Restrictions on a Parent's Right to Travel in Child Custody Cases: Possible Constitutional Questions

I. INTRODUCTION: THE PROBLEM

The marriage of John and Catherine G. is coming to an end after twelve years.[1] An interlocutory decree of divorce is rendered in favor of Catherine, and custody of the couple's minor son is granted to her. John is given the right to visit his son at reasonable times and to see him at least one day each week. John alleges that Catherine has threatened to remove the boy from the state and to change his name, thus defeating John's visitation rights. Therefore he asks that Catherine be prohibited from moving with the boy outside their home county of San Francisco. Catherine claims that such a restriction would be arbitrary and unreasonable since it would compel her to stay within the county even though it may become necessary for her to move. Maybe she could get a better job elsewhere, maybe she would want to live near her parents, maybe she would remarry, or maybe she simply would like to live elsewhere. Catherine might base her argument on the constitutional right to travel. Should the court issue the requested prohibition? Can it do so under the United States Constitution?

In many situations and in many courts the parent has not been permitted to move. The divorce decree may have included a specific travel restriction or the visitation provisions of the decree may be interpreted to imply one.[2] There are a number of rationales for this restriction, which to some extent overlap: the visitation rights of the non-custodial parent would, in effect, be defeated by removal of the children; removal to another state would not be in the best interests of the child; or removal of the children would take them out of the jurisdiction and beyond the enforcement powers of the court issuing the decree. This article will discuss whether such restrictions are

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[1]This hypothetical is adapted from Gudelj v. Gudelj, 41 Cal. 2d 202, 259 P.2d 656 (1953), which is discussed, *infra*, n. 8.
[2]Rosin v. Superior Court, 181 Cal. App. 2d 486, 5 Cal. Rptr. 421 (1960).

subject to constitutional limitations as an infringement of the right to travel.[3]

A. THE LAW IN CALIFORNIA

The law in California on this point is not entirely clear,[4] but there are several appellate cases in which travel restrictions of the custodial parent have been upheld.[5] A California appellate court has said that a parent should seek court approval before removing a child from the state unless the other parent has given his consent.[6] The statutory authorization relied on in some of these cases is Cal. Civ. Code § 213 (West 1954): "A parent entitled to the custody of a child has a right to change his residence, subject to the power of the proper Court to restrain a removal which would prejudice the rights or welfare of the child." However, the court in *Rosin v. Superior Court*[7] held that this section "has no direct application to divorce and should not be held controlling in the face of a divorce decree which specifies what the future relationship shall be in the given instance."

The leading California Supreme Court case is *Gudelj v. Gudelj*,[8] where both parents were granted joint custody of the child, with Catherine, the wife, having physical custody. Her husband, John, asked for a court order forbidding his wife from removing the child from the county. The request was granted. The court order prohibited the wife from removing the child from the county of San Francisco for any period longer than five days, except that once a year she was allowed to leave for three weeks. The Supreme Court upheld this order:

> Presumably such visits [with the father] are for the best interests of the child. The record includes testimony to the effect that Catherine

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[3]This situation can also arise in reverse. In Milne v. Goldstein, 194 Cal. App. 2d 552, 15 Cal. Rptr. 243 (1961), the non-custodial father sought permission to have physical custody of his two daughters for six weeks every summer. He wanted to take them to his home in South Africa, and offered to post bond to guarantee their return. The mother sought to restrain the removal. The appellate court held for the mother:

> The problem of removal of the children from the state and to a foreign country for visitation purposes . . . by a parent *who has no other custodial rights*, requires special appraisal; once the parent and child are outside of the jurisdiction of the court they are for all practical purposes beyond the reach of its decrees, and the foreign court, on the basis of a change of circumstances, could impose other custodial orders.

194 Cal. App. 2d at 557, 15 Cal. Rptr. at 245-246.

[4]*See* Ernst v. Ernst, 214 Cal. App. 2d 174, 177, 29 Cal. Rptr. 478, 480 (1963), where the court said that the "cases dealing with the removal of children from the state and the effect of such removal follow no clear pattern."

[5]*See infra* note 8 to note 15.

[6]Ernst v. Ernst, 214 Cal. App. 2d at 179, 29 Cal. Rptr. at 481.

[7]181 Cal. App. 2d 486, 497, 5 Cal. Rptr. 421, 427-428 (1960).

[8]41 Cal. 2d 202, 259 P.2d 656 (1953).

> had threatened to remove the boy from the state and to change his name, thus defeating John's visitation rights. Under such circumstances, it cannot be said that the restrictions imposed upon removal of the child amount to an abuse of discretion.[9]

An even stricter restriction on the mother was involved in *Ward v. Ward*,[10] where the trial court held: "The children are not to be taken out of the jurisdiction of the court, the State of California. The children are not to be taken on a plane or boat. The children are to remain domiciled in Calaveras County." This prohibition was upheld on appeal: "It is clear from the statement in the ruling of the court that the court believed it was for the best interests of the children that they not be removed from Calaveras . . . ."[11]

In *Dozier v. Dozier*,[12] also, the custodial mother was prohibited from moving with her child to another state, but for somewhat different reasons. The mother wanted to move to Connecticut so that she and her son could live near her family. The appellate court prohibited the removal, giving several grounds. The child suffered from asthma and there was medical testimony that the asthma would be more severe in Connecticut than in California. It appeared that the mother could find employment just as easily in California as in Connecticut. Further, the father expressed love for the child and wanted to support and visit him. This last fact was considered but was not held conclusive. The court, in a dictum, said that the fact that the removal would defeat the visitation rights of the other parent was not alone sufficient to restrain that removal.[13]

In addition to express restraints on removal, such a restraint may be interpreted from the custody decree at a subsequent date. In *Rosin v. Superior Court*[14] the mother was granted custody and the father granted specific visitation rights. The mother then moved with the children to Florida with the alleged intent of depriving the father of his visitation rights. This was held to be a violation of the custody decree, which the court read as implying a restraint on removal of the children because the specific visitation rights granted the father could only have been exercised if the children had remained in California.[15]

The prohibitions on removal to another locality are enforced in a number of ways. The enforcement may be by citation for con-

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[9] *Id.* at 209, 259 P.2d at 660.
[10] 150 Cal. App. 2d 438, 440, 309 P.2d 965, 967 (1957).
[11] *Id.* at 442, 309 P.2d at 968.
[12] 167 Cal. App. 2d 714, 334 P.2d 957 (1959).
[13] *Id.* at 719, 334 P.2d at 961. *See also*, Ward v. Ward, 150 Cal. App. 2d 438, 309 P.2d 965 (1957), which, however, upheld a restraint on the removal of the child; and Shea v. Shea, 100 Cal. App. 2d 60, 223 P.2d 32 (1950). This appears to be in conflict with the holding of *Gudelj v. Gudelj*.
[14] 181 Cal. App. 2d 486, 5 Cal. Rptr. 421 (1960).
[15] *See, e.g.*, Williams v. Williams, 103 Cal. App. 2d 276, 229 P.2d 830 (1951).

tempt,[16] or by reducing the alimony paid to the non-compliant parent to a nominal amount.[17] Relieving the non-custodial parent of his child support obligations is not as a rule accepted as a mode of enforcement in California.[18] The most extreme step would be to strip the non-compliant parent of the custody of the child. This has been done in isolated instances. In *Stack v. Stack*,[19] for example, custody of the child was transferred from the mother to the father largely because the mother proposed to remove the child from the state.

Several appellate cases have allowed the custodial parent to move to another state, often reversing the trial court. For example, in *Gantner v. Gantner*[20] the Supreme Court, *per* Traynor J., said that the trial court may permit the custodial parent to remove the children even to a foreign country, either temporarily or permanently if the evidence shows that the best interests of the children are thereby served. *Shea v. Shea*[21] held that under Cal. Civ. Code §213 (West, 1954) the court has no authority to limit movement of the custodial parent absent prejudice to the rights and welfare of the child. *Heinz v. Heinz*[22] has a similar holding.

California law has not given a definite answer to the important question of what the non-custodial parent must show about the effect of removal upon the child. In order to restrain such a removal is it enough for him to merely show that removal will not have a positive effect on the child? Or does he have to show that removal to another state is actually contrary to the child's best interest? The latter appears to be the more generally accepted rule. It is expounded in *Shea v. Shea*[23] and *Heinz v. Heinz*,[24] *supra*. Most of the cases which prohibited removal did so because the court said that removal would have been contrary to the best interests of the child.

On the other hand *Gantner v. Gantner*,[25] which dealt with removal to a foreign country, said such removal would be granted if it were shown to be in the best interest of the child. Dictum in *Walker v.*

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[16] Rosin v. Superior Court, 181 Cal. App. 2d 486, 5 Cal. Rptr. 421 (1960).
[17] Williams v. Williams, 103 Cal. App. 2d 276, 229 P.2d 830 (1951).
[18] "[W]e do not regard an order depriving the children of support for an alleged fault of the mother . . . as a proper exercise of the court's discretion in such matters." Ernst v. Ernst, 214 Cal. App. 2d at 179, 29 Cal. Rptr. at 481. *But see* White v. White, 71 Cal. App. 2d 390, 163 P.2d 89 (1945).
[19] 189 Cal. App. 2d 357, 11 Cal. Rptr. 177 (1961).
[20] 39 Cal. 2d 272, 280, 246 P.2d 923, 929 (1952).
[21] 100 Cal. App. 2d at 63, 223 P.2d at 33.
[22] 68 Cal. App. 2d 713, 157 P.2d 660 (1945).
[23] 100 Cal. App. 2d 60, 223 P.2d 32 (1950).
[24] 68 Cal. App. 2d 713, 157 P.2d 660 (1945).
[25] 39 Cal. 2d 272, 280, 246 P.2d 923, 929 (1952).

Superior Court[26] says that "if the specific motive [of removing children from the state] is the frustration of the other parent's visitation rights and is unrelated to the child's welfare, permission to remove will be denied." The holding of *Rosin v. Superior Court*[27] is to the same effect. Here the mother was held in contempt of court for removing the children to Florida. There was discussion concerning defeat of the visitation rights of the father, but no discussion about the best interests of the child.[28]

B. THE LAW IN JURISDICTIONS OUTSIDE OF CALIFORNIA

To give an exhaustive review of the law on this point in each of the other forty-nine states is beyond the scope of this article. [29] However, a few examples of the judicial policies of some of the other states can be given. The general guideline, as in all custody questions, is what is best for the child. In many states a trial court has more power to forbid the removal than in California. Indeed, many authorities state that it is against the policy of the law to permit the removal of the child from the jurisdiction by the custodial parent unless it were shown that such a removal served the welfare of the child.[30]

In Illinois until 1952 permission to move by one parent was automatically denied when the other parent objected. It was declared to be against public policy to allow one parent to permanently remove the child from the state.[31] One author, referring to this automatic prohibition on removal, said: "In one important respect, however, the well being of children of divorced parents is completely ignored — their interests being considered secondary to the so-called rights of visitation of the non-custodial parent."[32] In 1952 an Illinois court for the first time granted permission for the custodial parent to remove the children in *Schmidt v. Schmidt*.[33] The court argued strongly that removal was in the best interests of the child. And

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[26] 246 Cal. App. 2d 749, 755, 55 Cal. Rptr. 114, 117 (1966). The court here granted permission to move.
[27] 181 Cal. App. 2d 486, 5 Cal. Rptr. 421 (1960).
[28] *See also*, Williams v. Williams, 103 Cal. App. 2d 276, 229 P.2d 830 (1951).
[29] For a review and annotation of some of the earlier cases *see* 154 A.L.R. 554-573 (1945), Annot., Divorce-Minor-Removal from State. For a more recent review *see* 24 AM. JUR. 2d 905-907 (1966), Order Permitting or Prohibiting Removal.
[30] 27B C.J.S. 483-484 Divorce § 313 (1959), Removing Children from Jurisdiction. *See also* Tantilla v. Tantilla, 152 Colo. 445, 382 P.2d 798 (1963); and Sachse v. Sachse, (La. App.) 150 So. 2d 772 (1963).
[31] Martinec v. Sharapata, 328 Ill. App. 339, 66 N.E.2d 103 (1946); Seaton v. Seaton, 337 Ill. App. 651, 86 N.E.2d 435 (1949).
[32] Ashcraft, *Removal of Children in Divorce*, 34 CHI. B. RECORD 343, 344 (1953).
[33] 346 Ill. App. 436, 105 N.E.2d 117 (1952).

permission was granted only on the basis that the custodial mother would pay the transportation costs for the child to visit his father in Illinois. Here for the first time in Illinois the court said that the welfare of the child was superior to the visitation rights of the father. But no mention was made of any right of the mother to leave the state. In New York, also, until 1955 it was general policy to deny the custodial parent permission to remove children from the state, on the ground that it would make visitation illusory.[34]

In Texas the custodial parent may be prohibited from moving with the child to another county within the state. This was the holding in *Ex Parte Rhodes*[35] where the custodial mother remarried and moved with her new husband and her child to a different county in Texas in direct violation of a court order. The child's father filed contempt charges against the mother. She was convicted and the conviction was affirmed on appeal. However, this case stands out by its recognition that a residence restriction is extreme and if used "may materially restrict the right of a citizen . . . to change the place of his or her residence. If permission to remove were denied, she would be in a better position to assert that she was deprived of her liberty without due process. We express no opinion on that matter."[36] This is the only recognition in any case of the possibility that the custodial parent has a constitutional right to move that the author has found.

II. THE CONSTITUTIONAL RIGHT TO TRAVEL

The question raised in *Ex Parte Rhodes*,[37] *supra*, whether travel restrictions imposed by a custody decree may violate the Constitution will be discussed in the remainder of this article. The Constitution of the United States nowhere expressly provides for the right to travel.[38] Nevertheless the United States Supreme Court has long recognized the existence of such a right, basing it on various provisions of the Constitution, including the Privileges and Immunities Clause of Art. IV § 2, the Privileges and Immunities Clause of the Fourteenth Amendment, the Commerce Clause, and the Due Process Clause of the Fifth Amendment.[39] Chief Justice Taney expressed this right very early in the *Passenger Cases:*[40] "For all the great purposes for which the Federal government was formed, we are one

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[34] Note, *Parent Having Custody Permitted to Remove Children from State*, 30 ST. JOHN'S L. REV. 98 (1955). Freed v. Freed, 309 N.Y. 668, 128 N.E.2d 319 (1955) was a departure from this rule.
[35] 352 S.W.2d 249 (1961).
[36] *Id.* at 251.
[37] *Id.*
[38] United States v. Guest, 383 U.S. 745, 758 (1966).
[39] *See*, Shapiro v. Thompson, 394 U.S. 618, 630 n. 8 (1969).
[40] 7 How. 283, 492 (1849).

people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."

In the 1868 case of *Crandall v. Nevada*[41] the Supreme Court ruled unconstitutional as a restriction of the right to travel a Nevada law which placed a tax on persons leaving the state. In *Williams v. Fears*[42] the Court expressed the right unequivocably:

> Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution.

The next major application of the right to travel came in *Edwards v. California*,[43] where a law making it a crime to bring an indigent person into the state was declared to be unconstitutional as a violation of this right. In the last two decades this right to travel has been greatly expanded. In *Kent v. Dulles*[44] and *Dayton v. Dulles*[45] United States Secretary of State Dulles had refused to issue a passport to the respective applicants because they allegedly planned to go abroad to further Communist causes. The Court held that this was illegal because Congress had not delegated such power to the Secretary.

> Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them.[46]

This holding was based on statutory grounds and the Court, although recognizing the existence of important constitutional questions, expressly refused to deal with them at that time.

Six years later the time came for the Court to deal with the constitutional questions. In *Aptheker v. Secretary of State*[47] the Court was faced with the Subversive Activities Control Act, which made it a felony for a member of a Communist organization to apply for, or attempt to use, a passport.[48] The Court recognized the validity and substantiality of the purpose of the legislation — to protect the security of the United States. It also recognized that such a legitimate governmental purpose may, when properly applied, over-

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[41] 6 Wall. 35 (1868).
[42] 179 U.S. 270, 274 (1900).
[43] 314 U.S. 160 (1941).
[44] 357 U.S. 116 (1958).
[45] 357 U.S. 144 (1958).
[46] Kent v. Dulles, 357 U.S. at 129.
[47] 378 U.S. 500 (1964).
[48] 50 U.S.C. § 785.

ride the constitutional right to travel. However the Court then held that the Act was too broad in its scope and that it unnecessarily restricted personal freedom when less drastic means were available to serve the purposes of the statute. Therefore the Act was held to be unconstitutional.[49]

The constitutional right to travel has been extended to invalidate not only laws which actually prevent the exercise of this right, but also laws which discourage its exercise. In *Shapiro v. Thompson*[50] the Court held unconstitutional a one year state residency requirement to be eligible for welfare. The Court said that this unjustifiably discouraged and penalized the exercise of the right to travel, especially by the poor.

> This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.[51]

According to *Shapiro*, legislation which serves to penalize the exercise of the constitutional right to move from state to state is unconstitutional unless it furthers a "constitutionally permissible state objective."[52] Most recently, in *Dunn. v. Blumstein*[53] the United States Supreme Court relied in part upon the right to travel when it declared state residency requirements for voting to be unconstitutional. The rationale was similar to that of *Shapiro v. Thompson, supra.*[54]

As this brief survey shows, the right to travel has, since its apparent beginning in 1849, been gradually extended and strengthened. Now it is certainly accurate to say that "the Constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized."[55]

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[49] In Worthy v. Herter, 270 F.2d 905 (D.C. Cir. 1959), *cert. den.* 361 U.S. 918 (1959), the court refused to extend this and rule unconstitutional the power of the executive to designate certain areas, generally areas under Communist domination, as forbidden to American travelers, holding that this falls under the power to conduct foreign affairs. "[T]he right to travel, like every other form of liberty, is, in our concept of an ordered society, subject to restrictions under some circumstances and for some reasons." *Id.* at 909. *See also* Mac Ewan v. Rusk, 228 F. Supp. 306 (E.D. Penn. 1964).

[50] 394 U.S. 618 (1969).

[51] *Id.* at 629.

[52] *Id.* at 633.

[53] 405 U.S. 330 (1972).

[54] An example of a case where the court refused to extend the right to travel to another context is found in United States v. Eramdjian, 155 F. Supp. 914 (S.D. Cal. 1957), which upheld the constitutionality of a statute which required narcotics addicts and violaters to register when crossing a United States border.

[55] United States v. Guest, 383 U.S. at 757.

III. THE POSSIBLE APPLICABILITY OF THE RIGHT TO TRAVEL IN CHILD CUSTODY CASES

It has been shown that there is a constitutional right to travel which has been rigorously protected. It has also been shown that often courts in child custody cases have restricted the residence of the custodial parent to a certain state or county. Such restrictions may obviously infringe upon the right to travel. With the first two steps of the syllogism completed the temptation is great to take the third and final step and say that all restrictions of this nature are unconstitutional and therefore void. The issue is, of course, not that simple. As *Shapiro v. Thompson*,[56] *Aptheker v. Secretary of State*,[57] and many other constitutional cases point out, a constitutional right may be limited, or even denied, if it serves a legitimate state purpose. The question therefore becomes, what are the purposes served by restricting the residence of the custodial parent, and which, if any, of these purposes are legitimate state purposes, so as to defeat a constitutional right. The answer to this question inevitably involves the balancing of conflicting interests, with the right to travel on one side and the purposes served by residency restrictions on the other side.

One purported purpose served by travel restrictions on the custodial parent is that such restrictions prevent that parent from leaving the jurisdiction of the court and perhaps trying to get a custodial order modified in another state on the basis of changed circumstances. In many states, including California, this no longer appears to be a rationale. A court does not lose jurisdiction when one parent and the child leave the state.[58] It would, of course, be handicapped in enforcing its decrees. But as the court in *Butler v. Butler*[59] said:

> The hazards of ineffective enforcement arising from the mere change of a ward's residence to another state are not such as to prevent the court from giving the fullest force and consideration of the child's greatest welfare, which . . . is always the paremount and determining factor.

Furthermore, the desire of one court to compete successfully with another court should not be allowed to defeat a fundamental right such as that of travel.

> With the fuller and more complete application of the principles of comity prevailing in these matters, . . . there is neither justification nor occasion for the court of one state assuming to itself a superiority of supervisory capacity in dealing with state wards.[60]

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[56] 394 U.S. 618 (1969).
[57] 378 U.S. 500 (1964).
[58] Annot., 154 A.L.R. 559 (1945).
[59] 83 N.H. 413, 143 A. 471, 473 (1928).
[60] *Id.*

There are two other closely connected purposes served by residence restrictions. The first is to protect the visitation rights of the non-custodial parent, who may support, and presumably loves his own child, who in turn presumably loves his parent. The second is to serve the best interests of the child. No one would claim that the latter is not a legitimate state purpose. When there is a divorce, and the child's family is broken, the court must do its best to serve the welfare of the child. This is a fundamental principle in this and many other areas of family law.

The distinction between the visitation rights of the non-custodial parent and the best interests of the child are quite tenuous. Can the two be separated? Some of the cases have indicated that this may be answered in the affirmative. In *Dozier v. Dozier*[61] the court said:

> The fact that by the child's removal from the state the father may be deprived of his visitation rights is generally not alone sufficient to justify restraint on the mother's free movement unless the latter is inconsistent with the welfare of the child.

Other cases, too, have held that the defeat of visitation rights alone cannot justify residence restrictions.[62] The trend appears to be going against this as a valid ground.[63] In Illinois, for example, the earlier cases said the child could never be removed if it would restrict visitation rights. Now the courts are taking a best-interest-of-the-child approach.[64] Courts should be very cautious in allowing the non-custodial parent's claim that his visitation rights would be infringed to defeat the other parent's right to travel. To do so may be to force the custodial parent to barter with the other parent for the opportunity to exercise his rights. For example, a parent who really did not care if the custodial parent and child left the jurisdiction may use the threat of getting a residence restriction imposed as a weapon to force the other parent to agree to lower support payments. This should be guarded against.

Serving the welfare of the child is the most often stated ground for limiting the residence of the child. This is for obvious reasons. Doctrines of law, even of constitutional law, have often yielded when necessary to serve the welfare of the child. "Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards chil-

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[61] 167 Cal. App. 2d at 719, 334 P.2d at 961.
[62] *E.g.*, Shea v. Shea, 100 Cal. App. 2d 60, 223 P.2d 32 (1950); and Heinz v. Heinz, 68 Cal. App. 2d 713, 157 P.2d 660 (1945), discussed, *supra.*
[63] H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES, 587 (1968).
[64] Ashcraft, *Removal of Children in Divorce*, 34 CHI. B. RECORD 343 (1953).

dren."[65] "The cardinal consideration is ever the welfare of the child, which includes its physical, intellectual, moral, and spiritual well-being. To this the rights of parents and all other considerations are subordinate."[66]

Serving the welfare of the child appears therefore to be a "constitutionally permissible state objective." This does not mean, however, that a court may automatically use these magic words every time it decides for any reason to restrict exercise of the right to travel. As already mentioned this involves the balancing of two factors: the welfare of the child, who has been thrown into an often unfortunate position by the divorce of his parents and the subsequent custody struggle over him; and the threatened curtailment of the fundamental right to travel, to be free to live where one desires.[67]

If there is no conflict between these two factors then the right to travel should not be curtailed. In other words, unless removal of the child from the state has been demonstrated to be harmful to his welfare, restraint on that removal, in the author's opinion, would not be constitutional. Under this standard, those cases which prohibited removal merely because the custodial parent could not show that it would promote the child's welfare would be unconstitutional. Moreover, a court should not be able to avoid the issue by simply changing the wording of its findings to include the words "serving the welfare of the child."[68] Specific evidence of harm to the child by removal would have to be required if the right to travel is to have any real meaning.

If a conflict between these two factors is shown it would be difficult, probably impossible, to argue that the welfare of the child must yield to the right to travel. However, in the author's opinion, the right to travel should not be restricted unless this is the only way to serve the welfare of the child, and only to the extent it is necessary to achieve this end.

> Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle funda-

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[65]May v. Anderson, 345 U.S. 528, 536 (1958) (concurring opinion of Frankfurter, J.).

[66]Commonwealth *ex. rel.* Rogers v. Davan, 298 Pa. 416, 419, 148 A. 524, 526 (1930), *quoted in* Falco v. Grills, 209 Va. 115, 161 S.E.2d 713, 719 (1968). The court here was discussing the Full Faith and Credit Clause.

[67]It may be argued that the right to travel is not being denied, that the custodial parent may go wherever he chooses, as long as he does not take the child with him. This, however, is unrealistic. It is certainly an inhibition of the constitutional right if one has to choose between its exercise and having custody of one's child. *See* Shapiro v. Thompson, 394 U.S. at 629.

[68]For example, in Rosin v. Superior Court, 181 Cal. App. 2d 486, 5 Cal. Rptr. 421 (1960), in which the court discussed in detail the visitation rights of the father, but made no specific finding that removal to Florida was contrary to the welfare of the children, it could have perfunctorily added such a finding, even if there were not specific facts supporting it.

> mental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.[69]

One important factor in the balancing of rights and obligations is the relative ease of transportation today. If custody were given to one parent, with the right given to the other parent to have the children for, say, six weeks once a year, it would be hard to justify restricting the residence of the custodial parent, because wherever the custodial parent lived it would be relatively easy to send the child to visit the other parent. This type of custody order should be issued whenever possible so that a restraining order may be avoided. To do otherwise would be to infringe upon a constitutional right when less drastic means are available. If the transportation costs were a serious problem, the decree might include some provision for sharing them between the parents.[70]

In some cases, as in *Gudelj v. Gudelj*[71] and *Ward v. Ward*,[72] *supra*, joint custody was granted to both parents, with physical custody given to one parent. This, by itself, should not be sufficient to affect the exercise of the constitutional right of the parent with physical custody. A restriction of residence applied to such a parent would be just as restraining as one applied to a parent with full custody. To say otherwise would allow the trial judge to defeat the constitutional issue by merely changing the words without substance. If there were some special circumstances which called for this type of custody arrangement, such circumstances may be relevant to the question of restrictions on removal.

If the constitutional right to travel is to be recognized in this area, some standard must be established of the showing required in order for this right to be defeated. A judge must not be allowed to automatically include a finding that the welfare of the child requires a travel restriction whenever he wants to impose one. One could say that close proximity to the other parent is always in the child's interest. If this were the case the right to travel would be virtually meaningless. But this is a very questionable generalization. Six weeks of visitation with the other parent every summer may do the child more good than weekend visits with all their emotional turmoil. As before mentioned, if there are viable alternatives, one restricting the

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[69] Aptheker v. Secretary of State, 378 U.S. at 508, *quoted from* Shelton v. Tucker, 364 U.S. 479, 488 (1960).

[70] The poverty of one or both of the parents may be a problem the court has to face in the balancing of the rights and obligations of the parents. If the parents are poor transportation may not be as easy as is assumed. However, the problem of poverty cases, although important, is beyond the scope of this article.

[71] 41 Cal. 2d 202, 259 P.2d 656 (1953).

[72] 150 Cal. App. 2d 438, 309 P.2d 965 (1957).

right to travel, and the other allowing its exercise, the less restrictive alternative must be chosen.

A somewhat different question is raised when the requirements of the child's health is the reason given in imposing travel restrictions, as in *Dozier v. Dozier.*[73] However, this must not be allowed to be used as a pretext. When the court says it believes a child is better off in one state than in another, it is making decisions that the parent usually makes. This should only be done with good reason. To insure against courts evading the right to travel on pretext, or by merely using the magic words of "best interest of the child," specific evidence of harm to the child should be required before removal could be prohibited. A court should not, as in *Gudelj v. Gudelj,*[74] say that "presumably" the best interests of the child require the restriction. Otherwise, in the author's opinion, such a restriction would be unconstitutional.

IV. CONCLUSION

The hypothetical situation discussed in the introduction of this article was an adaptation of the facts of the case of *Gudelj v. Gudelj.*[75] In the real case the husband was granted all that he desired. The mother was restricted to living within the County of San Francisco. The question is whether this was allowable under the United States Constitution. If the arguments set forth in this article are accepted the answer must be negative. There were no facts showing that the restrictions were necessary for the welfare of the child. Indeed, the court merely said that the visitation rights of the father, which would allegedly be defeated by removal, would "presumably" be in the best interests of the child.[76] Further, even if the welfare of the child had required some restriction, the one actually imposed was far broader than the minimum required. With the relative ease of transportation today a much less restrictive order would have been sufficiently effective.

It should be noted that some appellate courts appear to be reluctant to impose restrictions upon the custodial parent, although there is no articulation of a right to travel that would be defeated by such a restriction. The court in *Dozier v. Dozier,*[77] discussed *supra,*

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[73] 167 Cal. App. 2d 714, 334 P.2d 957 (1959). Here the court mentioned both that the child was better off in California because of his health and that his father's visitation rights would be curtailed, and used both grounds to find that the welfare of the child required the court to prohibit the removal to Connecticut. However, the court relied heavily on the health factor, saying defeat of the visitation rights alone would not justify the prohibition.

[74] 41 Cal. 2d at 209, 259 P.2d at 660.

[75] 41 Cal. 2d 202, 259 P.2d 656 (1953).

[76] *Id* at 209, 259 P.2d at 660.

[77] 167 Cal. App. 2d at 719, 334 P.2d at 961.

although placing a restriction on the mother's residence, indicated that restrictions are not desirable: "Under ordinary circumstances, a mother having custody of a child should be permitted to move about freely, and any unnecessary or arbitrary restrictions on her residence is unreasonable." A leading California authority agrees.[78] This shows an instinctive feeling on the part of courts and writers that the custodial parent should be allowed to travel freely and change his residence.

The constitutional right to travel has never to the author's knowledge been relied upon to strike down residency restrictions in custody decrees.[79] It is not being suggested here that this right is absolute and that any court order which restrains it is patently unconstitutional. But it is time that this right be considered and weighed along with the ends purported to be served by limiting the exercise of this right in custody cases. In any event, this discussion has attempted to show that orders restricting the exercise of the right should be avoided whenever any less restrictive remedy is available. Also, specific evidence that the child would be harmed by removal should be required before any restriction at all can be imposed. Otherwise such a restriction should be declared unconstitutional.

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[78] CALIFORNIA CONTINUING EDUCATION OF THE BAR, 1 THE CALIFORNIA FAMILY LAWYER, 539, 567 (1961). *See also*, H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES, 587 (1968).

[79] *Ex Parte* Rhodes, 352 S.W.2d 249, 251 (1961), *discussed supra*, mentioned merely the possibility of this problem.