Custody Relocation: More Questions than Answers Result from High Court Opinions in California and New York

Pamela Markert
CUSTODY RELOCATION: MORE QUESTIONS THAN ANSWERS RESULT FROM HIGH COURT OPINIONS IN CALIFORNIA AND NEW YORK

A couple have been married for eight years and have three young children. They decide to divorce. How can each parent ensure his or her involvement in the children's upbringing should the other parent decide to move to a different geographic location?

I. INTRODUCTION

In 1993, thirty percent of children under eighteen lived with only one parent—more than double the number of children who lived with a single parent in 1970.1 Single parent households, coupled with an increasingly mobile society,2 have presented a relatively new question for the judicial system: should one parent be permitted to relocate with a child3 away from the other parent?4

The issue of whether a parent has a right to relocate with a child was addressed by California and New York's highest courts in early 1996.5 Within less than twenty-one days of each other,6 the New York Court of Appeals in Tropea

1. BUREAU OF THE CENSUS, MARCH ANNUAL DEMOGRAPHIC SUPPLEMENT TO THE CURRENT POPULATION SURVEY, BRIEF CB94-116 (Aug. 10, 1994). The number of family groups maintained by single parents in 1970 was 13%. Id. In 1988, 24% of children were living with a single parent, with mothers accounting for about 87% of all single parents. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-23, NO. 162, STUDIES IN MARRIAGE AND THE FAMILY, BRIEF SB-3-89 (Mar. 1988). One parent situations are usually the result of divorce, separation, out-of-wedlock births, or widowhood. Id.

2. In re Marriage of Burgess, 913 P.2d 473, 480 (Cal. 1996). Twenty percent of Americans change their residences each year. Id.

3. The term "child" in this comment refers to the singular and plural as well as the feminine and masculine.

4. Although there is no explicit provision in the United States Constitution, the United States Supreme Court has inferred that citizens have a "right to travel" from various constitutional provisions. See Shapiro v. Thompson, 394 U.S. 618 (1969). This right, however, has not been interpreted to extend to the right to relocate with a child. In re Marriage of McGinnis, 9 Cal. Rptr. 2d 182, 187 (Ct. App. 1992).


6. Tropea was decided on March 26, 1996. Tropea, 665 N.E.2d at 145. Burgess was decided on April 15, 1996. In re Marriage of Burgess, 913 P.2d at

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v. Tropea⁷ and the California Supreme Court in In re Marriage of Burgess⁸ held that the custodial parent was permitted to move with the child against the wishes of the noncustodial parent.⁹

The reaction to these decisions¹⁰ indicates a growing polarization between two conflicting views of how a child should be raised.¹¹ One view is that a child will benefit most from frequent and continuing contact of both parents. This view requires each parent to sacrifice his or her own interests to ensure continuing contact with the child by the other parent.¹² The other view is that the child's well being depends most directly on the care provided by the custodial parent, so that the well-being of the custodial parent should be of primary concern.¹³ Conflicts that arise from a custodial parent's decision to relocate, in circumstances in which the move will restrict the other parent's access to the child, are so contentious because resolving them requires choosing between these polarized views.¹⁴ The Burgess and Tropea decisions are ultimately unsatisfying because they attempt to resolve the issue without acknowledging the conflict.¹⁵ As a result, they ensure continuing controversy by failing to provide adequate guidance to the lower courts.¹⁶

The background section of this comment will examine the origins of the legal conflict.¹⁷ First, this section will establish the legal framework and terminology structuring the courts' approach to relocation cases.¹⁸ Second, this section will explore the substantive basis for the conflicting views, examining the role of gender and changing family roles in the

⁸ 913 P.2d 473 (Cal. 1996).
⁹ Tropea, 665 N.E.2d at 153; Burgess, 913 P.2d at 476.
¹¹ See discussion infra Part II.B.2-3.
¹² See discussion infra Part II.B.3.
¹³ See discussion infra Part II.B.2.
¹⁴ See discussion infra Part II.D.
¹⁵ See discussion infra Part IV.B.
¹⁶ See discussion infra Part II.D.
¹⁷ See discussion infra Part II.A.
¹⁸ See discussion infra Part II.A.
dispute.\textsuperscript{19} Third, the section will discuss the cases leading up to \textit{Burgess}\textsuperscript{20} and \textit{Tropea}\textsuperscript{21} and explain why these decisions compelled a reexamination of the issues.\textsuperscript{22}

The analysis section will then explore why \textit{Burgess} and \textit{Tropea} have not fully resolved the relocation issue and the unpredictability that remains at the trial court level.\textsuperscript{23} This comment then proposes new legislation that incorporates the best aspects of both the \textit{Burgess} and \textit{Tropea} decisions to resolve this dispute.\textsuperscript{24} The proposal identifies areas of consensus, where it is possible to bridge the otherwise polarized conflict, and suggests an alternative to current laws that will ensure both flexibility and uniformity in relocation cases.\textsuperscript{25}

\section*{II. BACKGROUND}

\subsection*{A. Custody, Relocation, and the “Best Interests of a Child” Test}

Divorcing parents typically live in the same location, and the overwhelming majority resolve the custody issues associated with their divorce without resorting to litigation.\textsuperscript{26} Seventy-five percent of custodial mothers will move, however, within four years of divorce.\textsuperscript{27} If the move is sufficiently far, the existing custody arrangement may be disrupted.\textsuperscript{28} Resolving custody issues associated with parental moves—whether they be triggered by a job promotion, change of employment, remarriage,\textsuperscript{29} or some other factor—involves issues

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\textsuperscript{19} See discussion infra Part II.B.
\textsuperscript{20} \textit{In re Marriage of Burgess}, 913 P.2d 473 (Cal. 1996).
\textsuperscript{22} See discussion infra Part II.C.
\textsuperscript{23} See discussion infra Part IV.
\textsuperscript{24} See discussion infra Part V.
\textsuperscript{25} See discussion infra Part V.
\textsuperscript{27} Maura Dolan, \textit{Justices Ease Relocation of Children in Divorce Cases; Families: State High Court Gives Wider Freedom to Parent with Primary Custody. More Legal Battles Are Predicted.}, \textit{L.A. TIMES}, Apr. 16, 1996, at A1. For example, according to experts, three of four custodial mothers move at least once within four years of separation or divorce, with 11.5 million minor children relocating each year. \textit{Id.}
\textsuperscript{28} See discussion infra Part II.C-D.
\textsuperscript{29} The \textit{Burgess} court pointed out that approximately one out of five Americans change residences each year and "economic necessity and remarriage account for the bulk of relocations." \textit{In re Marriage of Burgess}, 913 P.2d 473, 480
as complex as the original custody determination itself with considerably less judicial guidance. Judicial review of a move begins with a clear understanding of the pre-move custody arrangement.

1. Defining “Custody” in California and New York

a. California

Part of the confusion surrounding child custody stems from the numerous definitions of the word “custody.” For example, California recognizes joint custody, joint legal custody, joint physical custody, sole legal custody, and sole physical custody. “Joint custody” is defined as both joint physical custody and joint legal custody. “Joint legal custody” is defined as the right and responsibility of both parents “to make the decisions relating to the health, education, and welfare of a child,” such as choosing a medical doctor or selecting a school for a child. When parents have “joint physical custody” each parent has “significant periods of physical custody... in such a way as to assure a child of frequent and continuing contact with both parents.” “Sole legal custody” grants one parent the right and responsibility to make the health, education, and welfare decisions of a child. Finally, “sole physical custody” means that a child resides with one parent, subject to visitation by the noncustodial parent.

At the time of an initial custody determination, California law does not recognize a custody preference. Instead, it employs the “best interests of the child” standard applied on

(Cal. 1996).

30. See discussion infra Part IV.
31. See discussion infra Part II.A.1-2.
32. See infra notes 38-42, 52-55 and accompanying text.
33. CAL. FAM. CODE § 3002 (West 1994).
34. Id. § 3003.
35. Id. § 3004.
36. Id. § 3006.
37. Id. § 3007.
38. Id. § 3002.
40. Id. § 3004.
41. Id. § 3006.
42. Id. § 3007.
43. “The order of preference begins with the ‘best interests of the child’ standard as provided in Section 3011.” Id. § 3040.
a case-by-case basis. California law, however, carries a presumption that joint custody is in the best interests of a child, suggesting that custody be granted to the parent most likely to encourage the child's continuing contact with both parents even though joint custody in itself is not to be presumed.

In practice, joint legal custody is awarded in nearly eighty percent of California divorces. Joint physical custody, however, is less common, occurring in fewer than half of divorce cases. Irrespective of whether joint custody or sole custody (or a permutation thereof) is determined either at the time of a marital dissolution or a custody proceeding, the court retains power to modify custody arrangements for the duration of a child's minority. Furthermore, California has a long established rule permitting the parent who has custody to move unless it would be to the detriment of the child.

b. New York

In contrast to California law, New York law has relatively few terms to define custody arrangements. A "custody determination" made by the court establishes either temporary or permanent custody of a child, including

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44. Id. § 3011.
45. CAL. FAM. CODE § 3080 (West 1994). The presumption favoring joint custody is subject to section 3011 of the California Family Code, which outlines the best interest of a child considerations. Id. § 3011.
46. Section 3040 of the California Family Code establishes an order of preference when granting custody. Id. § 3040. Section 3040(1) states in part:
   To both parents jointly pursuant to Chapter 4 (commencing with Section 3080) or to either parent. In making an order granting custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent, subject to Section 3011 . . .
   Id. § 3040(1) (emphasis added).
47. MACCOBY & MNOOKIN, supra note 26, at 288.
48. See id. at 104.
49. CAL. FAM. CODE § 3402(g) (West 1994).
50. Section 7002 of the California Family Code provides that "a minor is under the age of 18 years old unless in a valid marriage, on active duty with the armed forces of the United States, or has received a declaration of emancipation pursuant to §7122." Id. § 7002.
51. Id. § 7501.
52. N.Y. DOM. REL. LAW § 75 (McKinney 1988).
53. Id. § 75-c.2.
visitation rights by the noncustodial parent.54 “Physical custody” is defined as “actual possession and control of a child.”55 Under New York law, the custodial parent is the parent who cares for the child on a day-to-day basis.56 The noncustodial parent is granted visitation rights if it is in the best interests of the child.57 However, the New York law does not specifically define “custodial” or “noncustodial” parent.58 Additionally, as in California, a custody decree may be modified, replacing any prior decree.59

2. Relocation and the “Best Interests of the Child”

In situations where the noncustodial parent seeks to change custody in response to the custodial parent’s request to relocate with the child,60 courts apply the “best interests of the child”61 analysis to decide whether a custodial parent will be permitted to move.62 Neither California nor New York has a statute that expressly addresses the problem of move away cases.63 In California, the courts have invoked two statutes64 in support of their decisions: the best interests of the child standard, codified in section 3011 of the California Family Code,65 and section 7501 of the Family Code which the Cali-

54. N.Y. DOM. REL. LAW § 240 (McKinney 1996).
55. N.Y. DOM. REL. LAW § 75-c.8 (McKinney 1996). Parents of a child in New York are required to support the child until the age of twenty-one years. N.Y. DOM. REL. LAW § 240(1)(b) (McKinney 1996).
56. Id. § 240.
57. Id.
58. See N.Y. DOM. REL. LAW § 75-c (defining terms in Article 5-A—Uniform Custody Jurisdiction Act).
59. Id. § 75-c.7.
60. See discussion infra Parts II.C-D.
61. Neither California nor New York have a clear definition of what is considered to be the “best interests of a child” codified in their statutes. See CAL. FAM CODE § 3011 (West 1994); N.Y. DOM. REL. LAW § 240(1) (McKinney 1996). The New York statute merely states the phrase “best interests of the child” without further clarification. See N.Y. DOM. REL. LAW § 240(1) (McKinney 1996). The California statute gives some examples of what constitutes the “best interests of the child,” but allows the court to consider any factor it deems relevant. See CAL. FAM CODE § 3011 (West 1994).
62. See discussion infra Part II.C-D.
63. See infra notes 67-68 and accompanying text.
64. CAL. FAM. CODE §§ 3011, 7501.
65. See, e.g., In re Marriage of Battenburg, 33 Cal. Rptr. 2d 871 (Ct. App. 1994). In fact, the Battenburg court went so far as to pronounce section 3040 of the California Family Code as the determinative test when it stated “t[he] test has always been and continues to be the ‘child’s best interests.’” Id. at 872; see also In re Marriage of McGinnis, 9 Cal. Rptr. 2d 182 (Ct. App. 1992); In re Mar-
fornia Supreme Court in *Burgess* interpreted as giving a custodial parent the presumptive right to change the residence of a child absent a determination that the move would adversely impact the child. New York does not address relocation directly through legislation, but the courts have used the general language of section 240 of New York Domestic Relations Law to make decisions that are "in the court's discretion . . . [in light of] the best interests of the child."

Although these "best interests" statutes may technically govern relocation decisions, commentators observe that "a 'best-interest-of-the-child' standard without more is so amorphous as to be unhelpful." In move away cases, even more than in initial custody decisions, the "best interests" standard obscures rather than illuminates judicial decision making.

**B. Custody, Relocation, and the Issue of Gender**

The best interests of the child standard has been continuously used as a custody standard, covering dramatic shifts in custody decision making. At the beginning of the nineteenth century, the paternal presumption gave way to a maternal one for a child of "tender years." By the 1970s, divorcing couples increasingly assumed "joint custody" as an expression of an egalitarian commitment that both parents should be involved in childrearing. All of these custody preferences have been administered under the rubric of a
best interests rationale, and different judges in different jurisdictions continue to make decisions that vary markedly in their interpretation of that standard. 14

Both mothers’ and fathers’ groups have criticized judicial determinations for bias based on the gender of the parent. 75 While modern courts have embraced gender neutral custody presumptions, 76 they have not—and cannot—escape the perception that gender is a factor in determining issues such as the weight to be given to the caretaking role, the relative importance of continued contact with both parents, and a variety of other custody factors. 77

1. Gender and Child Custody—The Courts’ View

Laws in California and New York make it clear that the fitness of a parent for childrearing is not to be determined by a parent’s sex. 78 California uses the “best interests” test to determine which parent receives primary custody and does not create a preference for one type of custody arrangement over another. 79 Under section 3040 of the California Family Code, custody of a child may be granted to either the father or mother. 80 According to section 3040, the court “shall not prefer a parent as custodian because of that parent’s sex.” 81 Neither parent is entitled to custody as a matter of right. 82 Thus, each parent is equally entitled to custody, depending on the court’s determination of the child’s best interests. 83

New York’s provision for gender neutrality is more force-

74. See discussion supra Part II.C.
75. See Warshak, supra note 71, at 397. Working mothers argue that they are being held to a higher standard than working fathers, while fathers argue that historical preferences towards mothers continue to influence judges in custody decisions. Id. at 396.
76. See infra notes 78-85 and accompanying text.
77. See discussion infra Part IV.
78. CAL. FAM. CODE § 3040(a)(1) (West 1994); N.Y. Dom. REL. LAW § 240(1) (McKinney 1996). California and New York statutes have also made it very clear that each parent has a duty to support his or her child financially. CAL. FAM. CODE § 3900 (West 1994); N.Y. DOM. REL. LAW § 33 (4) (McKinney 1988).
79. CAL. FAM. CODE § 3040(b) (West 1994). (“This section establishes neither a preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody, but allows the court and the family the widest discretion to choose a parenting plan that is in the best interest of the child.”).
80. Id. § 3040(a)(1).
81. Id.
82. Id.
83. Id.
ful than California's. Under section 240(1) of New York Domestic Relations Law, "in all cases there shall be no prima facie right to the custody of the child in either parent." Child custody determinations in New York are made "in the court's discretion... having regard to the circumstances of the case and of the respective parties and to the best interests of the child."

2. Gender and Child Custody—A Mother's View

Mothers overwhelmingly receive custody at divorce, usually provide the majority of child care (even in situations where joint custody is awarded), and often have the strongest emotional and psychological ties with the child. In all fourteen relocation cases to reach the appellate level in California and New York since 1992, a mother attempted to relocate with the child against the father's wishes. Of those cases, only the Messler case in New York involved a move by a mother who was not a custodial parent. Not surprisingly, the Burgess attorney rejoiced that "[t]he legal chain that held

84. N.Y. DOM. REL. LAW § 240(1) (McKinney 1996) (emphasis added).
85. Id.
88. 638 N.Y.S.2d 242 (App. Div. 1996). The noncustodial mother was seeking to modify custody, but since she would be moving out of state, the court's decision also considered her relocation plans. Id. at 244.
[mothers] hostage to their ex-spouse's desires or whims has now been forever severed when his client was permitted to move with her children.

Regarding the general issue of custody, feminists have argued that the courts should tie custody rights to the assumption of responsibility for the child. In the Burgess case, a commentator has argued that the California Supreme Court relied heavily on an amicus curiae brief filed on behalf of Dr. Judith Wallerstein. The Wallerstein brief argued that the stability of a child's primary caregiver is a major factor in a child's well-being after divorce, and that the ability to move often contributes further to stability. To the extent that mothers are the most likely to be the primary caretakers, Dr. Wallerstein's position supports their right to move.

3. Gender and Child Custody—A Father's View

In 1995, there were approximately 280 fathers' rights groups in the United States. Members of these groups assert that "mothers aren't enough, children need both parents." Men often perceive divorce proceedings, particularly custody arrangements, as unfair to fathers and as being

91. Shear, supra note 10, at 451. Even though commentators believe that Dr. Wallerstein's brief was influential to the holding in Burgess, it is important to note that the decision only referenced Dr. Wallerstein's brief in a footnote that emphasized respecting the opinions of "reasonably mature" adolescents when making custody decisions. In re Marriage of Burgess, 913 P.2d at 483. Dr. Wallerstein's brief was adapted into an article. See 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 (1996).
92. See Wallerstein & Tanke, supra note 91, at 307-15.
93. Id. The article adapted from Dr. Wallerstein's brief does not favor one parent over another based upon gender; but, rather, the focus is on the role of the parent in a child's life. Id. In response to the Burgess decision, Dr. Wallerstein was quoted as saying, "nobody is saying that children should be taken away...[b]ut it is in the best interest of the children to maintain the stability of the post-divorce family and not to go back to court whenever a parent wants to move away." Dolan, supra note 27, at A1.
95. Id.
"gender neutral in name only." Since only one in ten children live with their fathers after divorce, fathers who wish to take an active part in their child's upbringing perceive a bias against them in custody proceedings.

In support of a father's continued involvement with his child, it is argued that a father's role, however different from a mother's role, is equally as meaningful and important in a child's development. Research suggests that men are just as competent as women in providing day-to-day care of children, such as feeding, bathing, and nurturing. Moreover, there is a growing number of noncustodial fathers who, even several years after a divorce, maintain weekly visits with their child, disproving the contention that men want custody simply to pay less support or to punish their ex-spouses. Not surprisingly, the recent decisions in Burgess and Tropea are seen as a defeat to men who actively participate in child rearing.

C. Relocation Cases in California and New York Prior to 1996

Prior to the Burgess and Tropea decisions in early 1996, lower court decisions in California and New York had been inconsistent. Courts typically held either that a custodial parent was presumed to have a right to move or be denied relocation, asserting a general presumption that a move constitutes a change in circumstances with the burden on the moving party to prove that relocation would be in the “best interests of the child.”

Since the “best interests of the child” standard is not

98. Warshak, supra note 71, at 398.
99. Id. at 398-99.
100. Thompson, supra note 97, at 217.
101. Id. at 219.
102. Id. at 223.
103. The attorney who represented Mr. Burgess, noting the loss a parent will have when the other parent has moved a great distance, called it “tragic,” and said, “I am surprised they went to this extreme . . . . A child needs both parents actively involved in his or her life to have a meaningful life.” Dolan, supra note 27, at A1.
106. See discussion infra Parts II.C.1-2.
107. See discussion infra Parts II.C.1-2.
clearly defined in a statute, a judge may take into account many factors, exclude others, and give each factor a “weight” as determined by that judge. Appellate courts have attempted to provide guidance and uniformity to lower courts by developing different “tests” to analyze custody disputes and visitation arrangements.


Prior to In re Marriage of Burgess, the best interests test prevailed as the overriding consideration on appeal. The custodial parent had the burden to prove the relocation was necessary. Appellate courts honored trial court decisions unless the court abused its discretion. Deference was given to the trial courts because “[a]ppellate courts cannot micro-manage the custodial status of minor children who are subject to the lower court’s jurisdiction in move away cases.”

For example, in In re Marriage of Selzer a relocation request was granted to a mother who had sole physical custody of a child. The purpose of her move was to secure a better job in a nearby city. The father appealed, arguing that the move interfered with visitation and would remove the

108. Section 240 of the New York Domestic Relations Law states that a judge can enter an order for custody that is “in the court's discretion” and further states that “justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child.” N.Y. DOM. REL. LAW § 240 (McKinney 1996). The New York statute does not define what the best interests of the child actually means. Id. Similarly, in section 3011 of the California Family Code, the “best interests of the child” are discussed in general terms of health, safety, and welfare and “any other factors” a court may find relevant. CAL. FAM. CODE § 3011 (West 1994).

109. See discussion infra Parts II.D.1-2.


111. In re Marriage of Hoover, 46 Cal. Rptr. 2d 737, 738 (Ct. App. 1995) (quoting In re Marriage of Carlson, 229 Cal. App. 3d 1330 (Ct. App. 1991)) (“The precise test is whether any rational trier of fact could conclude that the trial court order advanced the best interests of the child.”).

112. See In re Marriage of Roe, 23 Cal. Rptr. 2d 295 (Ct. App. 1993); In re Marriage of McGinnis, 9 Cal. Rptr. 2d 182 (Ct. App. 1992); In re Marriage of Rosson, 224 Cal. Rptr. 250 (Ct. App. 1986).

113. Roe, 23 Cal. Rptr. 2d at 298.


115. 34 Cal. Rptr. 2d 824 (Ct. App. 1994).

116. Id.
child from the community where she grew up. In reaching its decision, the court of appeals reviewed five earlier cases that addressed the issue of relocation and concluded that numerous factors may be considered by the trial court. According to the court of appeals, these factors must be analyzed so as to produce a result which ultimately satisfies the best interests of the child so that the decision is likely to be sustained on appeal. This approach was to be applied even when courts employed "divergent approaches to a 'move away' issue." The court of appeals affirmed the trial court's decision, finding no abuse of discretion.

However, using divergent approaches to relocation cases has created inconsistent and confusing outcomes. In 1993, for example, in In re Marriage of Roe, the court of appeal for the second district held that a mother who shared joint custody with the child's father was permitted to move to another state because her current husband could not find employment in California. But in 1991, in In re Marriage of

117. Id. at 825.
118. In re Marriage of Roe, 23 Cal. Rptr. 2d 295 (Ct. App. 1993) (granting custodial parent's request to move only after proving that the move would be in the child's best interest); In re Marriage of McGinnis, 9 Cal. Rptr. 2d 182 (Ct. App. 1992) (reversing and remanding a trial court ruling granting the custodial parent's move); In re Marriage of Carlson, 280 Cal. Rptr 840 (Ct. App. 1991) (denying the custodial parent permission to move with the child because it would impede continuing contact with both parents); In re Marriage of Fingert, 271 Cal. Rptr. 389 (Ct. App. 1990) (holding that the primary custodial parent had a constitutional right to travel with a minor child); and In re Marriage of Rosson, 224 Cal. Rptr. 250 (Ct. App. 1986) (holding that the custodial parent's desire to move was sufficient to revisit the existing custody arrangement as a changed circumstance and put the burden on the moving parent to prove that it was in the child's best interest).

119. In re Marriage of Selzer 34 Cal. Rptr. 2d 824, 829 (Ct. App. 1994). The court cited examples of facts to be considered in move away cases, including "a custodial child's age and preference, if expressed; an order granting the noncustodial parent expended custodial or visitation time . . .; the moving party's motives; the necessity, if any, of continuity in custody; and effect on the economic condition of both parents of the move proposed." Id.

120. Id.
121. Id.
122. Id.
123. See infra notes 124-29 and accompanying text.
125. Id. at 301. The court in Roe acknowledged the provision in section 4600(a) of the Civil Code (now section 3040 of the California Family Code) that assures minor children continuing contact with both parents, but the Roe court also stressed a qualification made in subdivision (d) that expressly restricts a court from presuming that one type of custody arrangement is preferred over
The fifth district California court of appeal held that a mother who had sole physical custody of two minor children was not permitted to leave California because it would impede the father's exercise of visitation. Even though the mother desired to move back to be near her family in the state in which she grew up and in which the parties lived during part of the marriage, the father's right to visitation prevailed. Carlson and Roe illustrate that the labels of joint and sole custody codified by statute and used in court opinions have not been determinative in relocation cases.


Since 1992 and prior to Tropea v. Tropea, eight relocation cases reached the New York Appellate Division. In five of the New York cases, the court denied the custodial parent's request to relocate with the child. Prior to Tropea, lower courts developed a three-tiered test to make relocation decisions. First, it was determined whether a noncustodial parent would be deprived of "regular and meaningful access to the child." If access still existed, the court would permit the move. If "regular and meaningful access" would be disrupted, there was a presumption that the move was not in the child's best interests and the custodial parent would be forced to demonstrate exceptional circumstances.
cumstances to justify the move. If the exceptional circumstances were proved to the court's satisfaction, only then did the court consider the child's "best interests."

This "three-step test" put a substantial burden on the custodial parent requesting relocation. In Leslie v. Leslie, for example, the trial court's ruling permitting the mother to relocate was reversed as she failed to demonstrate that "exceptional circumstances" existed. The court, while acknowledging that the child's best interests was the predominant concern, determined that move away disputes require "a careful balancing of the rights and problems of both the child and of his or her parents."

Less than two months after the Leslie decision, in Lavelle v. Lavelle, the court also held that the primary consideration is the best interests of the child. However, the Lavelle court determined that when the noncustodial parent's visitation is substantially affected, the relocation is presumed not to be in the child's best interest. The court asserted that although the mother was awarded sole custody at the time of divorce, the employment transfer of her new husband was not a sufficient reason for allowing a relocation as it was a purely voluntary decision which involved only economic betterment.

In Wilson v. Wilson, the most recent case prior to Tropea, the court acknowledged that the custodial parent's reason for moving was due to economic necessity but, because

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136. Id.
137. Id.
138. See infra notes 139-51 and accompanying text.
140. See Leslie v. Leslie, 579 N.Y.S.2d 164 (App. Div. 1992). In Leslie, the mother wanted to move to obtain a doctoral degree from the University of Virginia with the hope of improving the standard of living for herself and her son. Id. at 165. The court determined that obtaining an advanced degree was "a desire for economic betterment, as opposed to economic necessity, [and] does not constitute an exceptional circumstance sufficient to justify a move." Id.
141. Id.
142. Id. (emphasis added).
144. Id. at 876.
145. Id. at 876. The court further stated that the presumption could be rebutted if there were exceptional circumstances presented by the relocating parent. Id.
146. Id.
the necessity was "foreseeable and self created," the court held that the custodial parent had "failed to overcome the presumption that the proposed relocation would not be in the best interests of the children."\textsuperscript{148} The Wilson court asserted that the "best interests" test precluded relocation unless it could be proven that the relocation itself was in the child's best interest, placing the burden on the relocating parent to show exceptional circumstances.\textsuperscript{149} Although the courts in Leslie, Lavelle, and Wilson considered the best interests of the child per section 240 of the New York Domestic Relations Law, the additional burden on the moving parent to show exceptional circumstances created a standard neither codified by statute nor supported by New York Court of Appeals precedent.\textsuperscript{150}

D. The Burgess and Tropea Decisions

The highest courts in California and New York interpreted existing laws regarding relocation to provide a consistent standard that courts could use when addressing relocation issues.\textsuperscript{151} On March 26, 1996, the New York Court of Appeals, resolving two cases\textsuperscript{152} in a single decision, held that the custodial parent, who had sole physical custody of the children, was allowed to relocate outside the area where the noncustodial parent resided.\textsuperscript{153} Less than one month later, the California Supreme Court also held that the custodial parent was allowed to relocate.\textsuperscript{154}

1. The Tropea Decision

In the first case addressed in Tropea v. Tropea, the

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  \item Id. at 327 (emphasis added). According to the facts presented in the court's decision, the "foreseeable and self created" circumstance the custodial parent was faced with was caused by her acceptance of a marriage proposal from a college professor who was not given tenure at a nearby college and had to search for a position away from the custodial parent's former marital residence. Id.
  \item Id.
  \item See supra notes 139-50 and accompanying text; N.Y. DOM. REL. Law § 240 (McKinney 1996).
  \item Id.
  \item See discussion infra Parts II.E.1-2.
  \item Tropea v. Tropea, 665 N.E.2d 145 (N.Y. 1996). The two cases decided in the Tropea decision were Tropea v. Tropea and Browner v. Kenward. Id. at 146-48.
  \item Id. at 146.
  \item In re Marriage of Burgess, 913 P.2d 473, 476 (Cal. 1996).
\end{itemize}
mother, Tammy Tropea, petitioned to change the visitation arrangement and for permission to relocate with her two sons to where her fiancé lived and had an established business. The father cross-petitioned for a custody change in favor of himself, asserting that Ms. Tropea was moving as part of a lifestyle choice for which he should not be “punished” by the loss of proximity and weekday contact with his sons. The court was not persuaded by the father’s allegations relating to the mother’s purported “unclean hands,” and the court emphasized that conduct of either parent which does not impact the child would not be considered and should not be brought before the court. Finding that the move was in the children’s best interests, the court noted that the new visitation schedule allowed for frequent and extended contact with the father.

The second case resolved in the Tropea decision involved Jacqueline Browner, Andrew Kenward, and their son. Ms. Browner had sole physical custody of their son. The father had liberal visitation. Ms. Browner petitioned for permission to relocate 130 miles away from Mr. Kenward’s home in White Plains, New York, as she wished to accompany her parents to Pittsfield, Massachusetts. The move to Pittsfield was also prompted by Ms. Browner’s loss of a job and inabil-

155. Tropea, 665 N.E.2d at 146. The original agreement between the parties gave sole custody of the children to Ms. Tropea, visitation to the father, and restricted both parties from relocating outside the county of their former marital residence without prior judicial approval. Id. The requested move was from Syracuse to Schenectady, approximately two and a half hours away. Id.

156. Id.

157. Id. at 152. The court made it clear that: [R]elocation determinations are not to be made as a means of castigating one party for what the other deems personal misconduct, nor are the courts to be used in this context as arbiters of the parties’ respective “guilt” or “innocence.” Children are not chattel... decisions should be made with a view toward what serves their interests.

158. Id. at 152.

159. Id.

160. Id. at 147.

161. Id.

162. Id.

ity to find meaningful work in New York.\textsuperscript{164} Ms. Browner had found a marketing job in Pittsfield which would give her enough income to rent a home of her own.\textsuperscript{165}

In analyzing the \textit{Browner v. Kenward} case, the court reviewed the appellate division's use of the "meaningful access" test\textsuperscript{166} and found that, although the elimination of the mid-week visitation would diminish the quality of weekend visits, Mr. Kenward was not deprived of the "opportunity to maintain a close relationship with his son."\textsuperscript{167} The court implied that the "open-ended balancing analysis" of the child's best interests now required had already been considered at the lower court level.\textsuperscript{168} Since the father's primary argument was that the appellate division misapplied the three-tiered test (which the \textit{Tropea} court concluded was not determinative), the court affirmed the appellate division's ruling.\textsuperscript{169}

In deciding to permit both Ms. Tropea and Ms. Browner to relocate, the New York Court of Appeals concluded that the three-step test used by the lower courts\textsuperscript{170} was difficult to apply. Citing problems defining words, such as "meaningful access," and trying to determine how far is too far,\textsuperscript{171} the court of appeals reasoned that each case must be looked at on its own merits, with a predominant emphasis on the best interests of the child.\textsuperscript{172} According to the court of appeals, the best interests of the child might be served in a variety of ways, including changing custody as an alternative to forcing the custodial parent to remain, or the possibility of relocating the noncustodial parent.\textsuperscript{173} The appellate court emphasized the

\begin{itemize}
\item \textsuperscript{164} \textit{Id.}
\item \textsuperscript{165} \textit{Id.} at 148. Ms. Browner also stated that she relied on her parents for both emotional and financial support, that the son was close to his grandparents, and that he was close to his cousins in the new city. \textit{Id.}
\item \textsuperscript{166} \textit{Id.} at 152.
\item \textsuperscript{167} \textit{Id.}
\item \textsuperscript{168} \textit{Tropea v. Tropea}, 665 N.E.2d 145, 152 (N.Y. 1996).
\item \textsuperscript{169} \textit{Id.}
\item \textsuperscript{170} \textit{See supra} Part II.D.2.
\item \textsuperscript{171} \textit{Tropea}, 665 N.E.2d at 149 (citing a case that disapproved of an 84 mile move, but also citing other cases that approved a 258 and a 340 mile move, respectively (citations omitted)).
\item \textsuperscript{172} \textit{Id.} at 150.
\item \textsuperscript{173} \textit{Id.} at 151. The court then outlined a set of factors, or considerations, that should be used in relocation cases including: (1) good faith of parent who is requesting or opposing the move; (2) child's attachment with each parent; (3) possibility of devising a visitation schedule that will maintain a meaningful parent-child relationship; (4) quality of the lifestyle the child would have if the
\end{itemize}
importance of placing the needs of the child first, since children are “innocent victims of their parents’ decision to divorce and are the least equipped to handle the stresses of the changing family situation.”

2. The Burgess Decision

Faced with inconsistent results in relocation cases at the lower court levels, the California Supreme Court heard its own “relocation case,” In re Marriage of Burgess, twenty days after the Tropea decision. The Burgess case involved a relocation request by Wendy Burgess who sought permanent physical custody of two minor children and permission to relocate approximately forty miles away from the noncustodial parent, Paul Burgess. During the marriage dissolution proceedings in July of 1992, the temporary custody order granted both parents joint legal custody, but sole physical custody to Ms. Burgess. A mediation agreement provided a detailed schedule for weekly visitation with the father. The agreement contained no provision in the event either parent decided to relocate outside of Kern County.

At a custody hearing in February of 1993, Ms. Burgess notified the court that she accepted a job transfer in another city approximately forty miles away from the former marital residence. Mr. Burgess testified at the hearing that he wished to be the children’s primary caretaker if Ms. Burgess moved. The trial court granted joint legal custody to both parents, but gave sole physical custody to Ms. Burgess.

move were permitted or denied; (5) any possible negative impact from continued or exacerbated hostility between the custodial and noncustodial parents; (6) effect of the move on extended family relationships; and, finally, (7) a “catch all” provision that would include any other facts or circumstances that should be considered. Tropea, 665 N.E.2d at 151.

174. Id. at 150.
176. See supra note 6.
177. Burgess, 913 P.2d at 476. Ms. Burgess had temporary physical custody of the minor children. Id.
178. Id. at 476-77.
179. Id. at 476.
180. Id. at 477.
181. Id. at 476-77. The facts do not indicate whether Ms. Burgess was considering relocation at the time of the mediation agreement. Burgess, 913 P.2d at 476.
183. Id.
184. Id.
The court order retained the existing visitation schedule and also provided a schedule to be used if the mother relocated.\footnote{In re Marriage of Burgess, 913 P.2d 473, 477 (Cal. 1996).} Mr. Burgess then moved for reconsideration and for a change in custody, but his motion was denied.\footnote{Id. at 478.} In August of 1993, the trial court issued an order, finding that "it is in the best interests of the minor children that the minors be permitted to move . . . and that the [father] be afforded liberal visitation."\footnote{Id.} The father appealed both the order denying reconsideration and the order denying change in custody.\footnote{Id.} The appeals were thereafter consolidated.\footnote{Id.} The court of appeal reversed the lower court's ruling granting custody to the mother, after finding "no showing of necessity was made\footnote{Id. at 479.} and that the reality of the move was merely out of convenience for the custodial parent.\footnote{Id. at 482.}

The California Supreme Court reversed, holding that the trial court had not abused its discretion\footnote{In re Marriage of Burgess, 913 P.2d 473, 477-78 (Cal. 1996).} and concluded that the court of appeal erred when requiring Ms. Burgess to show the necessity of relocation.\footnote{Id.} According to the supreme court, "[a] parent seeking to relocate with the minor children bears no burden of establishing that the move is 'necessary.'"\footnote{Id. at 482.} Addressing the appellate court's reason for its denial of the
relocation request, the supreme court concluded that since section 3040 "specifically refrains from establishing a preference or presumption in favor of any arrangement for custody and visitation," section 3020 of the California Family Code does not constrain a trial court to require "frequent and continuing contact with both parents." The supreme court also noted that section 7501 of the Family Code provides the long-established rule that the primary parent who has custody is entitled to move unless it would be detrimental to the child. Acknowledging the emotional ties and resulting stability a child develops with the custodial parent, the court also concluded that the burden will be on the noncustodial parent to prove that shifting custody to him or her would be in the child's best interest.

The interpretation of existing laws by the California Supreme Court in Burgess firmly establishes a "presumptive 'right' of a primary custodial parent to relocate with the child unless such a relocation would result in 'prejudice' to the child's 'rights or welfare.'" If custody was established previously, the "changed circumstance" test supplements the "best interests" test. However, the best interest test still controls.

III. STATEMENT OF THE LEGAL PROBLEM

The Burgess and Tropea decisions remove the "tests" lower courts had developed to resolve relocation cases without creating alternative standards to take their place. Instead, the Tropea decision gives the trial court judge ultimate discretion to consider any factors he or she deems relevant

195. Id. at 480.
197. Id.
198. Id.
199. Id. at 482. In addition to the burden being on the noncustodial parent to demonstrate that the move will not be in the child's best interests, "[t]he showing required [is to] be substantial." Id.
200. Id.
201. In re Marriage of Burgess, 913 P.2d 473, 482 (Cal. 1996). The changed circumstance test addresses whether "new circumstances" represent a significant change by looking back to the previous custody agreement and its surrounding circumstances. If a significant change has occurred, the court will re-evaluate the custody arrangement. Id.
202. Id.
203. Id.
204. See discussion supra Part II.D.2.
and to accord them an arbitrary weight when balancing the competing interests of each parent.\textsuperscript{205} Burgess, on the other hand, defers to the existing custody arrangement and holds that a primary parent who wishes to relocate with a child may do so without proving that the move is necessary.\textsuperscript{206}

What both decisions fail to do is provide guidelines to ensure uniformity and predictability in relocation cases. By removing the “tests” previously used by the lower courts, New York and California courts have eliminated one problem, but have created another. These decisions have left attorneys and parents unsure as to how to structure a custody and visitation arrangement which will protect each parent’s interests. This could prove to be detrimental to the child’s best interests. Lower court judges must now adhere to a new precedent that may be more uncertain and ambiguous than that which existed before these cases were decided.

Although the Burgess and Tropea courts attempted to deal with the single legal issue of relocation, the outcome has been to raise a more fundamental issue of who should raise a child. These decisions have polarized parents and have raised ideological and social concerns that go beyond the legal ramifications of the decisions themselves.

IV. ANALYSIS

Relocation cases continue to be viewed as a problem without a solution due, in part, to the philosophical discord as to whether the child’s best interests lie more in continuing contact with both parents or the greater stability that comes from the security of the relationship with the custodial parent.\textsuperscript{207} The issue is further complicated by the current laws in both states that provide imprecise standards in an effort to ensure maximum flexibility.

The legal solutions to the problem of relocation have been inconsistent. Prior to Burgess and Tropea, lower courts complicated existing laws by establishing tests or multi-step thresholds that parents had to meet even before the best interest of the child was considered.\textsuperscript{208} While the Burgess and Tropea courts stripped away those tests, they increased the

\textsuperscript{205} See discussion supra Part II.D.1.
\textsuperscript{206} In re Marriage of Burgess, 913 P.2d 473, 479 (Cal. 1996).
\textsuperscript{207} See discussion supra Part II.B.2-3.
\textsuperscript{208} See discussion supra Part II.D.
confusion surrounding the standards to be applied in move away cases. A full consideration of the cases suggests that custody disputes arising in the context of a move should be resolved in accordance with the same factors used to resolve any other custody conflict.

A. The Need for Guidance and Consistency at the Lower Court Level

Decisions prior to Burgess and Tropea treated relocation disputes as a unique issue—separate from other custody decisions. The standards and tests used by the lower courts in New York were particularly harsh on custodial parents proposing to move. This suggests that New York courts, which had less experience with shared custody orders than did California courts, premised the initial sole custody determination on the custodial parent remaining in the area absent extraordinary circumstances. New York courts made it clear that relocation could be grounds for transferring custody to the noncustodial parent—only the proposed move called into question the existing arrangement, not dissatisfaction with the caretaking abilities of the custodial parent.

California, on the other hand, has codified definitions of custody arrangements which provided a clearer standard for lower courts to follow in evaluating custody issues. Lower courts also used the definitions to evaluate relocation cases. “Joint physical custody” and “sole physical custody,” labeled at the time of an initial custody determination, gave courts a framework within which to work when custody arrangements had to be revisited. California courts, appearing to ignore the labels, demonstrated a greater willingness to allow a parent with sole custody to move even if the parent could not show extraordinary circumstances.

B. Interpretation of Burgess and Tropea Decisions

The Burgess and Tropea decisions emphasize that the child’s best interests should be of primary importance when
trial courts decide relocation cases,\textsuperscript{215} sweeping away older rulings that focused on the impact of a proposed move on the parents rather than on the child.\textsuperscript{216} Burgess makes clear that moves are to be decided in accordance with the same considerations that underlie other custody disputes, which is to approve a custody arrangement that will ensure the child's best interests.\textsuperscript{217} Tropea, however, makes the best interests rationale central to move away cases, but also considers factors such as a parent's motive for the move, as well as other issues particular to moves, as relevant to the extent that they affect the child's interests.\textsuperscript{218}

The problem with both of these decisions is that attention has been focused on the child without clear guidance as to what constitutes a child's best interests. Because appellate courts give trial courts substantial deference, only overruling a decision if there has been an abuse of discretion,\textsuperscript{219} the high courts seem to guarantee a measure of inconsistency, chaos, and confusion in future cases at the lower court levels.\textsuperscript{220} However, despite the court's insistence on eschewing bright line rules,\textsuperscript{221} the Burgess and Tropea decisions also suggest that there may be some common ground.

1. The Burgess Decision: What It Does and Does Not Do

Lower court decisions prior to Burgess were inconsistent,\textsuperscript{222} though most of the recent appellate court decisions in California ultimately granted relocation to the moving par-

\textsuperscript{216} See discussion supra Part II.C.1-2.
\textsuperscript{217} See supra notes 200-203 and accompanying text.
\textsuperscript{218} See supra notes 171-174 and accompanying text.
\textsuperscript{219} Burgess, 913 P.2d at 478; Tropea, 665 N.E.2d at 148.
\textsuperscript{221} Burgess, 913 P.2d at 483; Tropea, 665 N.E.2d at 150 ("It is counterproductive to rely on presumptions whose only real value is to simplify what are necessarily extremely complicated inquiries."). Tropea, 665 N.E.2d at 150.
\textsuperscript{222} See discussion supra Part II.C.1.
CUSTODY RELOCATION

ent. The courts, at times, applied the best interests of the child in context of how the move might limit frequent and continuing contact with the noncustodial parent; at other times the type of custody arrangement, whether sole or joint, was a consideration.

The Burgess decision is unique. According to the Burgess court, relocation is not a separate issue from custody. Relocation, as a modification to the original custody determination, requires the same kinds of considerations that are used in an initial custody determination. For example, the court emphasized section 7501 of the California Family Code as controlling when the primary parent decides to relocate. The importance of applying this statute is that it recognizes a custody determination was made prior to a proposed move. The move is viewed in context of an existing arrangement which has previously considered the best interests of the child. Instead of revisiting the issue of custody, the court considers whether the move is so harmful as to justify a change in custody to the other parent. The noncustodial parent then has the burden of proving that a change in custody is essential to the child's welfare. By removing the burden from the moving parent, courts in California are not allowed to hold the primary parent hostage to a particular geographic location. A change in custody occurs only if the court determines that the nonprimary parent is the better parent. The primary parent, who is a fit parent, will retain custody and may relocate if the move is not harmful to the child.

A problem with the Burgess decision is that it does not clearly address joint custody. The opinion briefly discusses joint physical custody in a footnote; however, it does not indicate which parent will have the burden of proof to justify a change from joint to sole physical custody or what factors

223. See supra note 87 and accompanying text.
224. See discussion supra Part II.C.1.
226. See discussion supra Part II.D.2.
227. Burgess, 913 P.2d at 480.
228. Id. at 481-82.
229. Id. The court addressed the issue of joint custody in the text of the opinion only minimally when it instructed trial courts to consider whether the custody change is expedient, essential, and imperative for the welfare of the child. Id. at 482-83.
230. Id. at 483, n.12. The court instructs trial courts to determine de novo a new primary custody arrangement in light of the best interests of the child. Id.
may be considered. If a custody arrangement is truly "joint physical custody," there is not a custodial parent or a noncustodial parent to whom to assign this burden.\(^{231}\)

Applying the best interests standard as codified in section 3011 of the California Family Code, the court could consider additional factors. For instance, courts could look at: which parent provided the most care before the move, the advantages of staying in the community versus the advantages of moving, whether the child has developed a closer bond to one parent, and any other factors it deems important. In making this determination, the reasons for the move should be irrelevant. The impact on the child, however, is very important. For example, if the child is a star basketball player and has a chance at securing a college scholarship, but there are no comparable basketball opportunities in the new location, the move would disadvantage the child. On the other hand, if a parent is moving because of a great new job that will vastly improve the parent's standard of living and allows the parent to spend more time with the child, this is in the child's best interests. The fact that the move ends the joint custody arrangement should be irrelevant unless the move is motivated by spite.

2. The Tropea Decision: What It Does and Does Not Do

The outcomes in the New York decisions prior to Tropea were fairly consistent, usually denying a moving parent's request to relocate.\(^{232}\) Relocation requests were often denied, primarily because the parent could not meet the initial burden imposed by the court to prove that the move was necessary.\(^{233}\) These decisions discouraged parents from attempting to relocate with a child because of this burden.\(^{234}\)

The Tropea court reached the conclusion that relocation cases should be decided using a "best interests of the child"

\(^{231}\) "Ordinarily, after a judicial custody determination, the noncustodial parent seeking to alter the order for legal and physical custody can do so only on a showing that there has been a substantial change of circumstances so affecting the minor child that the modification is essential to the child's welfare." Id. at 481-82 (emphasis added). For examples of cases that have been decided in light of Burgess, see In re Marriage of Whealon, 61 Cal. Rptr. 2d 559 (Ct. App. 1997); Brody v. Kroll, 53 Cal. Rptr. 2d 280 (Ct. App. 1996).

\(^{232}\) See discussion supra Part II.C.

\(^{233}\) See discussion supra Part II.C.

\(^{234}\) See discussion supra Part II.C.2.
standard. Although the conclusion is similar in Burgess, the underlying analysis differs. The Tropea court expressly eliminated the multi-step analysis formulated at the lower courts, which starts with the justifications for the move, as it “erects artificial barriers to the court’s consideration of all of the relevant factors.”

One reason for eliminating the three-tiered analysis was the inability of the lower courts to uniformly define “meaningful access.” Additionally, the court expressed concern that requiring the moving parent to prove “exceptional circumstances” risked overlooking cases where a child would benefit if the move were granted. The Tropea court cited a hypothetical move due to Mom’s remarriage as an example of when a move would benefit the child. If a lower court is faced with this situation, the issue is whether the disadvantages to the child from the move, i.e., loss of contact with Dad, outweigh the advantages of a new family unit and the greater continued contact with Mom, the primary caretaker. This differs from prior lower court decisions in that the reasons for the move and impact on the noncustodial parent are considered only to the extent that they affect the determination of the child’s best interests.

This approach is similar to Burgess, with the exception that Tropea does not begin with a presumption in favor of keeping the child with the custodial parent under the existing custody order. Relocation should be viewed in terms of whether a move justifies a change in custody from one parent to the other. This approach emphasizes that parents will be required to structure their lives in a way that will accommodate the child, rather than forcing a child to accommodate the parent’s lives. For example, the court provided suggestions on ways visitation may be modified, such as extended visitation periods or the possibility of relocation of the non-custodial parent. The decision also made clear that there should not be a presumption of enjoining a parent from moving to maintain the status quo.

While Tropea has provided some guidance, two flaws in the decision prevent it from resolving the relocation issue.

235. See discussion supra Part II.D.2.  
237. Id. at 151.  
238. Id. at 150.
First, the Tropea court restricts the best interests test by emphasizing how the impact of the move will affect the relationship of the child and noncustodial parent,239 as well as the custodial parent's reason for the move.240 By placing a non-custodial parent's visitation or the custodial parent's motives as key considerations,241 the Tropea court has, in effect, instructed the lower courts to consider the best interests of the child in light of the parent's motives for requesting or opposing the move.

Second, the Tropea court instructed the lower courts to decide whether the proposed move would serve the child's best interests based on a preponderance of the evidence standard.242 The result is to place the burden of proof with the moving party. However, since Tropea revisits custody at the time of a move, the parent who shoulders the burden of proof should be the parent who is least involved with the child. For example, if the nonmoving parent is only minimally involved with the child, the burden should be on that parent to prove that this minimal involvement is more beneficial to the child's best interests than if the move were granted. To hold otherwise reestablishes a presumption against the move regardless of the parenting arrangement. In turn, this could have the same effect of enjoining the custodial parent in a manner similar to cases decided prior to Tropea.

C. Reconciling the Child's Best Interests with the Parent's Best Interests

The fundamental question underlying relocation disputes is how to determine what is in a child's best interests.243 In some cases, a parent's circumstances may be considered. In other cases, the parent's circumstances may be ignored or treated as independent from those of the child.244 The parent's interests should be relevant to custody disputes to the extent that they affect the parent's role as a caregiver.

239. Id.
240. Id.
241. Id. at 151. After instructing the lower courts to feel free to consider factors it deems relevant, the court said “[t]hese factors include, but are certainly not limited to each parent's reasons for seeking or opposing the move . . . .” (emphasis added). Tropea v. Tropea, 665 N.E.2d 145, 151 (N.Y. 1996).
242. Id. at 151-52.
243. See discussion supra Parts II.C-D.
244. See discussion supra Parts II.C-D.
For example, if a parent has been the primary caretaker of a child, with little or no involvement by the noncustodial parent, the primary parent’s interests should be given deference when deciding whether to grant or deny relocation. Or, if both parents assume close to or equal to a 50-50 shared custody arrangement, the interests of each parent would be secondary to the best interests of the child.

The most common type of custody arrangement is something in between these two extremes. Usually the shared custody arrangement is less than equal. One parent is responsible for most of the primary caretaking responsibilities. Granting or denying a move for these types of cases requires looking at both the parent’s and the child’s best interests.

Neither the Burgess nor the Tropea decision address these types of custody arrangements when identifying what factors a court should consider when faced with a relocation case. The law in California recognizes sole custody and joint custody but does not label the type of arrangement that most parents have—something in between joint custody and sole custody. New York law simply addresses custody in terms of physical custody and visitation and does not attempt to define custody arrangements in terms of how childrearing responsibilities are shared. Because the courts do not first identify the parenting arrangement, the courts encourage needless litigation. For example, in New York, a parent that is providing almost all of a child’s care will have to go before the court and prove that the move is in the child’s best interest the same way a parent who has something akin to a joint custody arrangement would have to do. However, in California, the court unfairly burdens the noncustodial parent who is very active in the child’s life.

V. PROPOSAL

This comment proposes that both the California Family Code and the New York Domestic Relations Law be amended through legislation to include a statute for relocation cases. A codified standard will ensure that move away decisions, regardless of the judge or geographic location, will have a

245. Several of the cases discussed in the background have fact patterns that would meet this criteria. See discussion supra Parts II.C-D.
measure of uniformity and fairness. In addition, state legislature has a duty to provide guidance where there has been consensus. The suggested guidelines clearly identify the areas of consensus in move away cases, while incorporating the analysis that is implicit in the Burgess and Tropea decisions. The benefit of making the analysis in Burgess and Tropea explicit is that it will save a lot of trouble and confusion for lower courts, as well as aid parents and their lawyers when making custody decisions.

The proposal is a framework that should be modified for each state. California has already established custody labels that identify two types of custody arrangements; thus, the proposed parenting arrangements listed below should incorporate those labels. Since New York does not define custody the same way, the parenting arrangements can now be used to aid courts in identifying the respective involvement of each parent to his or her child.

A. Types of Custody Arrangements

There appear to be three distinct types of child custody arrangements, irrespective of the labels used when custody is awarded. First, there is the situation where one parent has assumed most of the caretaking responsibilities of the child, and, for purposes of this proposal, this parent will be referred to as the “primary parent.” In the primary parent arrangement, there is no significant involvement by the other parent, referred to as the “noncustodial parent.” The lack of involvement could be due to a move by the noncustodial parent making contact difficult or impossible, only occasional weekend visitation by the noncustodial parent, or visitation by the noncustodial parent diminishing over time to the point that the noncustodial parent’s involvement is minimal.

A second type of custody arrangement is one which involves both parents raising a child jointly, close to a 50-50 arrangement, whereby each parent has an integral role in the child’s life. This parenting arrangement will be referred to as “joint parenting.” In this case, neither parent has a more significant role in providing support and caregiving to the child. It is not intended that this arrangement mandates ex-

246. See supra notes 38-42 and accompanying text.
247. See supra notes 52-56 and accompanying text.
exactly a 50-50 commitment as measured by the amount of
time spent in the care of each parent. However, either par-
ent must be available in the event of medical emergencies,
conferences with teachers, medical appointments, social ac-
tivities, such as school events or sports, and any other situa-
tions that either parent would be expected to attend if the
family was still intact. If only one parent assumes the re-
sponsibility for the activities listed above, then the parenting
arrangement will not be considered joint parenting.

The final parenting arrangement would encompass all
other arrangements. This type of parenting plan, referred to
as “shared parenting,” would include less than a 50-50 ar-
rangement but more than weekend visitation by the noncus-
todial parent. The shared parenting plan would include
cases that are factually similar to Burgess and Tropea,
wherein both parents share childrearing responsibilities, but
in unequal amounts. Exact percentages of time spent with
the child will not be dispositive but will be reviewed on a
case-by-case basis using the factors outlined below.

B. Presumption in Favor of Granting a Move

The legislature should acknowledge a presumption in fa-
vor of allowing a parent and child to move in three clearly de-
fined circumstances. First, if the parent seeking to relocate
is the primary parent,\(^{248}\) then a move should be granted un-
less the noncustodial parent can show, by a preponderance of
the evidence, that the move is detrimental to the child’s
health, safety, welfare, or is being done in a spiteful or frivo-
lous manner solely to frustrate visitation by the noncustodial
parent. A presumption favoring the move of a primary par-
ent is similar to the court’s rationale in Burgess.\(^ {249}\) However,
this proposal limits the presumption to cases where the non-
custodial parent has had minimal, if any, involvement with
the child and ignores the labels used in a custody agreement.

Second, in cases of shared parenting, there should be a
two-tiered test. To create a presumption in favor of the
move, the moving parent must first show, by a preponder-
ance of the evidence, that the move is important to either the
child or the parent’s well-being. Factors meeting such a test

\(^{248}\) Primary parent as defined in Part V.A.
\(^{249}\) In re Marriage of Burgess, 913 P.2d 473, 478 (Cal. 1996).
include, but are not limited to, family relationships, and opportunities for marriage or remarriage, education, or employment superior to those available in the existing location. The parent opposing the move may do so successfully by showing that the proffered reasons are in fact trivial or that the move is designed to frustrate the opposing parent.

If the moving parent meets the first test, that parent must then show, by a preponderance of the evidence, that having the child remain with the moving parent will further the child's best interests. In this prong of the test, the reasons for the move will be irrelevant and the standards for determination shall be the same as those in any other custody determination. For example, the Tropea court outlined a series of factors tailored to move away cases which included: the child's respective attachments to each parent, capability of parents to devise a visitation schedule that would enable the noncustodial parent meaningful contact with the child, the quality of the child's lifestyle if the move were permitted, and the effect of the move on extended family relationships.\(^{250}\)

Third, a move should be favored where the continued involvement of both parents is detrimental to the child and the parent best meeting the child's best interests desires to move. Involvement by both parents is detrimental to a child when there is physical abuse or threats of physical abuse between the parents, or the parents have a high conflict relationship adversely impacting the child's well-being. Determining which parent is best meeting the child's needs is a factual determination that will be made on a case-by-case basis, with careful examination of any possible dangers to the child's health, safety, or welfare. If an abusive relationship is established, the court will not be bound by the primary, shared, or joint parenting arrangements discussed above.

C. Presumptions for Denying a Move

There are two circumstances in which the legislature should recognize a presumption against a move. The first example is when there is a joint parenting arrangement in which both parents are actively involved in raising the child, or share responsibility on a 50-50 basis, which could not continue if a move were granted. In such a case, the moving

party could still retain custody upon a showing, by a preponderance of the evidence, that the child's best interest would be better served by remaining with the moving parent. The court should give serious consideration to the custody arrangement that will best facilitate the child's continuing contact with both parents in making this determination. The moving parent's reason for the move should be irrelevant to the custody determination, unless the other parent can show that the sole reason for the move was to frustrate the joint custody arrangement. If the move is granted, the nonmoving parent will be granted liberal and extended visitation.

Second, there should be a presumption against a move when a child's health or safety could be in jeopardy. “Health” pertains primarily to a child’s physical health. For example, if a child has a disease that requires medical attention that may not be available where the moving parent desires to relocate, the child’s health becomes top priority and the proposed move of the child should be denied. “Safety” should be defined narrowly. It includes a consideration of potential physical harm to the child from either the moving parent or persons who will be in close contact with the child in the new location. Persons who have been convicted of child abuse, endangerment, or neglect mitigate against the move. Additionally, “safety” does not include hypothetical dangers such as moving to an urban area or an unfamiliar city. A child’s health and safety take priority over the parenting arrangement and the best interests of the child standard. If these measures are not adequately met, relocation with the child should be denied until the threat to the child’s health or safety no longer exists.

VI. Conclusion

Judicial decisions impacting the lives of children are subject to close scrutiny, because children are often viewed as innocent victims of their environment. Relocation cases, in particular, are seen as an additional burden on a child who already suffered the break up of a family and is now cast in the middle once again.

Some people find it hard to accept the decisions parents make which affect their child's geographic stability or remove their child from the community with which he or she is familiar. When the judicial system is forced to intervene and
make a decision on behalf of the child, blame is shifted from parents to the courts. When cases reach the states' high courts, the case becomes a battleground in the larger conflict over who should raise a child. The Burgess and Tropea decisions should not be used as vehicles to establish societal norms, as that is the duty of state legislatures. This comment suggests a legislative solution that can be uniformly applied, yet flexible enough to recognize and protect the interests of parents who are actively participating in meeting the physical and emotional needs of their child.

Pamela Markert

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