingbourne* in the Second District, *In re Marriage of Repond*, allowed removal based upon indirect benefits to the child.⁹⁷ However, since the *Repond* decision, the Second District has returned to the pattern of denying almost all removal petitions in the cases appealed thus far. *In re Marriage of Matchen* is one of the most recent cases.⁹⁸

III. EXPOSITION OF *IN RE MARRIAGE OF MATCHEN*

In *Matchen*, the court affirmed the decision of the trial court to deny the removal petition made by the mother, Jeanette Matchen. Ms. Matchen wanted to relocate three hours away to the Wisconsin Dells area with her children and fiancé. However, the court said the move would not be in the best interests of the children because of strong ties to family in Illinois, difficulties in the proposed visitation schedule, the children's preference, and no general enhancement of the children's lives.

A. Facts and Procedure

In August of 1995, Jeanette and James Matchen divorced.⁹⁹ As a result, they shared joint custody of their three children.¹⁰⁰ Jeffrey and Jessica lived with their mother, while Jeremiah lived with his father.¹⁰¹

In August of 2002, Jeanette Matchen met her current fiancé, Tom Mayer.¹⁰² Mr. Mayer worked as an electronics engineer and professional inventor, but had since retired to an 88-acre estate in the Wisconsin Dells area.¹⁰³ In 2004, Ms. Matchen filed a removal petition to relocate Jeffrey and Jessica from McHenry County, Illinois to the Wisconsin Dells area to reside

96. See, e.g., *Ford v. Marteness*, 857 N.E.2d 355 (Ill. App. Ct. 2006); *Fisher v. Waldrop*, 849 N.E.2d 334, (Ill. 2006); *In re Marriage of Main*, 838 N.E.2d 988 (Ill. App. Ct. 2005); *In re Marriage of Parr*, 802 N.E.2d 393 (Ill. App. Ct. 2003).

97. *In re Marriage of Repond*, 812 N.E.2d 80 (Ill. App. Ct. 2004) (allowing removal petition for children to move from Illinois to Switzerland where the custodial parent had an employment opportunity, the custodial parent's husband resided there, and a reasonable visitation schedule could be arranged).

98. *In re Marriage of Matchen*, 866 N.E.2d 683 (Ill. App. Ct. 2007).

99. *Id.* at 685.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

with her fiancé.¹⁰⁴ The court held hearings on August 24th, August 25th, and September 2nd in 2005, and on January 11th, 2006.¹⁰⁵

Ms. Matchen testified she worked part-time as a house cleaner, which allowed her to be at home with the children after school and allowed her the flexibility to pick up her children. It also allowed her to stay home when her children were sick.¹⁰⁶ However, she also testified she did not make enough money to cover her bills.¹⁰⁷ Her fiancé helped her by paying the rent and other expenses.¹⁰⁸ She reported difficulties spending time with the children when she worked full time.¹⁰⁹ Ms. Matchen also reported she had not searched for employment seriously for two years.¹¹⁰ She stated that if she moved to Wisconsin she would not have to work, as her fiancé would support her and the children.¹¹¹

Ms. Matchen also testified that she rented a run-down home on a busy street.¹¹² Her children had to share rooms initially, but she gave her room to her daughter so they could have their own rooms.¹¹³ She testified that her landlord was nosy, came to the house unannounced, and peered through the windows.¹¹⁴ Ms. Matchen reported that the home was musty, which affected the air quality and her daughter's asthma.¹¹⁵ She stated that she tried to find alternate housing in the past, but could not afford it.¹¹⁶ Ms. Matchen conceded that she had not used the McHenry County Housing Department in six years because they were not helpful to her in the past.¹¹⁷

In contrast, her fiancé had a three-bedroom home with a loft and full basement on an 88-acre estate in a quiet area.¹¹⁸ There, she and the children would each have their own rooms.¹¹⁹ The property had a pond for swimming and a shooting gallery.¹²⁰ Ms. Matchen and her children stayed at the estate

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 687.

112. *Id.* at 685.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 685–86.

118. *Id.* at 686.

119. *Id.*

120. *Id.*

every other weekend, where they engaged in many outdoor activities.¹²¹ Both Wisconsin and Illinois had most of the activities the children participated in.¹²² The schools in Wisconsin and Illinois were also similar, although the cost of registration in Wisconsin was less expensive.¹²³ Both children were outgoing, so they would be able to make new friends at a new school.¹²⁴ The children had extended family in both Wisconsin and Illinois, and Ms. Matchen would continue to support the children's relationships with family in Illinois.¹²⁵ She also proposed that the visitation schedule be changed to compensate for the visitations that their father would miss during the week.¹²⁶

Ms. Matchen reported that a move would enhance their children's quality of life.¹²⁷ The household would be stable, and she would not need to travel back and forth constantly.¹²⁸ Additionally, her relationship with her fiancé made her happy, and she did not know how it would continue if she would not be allowed to move to Wisconsin.¹²⁹

Mr. Mayer then testified that he had a good relationship with the children.¹³⁰ He also thought a move would benefit his fiancé and her children because of the improved financial situation, better schools, the peaceful estate, and the proximity to the children's only surviving grandparents.¹³¹ He testified it would be difficult to maintain the relationship and financial help if his fiancé were not able to move to Wisconsin.¹³² Mr. Mayer testified if he had to move back to Illinois, he would like to move to southern Illinois.¹³³

James Matchen testified next.¹³⁴ He stated that he exercised visitation regularly.¹³⁵ Mr. Matchen visited Tuesday and Thursday evenings.¹³⁶ He also had the children every other weekend, four weeks in the summer, and four days during Christmas break.¹³⁷ Mr. Matchen testified that visitation would be difficult, because the children would have to ride in the car three hours

121. *Id.*

122. *Id.*

123. *Id.* at 686–87.

124. *Id.*

125. *Id.*

126. *Id.* at 689.

127. *Id.* at 687.

128. *Id.*

129. *Id.*

130. *Id.* at 688.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

each way every other weekend.¹³⁸ Additionally, he would not be able to see the children as often, since his visitation during the week would be gone.¹³⁹ Also, he feared eventually they would not want to make the trip.¹⁴⁰

Mr. Matchen also stated that he participated in outdoor activities with the children, and attended most of his children's games, recitals, and concerts.¹⁴¹ He noted that the children went to the McHenry schools their entire lives and had friends there.¹⁴² He conceded that their mother's current home is near a busy highway, but the children never went near the road.¹⁴³ Mr. Matchen said that the home had three bedrooms, but one was used as an office.¹⁴⁴ The home may have been musty, but his daughter's asthma was under control with medication.¹⁴⁵ Lastly, the children testified that they did not want to move to Wisconsin.¹⁴⁶

After the testimony, the trial court denied the removal petition, and found that the children's best interests would not be served by moving to Wisconsin.¹⁴⁷ It cited strong ties to family in Illinois, no general enhancement of the children's lives if they moved to Wisconsin, the children's preference, and visitation difficulties for the father in making their decision.¹⁴⁸ The court said it would not disrupt the children's lives just "because Mr. Mayer chooses not to move if he can avoid it."¹⁴⁹ Additionally, the court found that the "negative aspects of the children's current living situation in McHenry exist, in large part, due to respondent's decision to work only 15 hours per week."¹⁵⁰ The court conceded that the mother's financial situation would be better, but again pointed to the fact that she and her fiancé could live in Illinois.¹⁵¹ The court noted that there were no bad motives by either party in requesting or objecting to the removal petition.¹⁵² Ms. Matchen appealed the decision.¹⁵³

138. *Id.* at 689.

139. *Id.*

140. *Id.* at 689–90.

141. *Id.* at 688–89.

142. *Id.* at 689.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 690.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

B. Majority Opinion

The majority affirmed the trial court's decision to deny the removal petition, finding that the decision was not against the manifest weight of the evidence.¹⁵⁴ Ms. Matchen did not persuade the court by arguing that the court did not consider the indirect benefits to the children when determining the general welfare of the children would not be enhanced.¹⁵⁵ In other cases where removal was justified, other critical factors were present.¹⁵⁶ Additionally, each removal case had different facts and circumstances, which distinguished each one from the next.¹⁵⁷ Here, the court explained, sufficient evidence supported the trial court's conclusion.¹⁵⁸ It pointed to similar schools and activities in each state.¹⁵⁹ The court did not believe Ms. Matchen would have to seek full-time work if not allowed to move, since Mr. Mayer did not plan to end the relationship depending on the outcome of the case.¹⁶⁰

The court also found evidence of the children's strong ties with their family in Illinois.¹⁶¹ The children had close and frequent contact with family members, and did not want to move to Wisconsin.¹⁶² The court gave some weight to the children's wishes.¹⁶³ Additionally, it found the mother's testimony contradictory.¹⁶⁴ She testified that the children should be removed to be in a stable environment, yet she would still be constantly traveling back and forth from Wisconsin to Illinois to keep up the children's relationships.¹⁶⁵ The court said, "[I]t appears that [Ms. Matchen] is the only person who will truly be in a more stable environment after the move."¹⁶⁶ Also, they pointed to the close relationship between Mr. Matchen and his children, which was "an important factor in weighing against removal."¹⁶⁷

In addition, the court found evidence of difficulties in the father's visitation.¹⁶⁸ The father would lose his visitations during the week, and the

154. *Id.* at 695.

155. *Id.* at 691–92.

156. *Id.* at 692.

157. *Id.*

158. *Id.*

159. *Id.* at 693.

160. *Id.* at 693–95.

161. *Id.* at 694.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

children would have to travel three hours to visit him every other weekend.¹⁶⁹ In addition, the court found evidence that the proposed visitation schedule was not reasonable.¹⁷⁰ Ms. Matchen suggested the children stay an extra day on three day weekends, but the children would have stayed the third day anyway.¹⁷¹ Mr. Matchen was already entitled to have the children every other spring break.¹⁷² Additionally, his “accessibility to the children would be drastically reduced, if not eliminated, if the petition were granted.”¹⁷³ The court then cited *Eckert*, stating that a court should not allow removal for frivolous, unpersuasive, or inadequate reasons when a parent regularly exercised visitation.¹⁷⁴ While the court conceded that Ms. Matchen or her fiancé did not have to exhaust all employment and housing opportunities in Illinois, they stated that a “court should consider all circumstances of the case in considering the best interests of the children.”¹⁷⁵

C. Dissenting Opinion

Justice Bowman dissented and stated that the trial court’s denial of the removal petition was against the manifest weight of the evidence.¹⁷⁶ The justice believed the opposite conclusion was clearly evident and an injustice would occur if the petition was not approved.¹⁷⁷ According to Justice Bowman, the “trial court improperly penalized respondent for not seeking increased income opportunities or improved housing.”¹⁷⁸ Like the trial court, he pointed out that the person seeking removal does not have to exhaust all employment and housing opportunities in Illinois.¹⁷⁹ In fact, Ms. Matchen testified that she only worked part-time because it was important to be at home with the children when they were not in school and when they were sick.¹⁸⁰ Ms. Matchen was able to spend more time with her children because of her

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Matchen*, 866 N.E.2d at 694–95.

174. *Id.* at 695.

175. *Id.*

176. *Id.* at 696 (Bowman, J., dissenting).

177. *Id.*

178. *Id.* at 697.

179. *Id.*

180. *Id.*

fiancé's support.¹⁸¹ If she did not have this support, she would have to seek a full-time job, which was difficult due to her level of education.¹⁸²

If the court allowed Ms. Matchen to move to Wisconsin, she would not have to work and would get even more quality time with her children.¹⁸³ Additionally, the new traditional family unit created by the move would benefit the children.¹⁸⁴ The living conditions would also be improved by living in a stable home.¹⁸⁵ The quality of the home in Wisconsin was better, the children would have their own rooms, and an additional room for the activities the children enjoy.¹⁸⁶ Justice Bowman also cited the greater accessibility to activities in Wisconsin.¹⁸⁷ Therefore, the general welfare of the children would be enhanced.¹⁸⁸

Additionally, Justice Bowman said, "[T]here is no reason why the children cannot maintain relationships with their extended family in McHenry County if they move to Wisconsin."¹⁸⁹ The children only visited their extended family every two weeks, so they could continue to do this every other weekend when they are in Illinois.¹⁹⁰ Further, since Ms. Matchen had a history of supporting these relationships, there was no reason she would not continue to support them in the future just because she would live three hours away.¹⁹¹

Justice Bowman also disagreed that the proposed visitation was unreasonable.¹⁹² The visitation schedule does not have to be identical to the previous schedule, as removal will always "have *some* effect on visitation."¹⁹³ Visitation would only require a three-hour drive, which would not involve any complicated travel plans like in long-distance moves.¹⁹⁴ While Mr. Matchen would not have his weekday visitation, this visitation was not in the original visitation schedule, which "is evidence of her commitment to the children's relationship with their father."¹⁹⁵ Additionally, the schedule would allow the

181. *Id.*

182. *Id.*

183. *Id.* at 698.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 699.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 700.

195. *Id.* at 699–700.

father to have more extended contact with the children.¹⁹⁶ As far as accessibility to the children, Justice Bowman said the majority overstated the father's daily contact with the children.¹⁹⁷ According to Ms. Matchen, his unscheduled visits were not frequent and did not last more than five minutes at a time.¹⁹⁸

Ultimately, Justice Bowman thought moving to Wisconsin “[would] provide benefits of financial security, increased time with her children, improved living conditions, stable housing, and a traditional family setting.”¹⁹⁹ Justice Bowman also said that the court's decision forced Ms. Matchen to choose between her fiancé and residing in Illinois while working full-time, and pointed out that non-custodial parents do not need permission to re-marry and move out of state.²⁰⁰ Additionally, if Ms. Matchen's fiancé did decide to move to Illinois, the children could end up being more than three hours from McHenry County.²⁰¹

IV. ANALYSIS

Matchen was incorrectly decided because the court failed to consider the indirect benefits to the children and other relevant factors. The case is illustrative of the difficulty in applying the “best interests of the child” standard. Illinois should abandon this standard. This section examines the current national trend, other states' approaches to child removal, and the American Academy of Matrimonial Lawyers Model Relocation Act. Lastly, this section proposes an act for Illinois to adopt that reflects the current national trend in removal cases.

A. *Matchen* Was Incorrectly Decided

The *Matchen* court reached the wrong result. The majority ignored the *Collingbourne* decision, which held indirect benefits to the children should be considered in determining the best interests of the child.²⁰² In *Collingbourne*, the mother seeking removal wanted to move to Massachusetts to live with her fiancé, and, as a result, the family's financial situation would improve.²⁰³

196. *Id.* at 700.

197. *Id.*

198. *Id.*

199. *Id.* at 701.

200. *Id.* at 698–701.

201. *Id.* at 701.

202. *In re Marriage of Collingbourne*, 791 N.E.2d 532, 549 (Ill. 2003).

203. *Id.* at 534.

Matchen is similar. Ms. Matchen wanted to move to Wisconsin with her fiancé, and her family's financial situation would definitely improve.²⁰⁴ In addition, Ms. Matchen only planned to move three hours away,²⁰⁵ while in *Collingbourne* the mother was permitted to move from Illinois to Massachusetts.²⁰⁶ Also, the court in *Collingbourne* held the visitation schedule was reasonable where the father would get extended periods of visitation.²⁰⁷ Here, the mother proposed the father spend extended periods of time with the children,²⁰⁸ much like *Collingbourne*.

Justice Bowman was also correct in stating other relevant factors that should have been considered. The *Collingbourne* court held that the *Eckert* factors are not exclusive, and courts may consider other factors.²⁰⁹ In that case, the court relied on the indirect benefits to the child and a reasonable visitation schedule when they allowed removal. A single parent must deal with financial and scheduling pressures.²¹⁰ As the dissent pointed out, it is unfair to penalize the "respondent for not seeking increased income opportunities or improved housing."²¹¹ If Ms. Matchen were not allowed to move to Wisconsin, she would have to go through the stress of finding a job, and arranging the schedule and care of her children.²¹² If she were allowed to move, the financial and scheduling pressures would not be there.²¹³ The absence of these pressures would enhance the lives of Ms. Matchen and her children.

Stability of the family should also be considered.²¹⁴ Many studies have recognized the need for continuity and stability in a child's life.²¹⁵ In fact, the child's relationship with the primary caretaker is the single most important factor affecting a child's welfare when parents do not live together.²¹⁶ Studies have shown stability and continuity are more important than frequent contact between a child and the non-custodial parent.²¹⁷ Further, frequent contact with

204. *Matchen*, 866 N.E.2d at 685.

205. *Id.* at 689.

206. *Collingbourne*, 791 N.E.2d at 552.

207. *Id.* at 549.

208. *Matchen*, 866 N.E.2d at 689.

209. *Collingbourne*, 791 N.E.2d at 532.

210. *Matchen*, 866 N.E.2d at 697–98 (Bowman, J., dissenting).

211. *Id.* at 697.

212. *Id.* at 697–98.

213. *Id.* at 698.

214. *Id.*

215. Charles P. Kindregan, Jr., *Family Interests in Competition: Relocation and Visitation*, 36 SUFFOLK U. L. REV. 31, 51 (2002); see also Carol S. Bruch & Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 FAM. L.Q. 245, 262–63 (1996).

216. Bruch & Bowermaster, *supra* note 215, at 247.

217. Kindregan, *supra* note 215 at 51; see also Bruch & Bowermaster, *supra* note 215, at 262–63.

a non-custodial parent is detrimental to a child when there is high conflict between the parents.²¹⁸ If Ms. Matchen were allowed to move to Wisconsin, she and the children would continue to live together in a stable home. She would be able to stay home with her children, and improve her relationship with the children.

Additionally, Justice Bowman stated that the court cannot restrict the non-custodial parent from moving out of state.²¹⁹ It is unfair to restrict only one parent's ability to move out of state. The reasons for the non-custodial parent to move are treated as irrelevant, as are the custodial parent's objections to the move.²²⁰ Some have argued courts should consider the ability of the non-custodial parent to move in determining the best interests of the child.²²¹ Courts would then treat parents equally. Texas courts consider this factor in determining whether a child may be removed from the state.²²² In *Matchen*, if the court would have considered Mr. Matchen's ability to move to Wisconsin, removal would have likely been permitted since a move to Wisconsin would not be a difficult one.

Justice Bowman was also correct in stating there would always be *some* effect on visitation. Ms. Matchen's suggestions to change visitation are reasonable.²²³ Mr. Matchen would have extended visits with the children, and the children would only be three hours away.²²⁴ Again, studies have shown that stability and continuity are more important than frequent contact between the child and non-custodial parent.²²⁵ Increased visitation does not affect outcomes in children.²²⁶ The substance and character of the parent-child relationship is what is critical.²²⁷ Therefore, courts should focus on the stability of the family, rather than visitation rights.²²⁸

The majority also ignored the fact that if Ms. Matchen remained in Illinois, she could move to southern Illinois, and live more than three hours

218. 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, 314 (1996); see also Bruch & Bowermaster, *supra* note 215, at 262–63.

219. *Matchen*, 866 N.E.2d at 701 (Bowman, J., dissenting).

220. Carol S. Bruch, *Sound Research or Wishful Thinking in Child Custody Cases? Lessons From Relocation Law*, 40 FAM. L.Q. 281, 283 (2006).

221. See, e.g., Merle H. Weiner, *Inertia and Inequality: Reconceptualizing Disputes Over Parental Relocation*, 40 U.C. DAVIS L. REV. 1747, 1750–52 (2007).

222. *Lenz v. Lenz*, 79 S.W.3d 10, 18 (Tex. 2002).

223. *Matchen*, 866 N.E.2d at 700–01 (Bowman, J., dissenting).

224. *Id.*

225. Kindregan, *supra* note 215, at 51. See also Bruch & Bowermaster, *supra* note 215, at 262–63.

226. Wallerstein & Tanke, *supra* note 218, at 311–12. See also Bruch & Bowermaster, *supra* note 215, at 262.

227. Wallerstein & Tanke, *supra* note 218, at 312.

228. Kindregan, *supra* note 215, at 38. See also Bruch & Bowermaster, *supra* note 215, at 262–64.

away from Mr. Matchen.²²⁹ If the state was so concerned about a custodial parent moving far away to frustrate visitation with the non-custodial parent, then requiring parents to petition the court when moving out of the state is not a good answer. The state of Illinois is a relatively large state, measuring 385 miles in length.²³⁰ If the state were to restrict a parent's ability to move, a more sensible answer would be to place a geographic limitation on the parent's ability to move without court interference. For example, a court could require a parent seek permission before moving more than 300 miles from their current residence.

All in all, *Matchen* illustrates the difficulty of applying the "best interests of the child" standard in the IMDMA. There are simply no standards in the statute to guide a court in determining the best interests of the child.²³¹ Courts have relied on the *Eckert* factors and, after *Collingbourne*, any other relevant factors in determining the best interests of the child. Therefore, courts could essentially choose what factors to give more weight than others. Illinois removal cases are so fact-intensive, there is no uniformity in the decisions.²³² Unless a case is completely one-sided, parties will have difficulty predicting the outcome of their case. Due to these concerns, the "best interests of the child" standard in the IMDMA and the guiding factors relied on by Illinois courts should be abandoned. Illinois should adopt a new act that reflects the current national trend.

B. National Trend

The present national trend favors the custodial parent's ability to move unless motivated by bad faith.²³³ This recognizes a parent's constitutional right to travel.²³⁴ It also recognizes *res judicata*, a presumption that the original divorce decree is valid, and that the original court found it was in the best interest of the child to be with the custodial parent.²³⁵ Although many states generally allow removal, each state has its own standards for determining whether a child may be removed from the state.²³⁶

229. *Matchen*, 866 N.E.2d at 701 (Bowman, J., dissenting).

230. Illinois Facts, <http://www.illinois.gov/facts/geography.cfm> (last visited Nov. 5, 2008).

231. Cagle, *supra* note 14, at 265.

232. *Id.* at 258.

233. 65 AM. JUR. *Trials* 127 § 3 (2007).

234. *Id.*

235. *Id.*

236. *Id.*

C. Other States' Approaches to Removal

Some states are like Illinois and use the “best interests of the child” standard in determining whether a child may be removed from the state.²³⁷ In addition, some require the custodial parent to prove that the move is in the best interests of the child.²³⁸ While New Jersey uses the “best interests of the child” standard, it has a presumption in favor of removal.²³⁹ As discussed *supra*, the “best interests of the child” standard is difficult to apply.

In other states, removing a child from the state is a substantial change in circumstances.²⁴⁰ This allows the issue of custody to be reopened.²⁴¹ In Maryland, a non-custodial parent may challenge removal by seeking a custody change.²⁴² It seems reopening the issue of custody would be both emotionally and financially taxing, and should be avoided. Also, a custody change would disrupt continuity and stability in the relationship between the child and custodial parent, which studies have shown is very important.

States that follow the national trend generally have a presumption that the child may be removed from the state.²⁴³ Then, the non-custodial parent has the burden of proving the child should not be removed from the state.²⁴⁴ California goes one step further and places a substantial burden on the non-custodial parent, requiring him or her to prove it would be harmful to remove the children.²⁴⁵ This requirement maximizes the interests of a person's constitutional right to travel, and the ability of the custodial parent to decide what is in the best interests of their children. In addition to the different states' approaches to removal, the American Academy of Matrimonial Lawyers (AAML) developed a model relocation act.²⁴⁶

237. *See, e.g.*, Pollock v. Pollock, 889 P.2d 633, 636 (Ariz. Ct. App. 1995); Presutti v. Presutti, 436 A.2d 299, 303 (Conn. 1980); Yannas v. Frondistou-Yannas, 481 N.E.2d 1153, 1157–58 (Mass. 1985); MICH. COMP. LAWS ANN. § 722.23 (West 2007); D'Onofrio v. D'Onofrio, 365 A.2d 27, 28–29 (N.J. Super. Ct. Ch. Div. 1976).

238. *See, e.g.*, Pollock, 889 P.2d at 636; Anderson v. Anderson, 427 N.W.2d 627, 629 (Mich. Ct. App. 1988); Harder v. Harder, 524 N.W.2d 325, 326 (Neb. 1994).

239. *D'Onofrio*, 365 A.2d at 30.

240. *See, e.g.*, Lee v. Cox, 790 P.2d 1359, 1361 (Alaska 1990); ME. REV. STAT. ANN. tit. 19 § 1657 (2007).

241. *Id.*

242. Domingues v. Johnson, 593 A.2d 1133, 1140 (Md. 1991).

243. 65 AM. JUR. *Trials* 127 §3 (2007).

244. *Id.*

245. *Id.* at §8; *see also In re Marriage of Burgess*, 913 P.2d 473 (Cal. 1996).

246. *American Academy of Matrimonial Lawyers Proposed Model Relocation Act an Act Relating to the Relocation of the Principal Residence of a Child*, 10 J. AM. ACAD. MATRIM. LAW. 1 (1998).

D. AAML Model Relocation Act

The AAML Model Relocation Act requires the custodial parent to give notice to the non-custodial parent of a major move, which would be 100 to 150 miles away or across a state border.²⁴⁷ If the health, safety, or liberty of the child or parent is threatened, the court may waive the required notice.²⁴⁸ If the non-custodial parent fails to object to the relocation, then the custodial parent may move.²⁴⁹ If, on the other hand, the non-custodial parent objects, then a hearing will be held.²⁵⁰ The court should weigh the following eight factors:

- (1) the nature, quality, extent of involvement, and duration of the child's relationship with the person proposing to relocate and with the non-relocating person, siblings, and other significant persons in the child's life;
- (2) the age, developmental stage, needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child;
- (3) the feasibility of preserving the relationship between the non-relocating person and the child through suitable [visitation] arrangements, considering the logistics and financial circumstances of the parties;
- (4) the child's preference, taking into consideration the age and maturity of the child;
- (5) whether there is an established pattern of conduct of the person seeking the relocation, either to promote or thwart the relationship of the child and the non-relocating person;
- (6) whether the relocation of the child will enhance the general quality of life for both the custodial party seeking the relocation and the child, including but not limited to, financial or emotional benefit or educational opportunity;

247. *Id.* at 6–10.

248. *Id.* at 11.

249. *Id.* at 13.

250. *Id.* at 14.

- (7) the reasons of each person for seeking or opposing the relocation; and
- (8) any other factor affecting the best interests of the child.²⁵¹

The model act then provides three alternative burdens of proof that could be used in combination with the model act.²⁵² First, the custodial parent has the burden of proof that the move is in good faith and in the best interests of the child.²⁵³ Second, the non-custodial parent has the burden to prove the objections to the move are in good faith, and that the move is not in the best interests of the child.²⁵⁴ Third, the custodial parent has the burden of proof on whether the move is in good faith.²⁵⁵ Then, the burden is shifted to the non-custodial parent to prove the move is not in the best interests of the child.²⁵⁶

Although the AAML Model Relocation Act sets forth some helpful standards, the factors are problematic. As in Illinois courts, courts applying this model act could decide which factors to give more weight. Like the *Eckert* factors, they are not exclusive, so the courts could apply any other factor they deem appropriate. This will lead to variance in court decisions.

E. Proposed Relocation Act for Illinois

The following proposed relocation act was formed after review of other states' approaches to removal and the AAML Model Relocation Act. It seeks to eliminate the variance of court decisions, and to follow the current national trend. Illinois should adopt this act or follow similar guidelines to acknowledge the importance of the stability of the relationship between the custodial parent and children, along with the parent's constitutional right to travel and *res judicata*.

Illinois Model Relocation Act

- (1) A custodial parent who plans to move must notify the non-custodial parent at least 45 days prior to the move.
- (2) The court may waive the notice requirement if the custodial parent proves the safety and health of the child is threatened.

251. *Id.* at 18.

252. *Id.* at 20–21.

253. *Id.* at 20.

254. *Id.* at 21.

255. *Id.*

256. *Id.*

(3) A non-custodial parent may object to the move by filing a petition with the court if the custodial parent plans to move more than 400 miles from their current residence. This petition must be filed within 30 days of receipt of notice of the move. If the non-custodial parent fails to object to the move within 30 days of the receipt of notice, then the custodial parent is free to move.

(4) A hearing will be held if the non-custodial parent files a petition in a timely matter.

(5) The court shall presume the custodial parent may remove the child more than 400 miles from their current residence. The presumption may be overcome only if the non-custodial parent proves the move will be harmful to the child(ren) or if the move was made in bad faith.

(6) A parent that fails to comply with the notice requirements, or makes an objection to a move in bad faith, may be held in contempt of court.

F. Explanation of the Proposed Model Act for Illinois

Sections 1 and 2 of the proposed act are largely based upon the AAML Model Relocation Act. The notice requirement is both a common courtesy, and significant to any person with custody or visitation rights.²⁵⁷ The waiver option is just as important. It recognizes the serious problem of domestic violence, and that there are situations that may pose danger to children and the custodial parent if their whereabouts are known.

Section 3 of the proposed act seeks to remedy the unfairness of the current statute. Under the current statute, a custodial parent could relocate almost 385 miles away within the state without seeking permission from the courts. Yet, if a custodial parent wanted to move just several miles away out of state, they would have to seek permission from the court. Under the proposed act, the custodial parent would be able to move 400 miles from their residence, regardless of whether the move was in or out of state. Section 3 also provides that a custodial parent is free to move if the non-custodial parent fails to object within 30 days. The AAML Model Relocation Act has a similar provision.²⁵⁸ The provision seeks to eliminate parties returning to court

257. *Id.* at 6.

258. *Id.* at 13.

unnecessarily, as the non-custodial parent will not always object.²⁵⁹ In addition, it promotes finality and furthers the goal of stability and continuity in the relationship between the children and custodial parent.

Section 4 provides a hearing for the non-custodial parent if they object to the move. Most, if not all states, afford an opportunity for a hearing in these situations.

Section 5 reflects the current national trend of providing a presumption that the custodial parent may remove the child from the state. The second part of section 5 is based upon California's removal law. This section furthers the goal of stability and continuity in the relationship between the children and custodial parent. It also recognizes the parent's ability to travel, and the validity of the original decree declaring custody.

Section 6 reflects both the AAML Model Relocation Act and the law in many states. The section seeks to eliminate abuse in child removal cases. This section may come into effect if the custodial parent moves for no reason other than to frustrate the non-custodial parent. On the other hand, it may also deter a non-custodial parent from objecting when the move will not effect visitation, or when the non-custodial parent does not visit the children.²⁶⁰

V. CONCLUSION

Illinois courts have the difficult task of applying the "best interests of the child" standard as codified in section 609 of the IMDMA, and applying the *Eckert* factors and various other relevant factors. Since the application of the statute and factors produces such varied results, Illinois should abandon these standards, and replace them with standards that follow the current national trend. This Casenote proposed an act for Illinois that reflects the current trend. If Illinois adopted the act, it would eliminate the unfair practice of allowing a custodial parent to move 385 miles, from southern to northern Illinois, while not allowing a parent to move several miles across state lines without court permission. Most importantly, Illinois courts would recognize the importance of continuity and stability of the relationship between the children and custodial parent, along with the parent's constitutional right to travel, and *res judicata*.

259. *Id.* at 13–14.

260. *Id.* at 23.