

TO RELOCATE OR NOT TO RELOCATE WHAT IS THE STANDARD? WHERE DO WE GO FROM HERE?

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King Solomon said, *"Bring me a sword!"* So they brought a sword before the King. The King said, *"Cut the living child in two, and give half to one and half to the other."*

The oldest case for deciding the "best interest of a child" comes from the Bible, where the actual mother gives up her child to the imposter mother in response to King Solomon's solution to cut the child in half. Solomon reasoned that tactic proved she was the real mother, and so ultimately awarded the child to her. One of the least favorite custody issues for judicial officers to decide is a "move-away"—which parent gets the child—a ruling which may require the wisdom of King Solomon.

Best Interests and Change of Circumstances Tests

Move-away requests primarily arise in two distinct contexts: (i) an initial custody determination in which one parent, after dissolution of marriage but prior to the issuance of a final custody order, indicates his or her intent to move; and (ii) a request to modify a final custody order based on one parent's potential relocation.¹

In an initial custody determination, the trial court has "the widest discretion to choose a parenting plan that is in the best interest of the child" and "the court must look to *all the circumstances* bearing on the best interest of the minor child."² Once the trial court has entered a final or permanent custody order reflecting that a particular custodial arrangement is in the best interest of the child,³ the paramount need for continuity and stability in custody arrangements, and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker, weigh heavily in favor of maintaining that custody arrangement.⁴ A showing of changed circumstances is required to support a modification request seeking a change in a final determination of custody.

After the California Supreme Court decided *In re Marriage of Burgess*,⁵ we thought we had bright-line rules to apply when a party wanted to move away with a minor child. No longer was the burden on the relocating

parent to establish that the move was “necessary.” For an initial determination, we were to look at 1) the nature of the child’s existing contact with both parents, including *de facto* as well as *de jure* custody arrangements; 2) the child’s age; 3) the child’s community ties; 4) the child’s health and educational needs; 5) the child’s preferences, where appropriate;⁶ 6) whether the move was simply to frustrate the noncustodial parent’s contact with the child;⁷ 7) the child’s social connections; and 8) the child’s particular sports or academic activities within a school or community.⁸

Burgess also addressed move-away requests made after an initial custody order, stating that there must be a “significant” change of circumstances to alter the previous custody orders or change custody from the existing sole custodian to the other parent.⁹ Family Code section 7501(b) specifically states the Legislative intent to affirm the decision in *Burgess*, and “to declare that ruling to be the public policy and law of this state.”

Thereafter, the Court reaffirmed *Burgess* in *In re Marriage of LaMusga*,¹⁰ which was a request to modify final custody orders. The court held custodial parents have a presumptive right to move with their children, subject to the court’s discretion to restrain the relocation of a child if it would prejudice the welfare or rights of that child. The court reasoned bright line rules were inappropriate because trial courts have broad discretion in making custody orders consistent with the best interests of the children.

The court further clarified:

[T]he noncustodial parent bears the initial burden of showing that the proposed relocation of the children’s residence would cause detriment to the children, requiring a reevaluation of the children’s custody. The likely impact of the proposed move on the noncustodial parent’s relationship with the children is a relevant factor in determining whether the move would cause detriment to the children and, when considered in light of all of the relevant factors, may be sufficient to justify a change in custody. If the noncustodial parent makes such an initial showing of detriment, the court must perform the delicate and difficult task of determining whether a change in custody is in the best interests of the children.¹¹

What evolved are the “*LaMusga* factors,” which differ only slightly from the *Burgess* list above, but handle the interrelationship between child and adults more directly. These factors are now considered in most move-away cases where a best interests analysis is required, even if the court is making an initial custody decision:

1. The reason for the proposed move;
2. The children’s interest in stability and continuity in the custodial arrangement;
3. The distance of the move;
4. The age of the children;
5. The children’s relationship with both parents;

6. The relationship between the parents including, but not limited to, their ability to communicate and cooperate effectively and their willingness to put the interests of the children above their individual interests;
7. The wishes of the children if they are mature enough for such an inquiry to be appropriate;
8. The reasons for the proposed move; and
9. The extent to which the parents currently are sharing custody.

In re Marriage of Lasich,¹² an international move-away case decided before *LaMusga*, held the trial court was not required to conduct a *de novo* determination of child custody in a *de jure* sole custody situation. And the court in *In re Marriage of Brown and Yana*¹³ made it clear that if the noncustodial parent failed to make the initial showing of detriment to the child, the trial court had the discretion to deny the request for an evidentiary hearing on custody.

A parent’s parenting time has always been an important factor when assessing the initial burden of detriment. When a parent with sole custody seeks to move away and take the child, as in *Brown and Yana*, that parent is not required to show the move is in the child’s best interest. Instead, the noncustodial parent must demonstrate that the move would be detrimental to the child. The detriment cannot be asserted merely as a result of the relocation away from the noncustodial parent, but rather that the child will suffer detriment caused by the move itself, rendering it essential or expedient for the health, safety, and welfare of the child that there be a change to the noncustodial parent.¹⁴ If the noncustodial parent can show detriment to the child, then the court is required to hold a *de novo* evidentiary hearing as to custody.

A different standard applies when the parties share “genuine joint custody”¹⁵ which can be either court-ordered joint custody, or “actual joint custody.”¹⁶ In either scenario for joint custody, the court must make a *de novo* determination of the best interests of the child.¹⁷

Conditional change of custody orders are permissible so long as their primary purpose is not to coerce a custodial parent into abandoning a proposed move. The trial court must presume the parent requesting to move away with the children is going to move. Custody evaluators and trial courts are not permitted to ask the relocating party, “*If the court denies your request to allow the children to move away, would you stay?*” Any reference and reliance by an expert on an answer to such a question is subject to a motion to strike those parts of the report. It is reversible error for the court to base its decision on any such consideration.¹⁸

The recent holding in *Andrew V. v. Super. Ct.*¹⁹ makes clear that a court may not even grant “temporary” move-away orders without first holding a hearing. Thereafter, any move-away order is subject to an automatic thirty (30) calendar day stay.²⁰

Domestic Violence Analysis

A move-away request following a finding of domestic violence often necessitates a best interests adjudication, despite a previous sole custody order from the family court. If a custody order was made only in a domestic violence action and there have not been any custody orders made in the dissolution action, a custody order from the domestic violence action must not be assumed to be “final.”²¹

International Relocation

International moves pose greater problems because of any of a multitude of different scenarios, depending on where the requesting parent intends to relocate. A lawyer who has never represented a party in an international relocation case should consult or associate with an attorney experienced in international move-aways.

*In re Marriage of Condon*²² involved an international relocation. Although the deciding court cited *Burgess* for its rules, that case is factually distinguishable from *Burgess* and its companion interstate move-away cases. *Condon* established that California courts, analyzing whether it is in the children’s best interest to move to a foreign country, must consider as part of the children’s health, safety, and welfare,²³ the larger context, which includes the a) cultural differences, b) distance challenges, and c) jurisdictional enforceability problems that will inevitably occur in the new country.²⁴ Cultural and distance examples include the analysis of whether a child may be independently harmed by such things as a custom forbidding a girl to attend school, the eventual loss of U.S. citizenship, the impossibility of ever seeing a non-wealthy stay-behind parent again, the difficulty the child may have speaking the language of the new country, etc.²⁵ Thus, while the relocating parent in an international move-away case is not required to prove the move is a necessity, the objector may be able to show detriment to the child by raising more issues than those normally contemplated in a move within the United States.²⁶

Of paramount importance in international cases is the need to provide for enforceability. The court must carefully attempt to establish a California connection that cannot be overridden by the foreign court—a formidable task. Ideally, there should be a mechanism to lock the mover into obeying a state custody order in the foreign country, even when that country has no duty to enforce California laws. To accomplish this, it is now common practice to request that the court make “*Condon* Orders” imposing requirements on the moving parent such as establishing mirror orders in the foreign country, requiring a travel allowance, requiring that the moving parent post a bond, etc. However, *Condon* itself does not mandate such orders. *Condon* simply sets forth problems the trial court should consider in joint custody cases, and suggests creative ways to ensure the child’s access to the parent remaining in the United States. In practice, California lawyers and judges often use the factors set forth in the anti-abduction

statute in the Family Code²⁷ as a shortcut to requesting and receiving *Condon*-style orders, but the list of remedies in that statute are not mandatory requirements in non-abduction cases, and are open to creative lawyering and problem-solving.²⁸

Generally speaking, California orders are much more likely to be enforceable where the moving parent wants or needs future access to the United States for himself or the children. It becomes much more difficult to enforce a California order where the parent has no future incentive to obey.

*In re Marriage of Abargil*²⁹ applied *Condon* principles to an initial international move-away case and attempted to establish “guaranteed enforceability” of a California order in a foreign country. The court examined a set of problems, pre-*LaMusga*, that highlighted the interrelationship of the parents for the benefit of the child, focusing on each parent’s “ability to facilitate contact” and the “continuing contact” of the child with the stay-behind father. The *Abargil* trial court allowed the mother to move to Israel with the child, despite dangerous conditions caused by war, and other detriments the father brought to the court’s attention, because it found that the child had always been primarily with the mother, and that the mother would be the parent most likely to cooperate to allow the child to see his father. To address enforceability, the trial court ordered the mother to register her California decree in Israel, to post a bond, and to file her stipulation in Israel consenting to California jurisdiction, reasoning that she was voluntarily consenting to California’s long-arm jurisdiction.³⁰ Although father argued the enforceability orders were not strong enough, the trial court was affirmed on appeal.

Whether a state court custody order is enforceable outside this country without parental cooperation depends on the foreign country’s own laws and doctrines regarding children’s domicile or jurisdiction and whether the state court loses its power by virtue of the children’s residency in the foreign country. A country’s cooperation with the United States may only coincidentally coincide with whether it is a member of the Hague Convention.³¹ A country abiding by the strict terms of international conventions and treaties may still have different ideas about time frames, reciprocity, ages of children, and other issues. Further, consideration must be given to non-signatory and non-treaty countries, and to whether those countries have a history of cooperation with the United States independent of whether a California order is registered in their courts.

The most recent international paternity case, a double move away, *J.M. v. G.H.*³² shows that the *Burgess*/*LaMusga*/*Condon* analysis may have come as close as we can get to the bright-line standard we had hoped for after *Burgess*. *J.M.* shows that when the situation calls for a best interests analysis, the full set of *LaMusga*/*Condon* factors should be considered. The *J.M.* court first cited to *Burgess* for the underpinnings on how to handle an initial

determination;³³ used the *LaMusga* factors to decide how to split custody at trial after 50/50 interim orders had been in place;³⁴ and finally looked outside the family to analyze the *Condon* factors of culture, distance, and enforceability.³⁵

Strategically, the *J.M.* litigants, true joint custodians, each argued various detriments to the child caused by the child's potential move-away with the other side. A child custody evaluator weighed in on the *LaMusga* factors and determined the child was most bonded to mother. Not surprisingly, once the *LaMusga* and *Condon* detriments that the father had argued against the mother were found to be less important than the maternal bond, the mother won her move-away with the child. The trial court gave mother custody in Israel during the school year and gave father custody during the summer in his new California home. The trial court also examined the *Abargil* solutions to the *Condon* enforceability issues, and made orders that bound mother beyond a naïve reliance on Israel to enforce California law indefinitely. For example, mother did not have the money to post a bond, but the court ordered she would forfeit child support for violation of her move-away orders. The retelling makes the process sound logical, or even easy. However, the justices expressed their vicarious pain when they affirmed the trial court's close call and difficult decisions. Partially citing *LaMusga*, the court stated, "[u]nder the 'heart-wrenching circumstances' in move-away custody cases, the 'law is not amenable to inflexible rules.'"³⁶

The Future of Relocation Cases

The methodology of move-aways may now seem straightforward, but choosing between fit parents will still appear to litigants and courts to be like the sword of Solomon, ready to slice the baby in two. In all but the earliest cases, the law has slowly evolved, but has not been reversed. To make things all the more confusing for the lawyer who rarely handles a relocation case, today's decisions often cite to pre-*Burgess* cases, not with regard to who must show necessity or detriment, but rather to compare and contrast the needs of the child, the problems of the parents, or the environmental issues that plague each family when a relocation takes place. The body of law for move-aways is huge and growing, and none of it may be disregarded.

The future blending of international move-away analysis with that used for cases where the move is entirely within the United States is inevitable. Some might argue that the cultural and distance problems experienced in a *Condon* situation could apply equally to moves from Northern California to Southern California. In fact, some of the jurisdictional problems experienced by international couples may not be entirely absent from the uneven application of the UCCJEA between the states.

Lastly, the future analysis and prediction of which parent will be allowed to keep the children close in a move-away case may require an understanding of the macroeconomics and biases of our society rather than

focusing solely on the individual family. Of the thirty-four published California cases analyzed for this article, a large majority of the applicants who requested orders to allow them to relocate with the minor children were mothers. A large majority of those parents who prevailed in their request to relocate with the children were also mothers. And, of the seven published "true" or "genuine" joint custody cases in California, all seven of the moving parents were mothers. The reasons mothers want or need to move may need further serious analysis. However, one must still ask, "Are the real losers the children?" ■

- 1 *In re Marriage of Burgess*, 13 Cal. 4th 25, 37 (1996); *In re Marriage of LaMusga*, 32 Cal. 4th 1072, 1088 (2004).
- 2 *Burgess*, 13 Cal. 4th at 31-32 (emphasis added).
- 3 CAL. F.C. § 3011.
- 4 *In re Marriage of Carney*, 24 Cal. 3d 725, 730 (1979); *Burchard v. Garay*, 42 Cal. 3d 531, 541 (1986); *Burgess*, 13 Cal. 4th at 33.
- 5 *Burgess*, 13 Cal. 4th at 25.
- 6 *Id.* at 39.
- 7 *Id.* at 44.
- 8 *Id.* at 39.
- 9 *Id.* at 37.
- 10 *LaMusga*, 32 Cal. 4th at 1072.
- 11 *Id.* at 1078.
- 12 99 Cal. App. 4th 702 (2002).
- 13 37 Cal. 4th 947 (2006).
- 14 *Lasich*, 99 Cal. App. 4th at 711 (citing *Burgess*, 13 Cal. 4th at 38).
- 15 *In re Marriage of Whealon*, 53 Cal. App. 4th 132 (1997).
- 16 *Brody v. Kroll*, 45 Cal. App. 4th 1732, 1737 (1996).
- 17 *Niko v. Foreman*, 144 Cal. App. 4th 344 (2006).
- 18 *Mark T. v. Jamie Z.*, 194 Cal. App. 4th 1115 (2011).
- 19 234 Cal. App. 4th 104 (2015).
- 20 CAL. CIV. PROC. CODE § 917.7.
- 21 *Keith R. v. Super. Ct.*, 174 Cal. App. 4th 1047, 1055 (2009).
- 22 62 Cal. App. 4th 533 (1998).
- 23 CAL. F.C. § 3011.
- 24 *Condon*, 62 Cal. App. 4th at 546-547.
- 25 *Id.* at 546.
- 26 *See id.* at 546-547.
- 27 CAL. F.C. § 3048(b)(2).
- 28 *J.M. v. G.H.*, 228 Cal. App. 4th 925 at 931 (2014).
- 29 106 Cal. App. 4th 1294 (2003).
- 30 *Id.* at 1300.
- 31 The Hague Conference on Private International Law, Convention on the Civil Aspects of International Child Abduction.
- 32 228 Cal. App. 4th 925 (2014).
- 33 *Id.* at 936-937.
- 34 *Id.* at 937-939.
- 35 *Id.* at 933-934.
- 36 *Id.* at 937.