TESTIMONY IN SUPPORT OF HB 2101
"An Act Clarifying the Removal Statute"
Sponsored by Vice-Chairman Christopher G. Fallon, Representative David M. Torrisi, Representative Michael Festa, and Chairman Arthur J. Broadhurst
Heard Before the Judiciary Committee, September 25, 2003

Fathers & Families is a 501(c)(3) charitable organization incorporated in Massachusetts. Our mission statement reads, "Fathers & Families protects the child's right to the love and care of both parents. We seek shared parenting for the children of divorced and never-married parents, with equal rights and responsibilities for fathers and mothers."

Fathers & Families has approximately 1,800 Massachusetts supporters, approximately 40% of whom are women.

A bill identical to HB 2101 was reported favorably out of the Judiciary Committee in the last session of the Legislature.

Massachusetts' statute controlling the subject of removals was written in the 19th century when removals were rare. The statute provides little or no guidance to judges. As a result, case law has become determinative, such that removals are almost always permitted, without proper consideration of the best interests of the child.

Current practice is guided primarily by the 1985 SJC decision in *Yannas*. According to the *Yannas* decision, the court must consider whether the custodial parent has a "good and sincere reason" for the move; this criterion can be satisfied by the creative energies of any reasonably intelligent person. *Yannas* further requires that the move confer "a real advantage" on the child; because the "real advantage" is not required to be balanced against disadvantages, this criterion can also be satisfied in just about all cases.

Finally, *Yannas* requires the court to consider whether "the quality of the child's life may be improved by the change, *including any improvement flowing from an improvement in the quality of the custodial parent's life."* [emphasis added] In other words, the third criterion inappropriately identifies the best interest of the child with that of the custodial parent. Thus, the legal standard effectively becomes "the best interests of the *custodial parent*."

With the bar set so low, it is not surprising that almost all petitions for removal are granted. In fact, attorneys for non-custodial parents typically discourage their clients from contesting such petitions because of the near inevitability of the outcome.

The near impossibility of contesting a petition for removal became even more apparent with the appellate court's decision in *Rosenthal v. Maney*, decided in April, 2001. This decision strongly affirmed the criteria developed in the *Yannas* case.

Under current case law, the child's relationship with the non-custodial parent is not even a factor required to be considered. HB 2101 simply elevates the significance of the child's

frequent and regular contact with the non-custodial parent among the factors considered in a removal case. The proposed bill reflects the growing research literature by such renowned experts as Michael Lamb, Sanford Braver, Joan Kelly and Richard Warshak, among others, demonstrating that children of divorce do better with two parents actively involved in their lives. Thus, HB 2101 nudges the court towards outcomes that are good for children, according to eminent researchers, but without diminishing judicial discretion (note that HB 2101 does not establish any presumption for or against removal).

Since a bill identical to HB 2101 was favorably reported out of committee in the previous session, an important research study has been published. ("Relocation of Children After Divorce and Children's Best Interests: New Evidence and Legal Considerations." Journal of Psychology, 2003, Vol. 17, no. 2, by Sanford Braver and others). Until publication of this article (a copy of which is included as an Exhibit to this submission), the law on removals was based primarily on personal prejudice. Finally, research evidence on the best interests of children is available. The authors state that this is the first direct evidence on the effects of relocation. The authors surveyed 602 college students whose parents had divorced. They were queried on fourteen indicators of well-being. The authors state, "We find a preponderance of negative effects associated with parental moves . . . on 11 of the 14 variables there were significant . . . differences. As compared with divorced families in which neither parent moved, students from families in which one parent moved received less financial support from their parents (even after correcting for differences in the current financial conditions of the group), worried more about that support, felt more hostility in their interpersonal relations, suffered more distress related to their parents; divorce, perceived their parents less favorably as sources of emotional support and as role models, believed that the quality of their parents' relations with each other to be worse, and rated themselves less favorably on their general physical health, their general life satisfaction, and their personal and emotional adjustment." The authors also stated, "Combined, it is reasonable to project that even greater and more serious deficits might be found in children of relocating parents the longer the term of the follow-up."

Another new development since the previous session of the Legislature, was a two-day presentation solely devoted to removal by eminent researcher Joan B. Kelly before the Massachusetts Association of Guardians ad Litem. She noted that infants attach to both parents at the same age (six to seven months), even when one parent is the primary caregiver. She stated that in cases of removal before age six months, the child's relationship with the non-custodial parent will never recover. Between six and twenty-four months of age, attachments are fragile and relocation is likely to end the relationship. She noted that separation from attachment figures produced sadness, depression, anger, temper tantrums, and hitting in young children, among other negative effects. Finally, she stated that she "totally disagrees" with the *Yannas* identification of the child's needs with those of the custodial parent. In a published paper authored by Drs. Kelly and Michael Lamb (Head of the Section on Emotional and Social Development of the NICHHD), the authors wrote of removal, "Such moves stress and often disrupt psychologically important parent-child relationships and this may in turn have adverse consequences for children." (Journal of Family Psychology, 2003).

These results should not be surprising. Several studies have reported on the effects of moving on children whose parents have not divorced, and find that the effects are generally negative. Stolberg and Anker in 1983 found that divorced children do more poorly the larger the number of adjustments they are required to make, with relocation requiring a major adjustment. (The references for these assertions may be found in the Braver article, page 210).

It is useful to consider how we have reached the place we find ourselves. On page 209, Braver *et al*. state, "Unfortunately, in a recent review of the social science literature undertaken for the legal community (Gindes, 1998), not a single empirical study could be found containing direct data on the effects of parental moves on the well-being of children of divorce. In its absence, courts appear to have relied instead on quite indirect – and quite controversial – social science evidence about the potential effects of relocation on children. Even more troubling, this controversial evidence appears to have played an important role in generating the recent shift in legal doctrine away from restrictions on moves by custodial parents."

Particularly influential was the decision of the California Supreme Court in *In re the Marriage of Burgess* (1996). The *Burgess* decision follows closely an *amica curiae* brief filed in the case by Dr. Kelly's former colleague, Dr. Judith Wallerstein. Wallerstein's brief has been exhaustively critiqued by Dr. Richard A. Warshak in an article appearing in the Family Law Quarterly in the Spring of 2000 (attached as an Exhibit to this submission). Warshak's lengthy analysis is severely critical of the highly influential Wallerstein brief. He notes, for instance, that she cited only ten articles supporting her point of view that removals should generally be allowed. Even worse, seven of those articles were from Wallerstein's own research group. Wallerstein's research has been severely criticized because of a small sample size and because the divorced parents who have constituted her study group are self-selected individuals who voluntarily sought out psychological counseling at her clinic. She herself has rated almost two-thirds of these parents as being moderately to severely impaired on basic measures of psychological functioning. Thus, seven of the ten articles supporting the *Burgess* brief are drawn from a small sample whose relevance to the general population is highly questionable.

Warshak went on to identify over 75 studies in the social science literature, including some of Wallerstein's early publications, that support the importance of allowing both parents to remain actively involved in the lives of their children.

Recently, the New Jersey Supreme Court decided the removal case of *Baures v. Lewis* (2001). In this decision, the court once again linked positive outcomes for children of divorce to the welfare of the primary custodian. The decision again relied on social science literature. A careful reading of the decision discloses, however, that the social science articles relied upon are simply a re-run of the Wallerstein papers.

The *Burgess* decision provided a precedent that has been followed in several other large states towards loosening restrictions on removals. Nevertheless, other states have moved in the opposite direction. Currently, Alabama, Arizona, Alaska, Arkansas, Colorado, Montana and South Carolina have adopted statutes placing the burden of proof on the parent desiring to relocate.

A frequent criticism of statutes that restrict removal is that they infringe on the constitutional right of custodial parents to move. This argument has little merit. First, it should be noted that such legislation simply creates similar conditions for the custodial parent as already exist for the non-custodial parent. The non-custodial parent already faces a situation in which he may move away, or he may maintain frequent and regular contact with his children, but he may not do both. Thus, just as critics of legislation such as HB 2101 point out that the custodial parent would be unable to move in order to improve her career prospects, to increase her income, or to marry someone in another state, the same already holds true for the non-custodial parent.

Any constitutional argument concerning the infringement of the right to travel enters murky territory. The constitutional protections against depriving parents of access to their children is at least as well established as the constitutional right to travel. Thus, a custodial parent exercising her right to travel severely infringes the non-custodial parent's constitutional right to the "companionship, care, custody and management" of their children (*Stanley v. Illinois*, 405 US 645 (1972)). Moreover, under HB 2101, the custodial parent suffers no infringement of her right to travel, only her right to travel and to take her children with her. *Everett v. Everett,* 660 So.2d 599, 601 (Ala. Civ. App. 1995) found that the best interests of the child have priority over the parent's right to travel.

Another objection sometimes raised is that non-custodial parents desire simply to exert power and control over their ex-partners. This is a pernicious argument. It takes the natural desire to enjoy the company of one's children and to guide them towards successful adulthood, and perverts it into a sinister motive, all the while without evidence.

Another objection is that a removal petition does not in and of itself constitute a sufficient basis to warrant a change in custody. In *Rosenthal v. Maney*, the Massachusetts Appeals Court argued at length that there was no indication in the record that there had been any material change of circumstances sufficient to warrant a change of custody, which presumably would be necessary if the removal petition were denied and the custodial parent then relocated without the children. Since the original custody judgment "must be presumed to have been right," a judgment modifying the custody arrangement must be based on a material change in circumstances, other than the proposed move.

Fathers & Families finds this reasoning to be sophistry. What could be a greater change in circumstances than a proposed move to a state hundreds or thousands of miles away? The fact that the change in circumstances has not yet occurred, but is merely proposed, is a flimsy reed upon which to build such an argument.

Moreover, the court faced with a removal petition need not reach the issue of change in custody. It could simply deny the removal petition. The custodial parent could then either relocate alone, or stay in her present circumstances. If she determined to relocate, but was not allowed to take the children with her, she would need to make alternative arrangements for their care. At this point, a material change in circumstances would most definitely occur and a court could rule on a change of custody at that point in time.

If the court, after passage of HB 2101, felt compelled to deal with a change of custody at the time of a removal petition, it would do well to contemplate data by Braver and other investigators currently in press, entitled "Experiences of Family Law Attorneys with Current Issues in Divorce Practice." After surveying a substantial number of family law attorneys, Braver concluded that most custodial parents who lost in a relocation case do not or would not ultimately move. Thus, the children would be the winners, continuing to enjoy the close proximity of both parents in the majority of cases in which removal was denied.

In summary, HB 2101 is a bill that is good for children, comports with research findings on the well-being of children, and treats custodial and non-custodial parents evenhandedly.