CALIFORNIA DREAMING: DEMYSTIFYING THE CONFUSED AND CONFUSING LAW OF INTERNATIONAL RELOCATION TO AND FROM CALIFORNIA

Thomas Wolfrum and Lawrence Moskowitz[1]

It is no secret that we live in a highly mobile world. We talk on cell phones and conduct video conferences on handheld tablets with others in most any place in the world. We travel long distances at nearly supersonic speeds by airplane.

That we live in a highly mobile world is no secret to parents changing their relationships through divorce.[2] When a parent seeks to relocate with a minor child over the objection of the other parent, the relocating parent must obtain a court order to legally relocate with the child.[3]

Local, national, and international relocation cases are a mine field of family law. Relocation cases are financially expensive, emotionally treacherous and potentially damaging to children, parents, lawyers, consultants, experts, collaterals, and judges.

When relocation over the objection of the other parent arises, both parents want their respective lawyers to predict the outcome of their case. Predicting the outcome of a relocation case is difficult because relocation cases are fact driven.[4] With lawyers unable to reasonably predict outcomes, contested relocation cases are played out in a financially and emotionally expensive arena over long periods of time.[5] In addition, the trial judge's attitude toward

---

[1] Mr. Wolfrum practices Family Law, in Alameda and Contra Costa Counties and is an IAML Fellow. Mr. Moskowitz practices Family Law in Sonoma, Napa, Mendocino, and Marin Counties and is an AAML Fellow.

[2] Obviously, not all parents are married. For simplicity, "parentage act" cases and "dissolution of marriage" cases are subsumed herein by "divorce."

[3] The U.S. Census Bureau reports that the typical person in the U.S. will move 11.7 times in his or her life. See http://www.census.gov/prod/2012pubs/p20-567.pdf (accessed December 1, 2012).

[4] The fact most countries have moved away from awarding parental responsibilities to only one parent after divorce contributes to the difficulty of predicting the outcome of a relocation case. Consider, for example, California Fam. Code §3040,"(a) Custody should be granted in the following order of preference according to the best interest of the child as provided in Sections 3011 and 3020: (1) To both parents jointly … or to either parent. See F. Granet, "Alternating Residence and Relocation – A View From France" Utrecht Law Review, Vol. 4, Issue 2 June 2008, p. 48.

[5] In the important California relocation case *of In re Marriage of LaMusga* (2004) 32 Cal.4th 1072 a case in which mother filed a Petition for Dissolution on March 7, 1996. The appellate decision on her request to relocate was published 8 years later on April 29, 2004. The last pleading in that divorce was filed 13 years after the Petition, on August 13, 2009. http://icms.cc-courts.org/iotw/CIVIL/civildetails.asp?courtcode=A&casenumber=MSD95-01136&casetype=FL&dsn=&movetodate=&startdate=&sort=&start=0 accessed October 31, 2012.

relocation is often the deciding factor in relocation cases.[6] Experienced trial court judges are aware that while the research on the effect on children of relocation a material distance from one parent is inconclusive, the credible, existing research supports the conclusion that children are harmed by high conflict litigation, and many relocation cases are high conflict cases because one parent perceives him or herself the victor and the other parent perceives him or herself as the vanquished.

Adding to the difficulty of prosecuting or defending relocation cases is the fact that trial court relocation decisions are rarely reversed on appeal because of the significant discretion afforded trial judges in such cases.

This article is intended to be a primer for lawyers considering engaging in the prosecution or defense of an international relocation case to or from California.

Historical perspective

California has been in the forefront of family law in the United States for decades. Divorce in California gained considerable attention in 1969 when California became the first U.S. state to adopt "no fault divorce." The California Family Law Act of 1969 abolished divorce and replaced it with "dissolution of marriage." Starting January 1, 1970 fault was no longer needed in California for the married to become "unmarried." Starting in 1970, if one California spouse alleged irreconcilable differences that allegation was accepted as true and the marriage dissolved. However, no fault goes only so far in relocation cases. No fault refers in California to the fact a spouse does not need "grounds" for divorce. It does not mean in relocation cases the trial judge may not consider parental misconduct.

After 1970 no fault divorce steadily, if slowly, swept across the United States. By 1977, nine U.S. states adopted no-fault divorce. By 1983, 48 states adopted some form of no fault divorce, every U.S. state but South Dakota and New York. In 1985, South Dakota adopted no fault divorce. In 2010, the last hold-out state, New York, adopted unilateral "no-fault" divorce.

After 1970 divorce reform garnered much attention. For example, in 1970, the National Conference of Commissioners of Uniform State Laws (NCCUSL) appointed a committee to draft

[6] Anecdotally, years ago in one of Mr. Wolfrum's cases, a trial judge denied a parent's request to relocate from California to another state with the minor child despite the overwhelming facts supporting relocation (better job, family,) because, inter alia, the trial judge was a "relocation child" who, after years of commuting between Los Angeles and San Francisco for visitation was not about to sentence a child to years of interstate travel for visitation.

a uniform marriage and divorce law for consideration by state legislatures.[7] NCCUSL promulgated a Uniform Marriage and Divorce Act (UMDA), ultimately enacted by eight states.[8] The UMDA included provisions for original custody orders, visitation, and modification of original custody orders, but not relocation. Under UMDA §409, original custody decrees became non-modifiable 2 years after the original custody decree.[9] The intent of the UMDA was to maximize finality and continuity for the child.[10]

Relocation legislation began to garner attention in the United States in 1997 with the publication of the American Academy of Matrimonial Lawyers Model Relocation Act.[11] The AAML Model Act requires 60 days advance notice of relocation to the non-relocating parent, offers three options for presumptions and burden of proof, lists factors courts might consider, and provides remedies for the left behind parent. Under the AAML Model Act if the left behind parent timely objected to the relocation the court was required to conduct a hearing and to consider, among other factors,:

1. the nature, quality, extent of involvement, and duration of the child's relationship with the parents, other adults, and siblings;

2. the age, developmental stage, needs of the child, and the likely impact the relocation will have on the child's physical educational, and emotional development;

3. the feasibility of preserving the relationship between the non-relocating parent and the child through suitable visitation arrangements;

---

[7] Now the Uniform Law Commission (ULC). http://www.uniformlaws.org The mission of the ULC is to provide the states with non-partisan, well-conceived, and well drafted legislation that brings clarity and stability to critical areas of state statutory law.

[8] UNIF. MARRIAGE AND DIVORCE ACT, 9A U.L.A. The states were Arizona, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana, and Washington. 1970 was the year California adopted the first no fault divorce law in the United States. New York, in 2011, was the last of the 50 states to enact no fault divorce.

[9] The Act provided courts had jurisdiction for two years to modify an initial custody decree upon a showing of changed circumstances that it is in the best interest of the child, but only if based on "facts that have arisen since the prior decree or that were unknown to the court at the time." *Id*. §409(b).

[10] *Id*. §409 comment.

[11] Proposed Model Act on Relocation 15 J. AM. Acad. Matrim. Laws. 1 (1998) [AAML Model Relocation Act]. Included was a statement of the reasons for the move and proposed revised visitation schedule. 203(b)(5-6) at 8. The AAML Proposed Model Act on Relocation is available at http://www.aaml.org/library/publications/model-relocation-act-0. The AAML Board of Governors approved the Model Act in Cancun, Mexico March 9, 1997.

4. the child's preference, taking into consideration the age and maturity of the child;

5. whether there is an established pattern of conduct of the person seeking the relocation, either to promote or thwart the relationship of the child and the non-relocating person;

6. whether the relocation of the child will enhance the general quality of life for both the custodial party seeking the relocation and the child;

7. the reasons of each person for seeking or opposing relocation; and

8. any other fact affecting the best interest of the child.[12]

The AAML Model Act provides three options for assignment of the burden of proof at trial. The first alternative places the burden on the relocating parent to show he or she seeks to move in good faith and the move is in the best interest of the child.[13] The second places the burden of proof on the left behind parent to prove relocation is not in the best interest of the child.[14] The third places the burden on the relocating parent to show the relocation is made in good faith and on the left behind parent to prove the relocation is not in the best interests of the child.[15]

In 2000, the American Law Institute (ALI) published an analysis of family law and recommendations in the Principles of Family Law Dissolution.[16] The Principles require advance notice of intent to relocate.[17] The Principles direct judges to revise parenting time to accommodate relocation without changing the proportion of parenting time before the relocation if possible.[18] If that standard cannot be met, judges are directed to modify initial decrees based on the best interests of the child.[19] The Principles presume a parent exercising the clear majority of custodial responsibility has a right to relocate with the child if that parent proves relocation has a valid purpose, is made in good faith, and is to a location reasonable in

---

12 *Id*. §405, at 118 – 19.

13 *Id*. §407, 20 -22.

14 *Id*.

15 *Id*.

16 AMERICAN LAW INSTITUTE, PRINCIPLES OF LAW OF FAMILY DISSOLUTION, ANALYSIS AND RECOMMENDATIONS §2.17(2) (2002). See http://www.ali.org. The mission of the American Law Institute is to produce scholarly work to clarify, modernize, and otherwise improve the law.

17 *Id* §2.17(2)

18 *Id*. §2.17(3)

19 *Id*. §2.17(4)

light of the reason for relocation.[20] The Principles assume impairment to the relationship of the child and parent with the most parenting time is less detrimental than the impairment to the relationship of the child with the other parent.[21] Relocation under the Principles maybe justified if the relocation is to be closer to family, closer to emotional support, for health reasons, for safety, for significant employment, for significant education of a relocating parent or his or her new significant other, or just to improve quality of life.[22] Relocation is presumed appropriate unless the relocation purpose can be achieved without relocation or by relocating to a location less disruptive to the child's relationship with the other parent.[23] Even if the relocating parent with "clear majority of parenting time" does not establish a valid, good faith motive, and the purpose of the relocation is unreasonable, the Principles permit relocation if the relocation is in the child's best interest.[24] The Principles do not take into consideration the left behind parent's contributions to a child's moral development, education, psychological development, social development, or career.

In 2008, the NCCUSL Family Law Joint Editorial Board suggested NCCUSL draft and propose a Uniform Relocation Act. A NCCUSL Committee was formed and met. Jeff Atkinson, Professor of Law at DePaul University School of Law, was selected as the Reporter and, with his guidance, the committee drafted an Act. After drafting, further work on the Act was suspended because of the perceived difficulty of drafting an act, with or without a presumption in favor of or against relocation, that might be approved in a significant number of U.S. states.[25]

In 2010, the American Bar Association Family Law Section appointed a committee to draft a Model Relocation Act. The ABA Model Act on Relocation is based on the best interest of the child and, like the AAML Model Act, includes a number of factors, for example,

> (1) the quality of relationship and frequency of contact between the child and each parent;
>
> (2) the likelihood of improving or diminishing the quality of life for the child, including the impact on the child's educational, physical, and emotional development;

---

20 *Id*. §2.17(4)(a).

21 *Id*., 361. 51% of parenting time might not be material. Query is 60% material?

22 *Id*. §2.17(4)(a)(ii).

23 *Id*. §2.17(a)(a)(iii).

24 *Id*. §2.17(4)(b).

25 Author Thomas Wolfrum represented the American Academy of Matrimonial Lawyers at the initial NCCUSL meeting.

(3) the views of the child, having regard to the child's age and maturity;

(4) the child's ties to the current and proposed community and to extended family members;

(5) the parents' reasons for seeking or opposing relocation and whether either parent is acting in bad faith;

(6) a history of or threat of domestic violence, child abuse, or child neglect;

(7) the willingness and ability of each parent to respect and appreciate the bond between the child and the other parent and to allow for a continuing relationship between the child and the other parent, unless the court finds that the other parent has sexually assaulted or engaged in domestic violence against the parent or a child, and that a continuing relationship with the other parent will endanger the health or safety of either the parent or the child;

(8) the degree to which one or both parents have relied on a prior agreement or order of the court regarding relocation;

(9) the degree to which the parties' proposals for contact after relocation are feasible, having particular regard to the cost to the family and the burden to the child; and

(10) any other relevant factor affecting the best interests of the child.

The ABA Model Act on Relocation was withdrawn in 2012. [26]

In 2010, the Hague Conference on Private International Law and the International Centre for Missing and Exploited Children hosted, with the support of the United States Department of State, an International Judicial Conference on Cross-Border Family Relocation. The Conference was attended by approximately 50 judges and other experts from around the world. They agreed on the following:

"States should ensure that legal procedures are available to apply to the

[26] http://www.abanow.org/wordpress/wp-content/files_flutter/13285666982012mm104.pdf.

competent authority for the right to relocate with the child. Parties should be strongly encouraged to use the legal procedures and not to act unilaterally. The person who intends to apply for international relocation with the child should, in the best interests of the child, provide reasonable notice of his or her intention before commencing proceedings or, where proceedings are unnecessary, before relocation occurs.

In all applications concerning international relocation the best interests of the child should be the paramount (primary) consideration. Therefore, determinations should be made without any presumptions for or against relocation.

In order to identify more clearly cases in which relocation should be granted or refused, and to promote a more uniform approach internationally, the exercise of judicial discretion should be guided in particular, but not exclusively, by the following factors listed in no order of priority. The weight to be given to any one factor will vary from case to case:[27]

1. the right of the child separated from one parent to maintain personal relations and direct contact with both parents on a regular basis in a manner consistent with the child's development, except if the contact is contrary to the child's best interest;

2. the views of the child having regard to the child's age and maturity;

3. the parties' proposals for the practical arrangements for relocation, including accommodation, schooling and employment;

4. where relevant, to the determination of the outcome, the reasons for seeking or opposing the relocation;

5. any history of family violence or abuse, whether physical or psychological;

---

[27] The conference noted that "[W]hile these factors may have application to domestic relocation they are primarily directed to international relocation and thus generally involve considerations of international family law. http://www.hcch.net/index_en.php?act=events.details&year=2010&varevent=188. Accessed October 30, 2012.

6. the history of the family and particularly the continuity and quality of past and current care and contact arrangements;

7. pre-existing custody and access determinations;

8. the impact of grant or refusal on the child, in the context of his or her extended family, education and social life, and on the parties;

9. the nature of the inter-parental relationship and the commitment of the applicant to support and facilitate the relationship between the child and the respondent after the relocation;

10. whether the parties' proposals for contact after relocation are realistic, having particular regard to the cost to the family and the burden to the child;

11. the enforceability of contact provisions ordered as a condition of relocation in the State of destination;

12. issues of mobility for family members; and

13. any other circumstances deemed to be relevant by the judge.[28]

California procedures for obtaining order permitting relocation with child

Having briefly reviewed relocation from a historical perspective, we turn to the "nuts and bolts" of prosecuting or defending a relocation case litigated in California.

Notice

A parent with rights of custody seeking to relocate with a minor child a material distance from the other parent within California, from California to another of the other 49 U.S. states, or from California to a "foreign" country, must, assuming California has jurisdiction over child

[28] See also The Hague Convention of 1980 (Convention of 25 October 1980 on the Civil Aspects of International Child Abduction) and the Hague Convention of 1996 (Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement Note on International Family Relocation, January 2012 accessed at http://www.hcch.net/upload/wop/abduct2012pd11e.p and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children). The United States has not ratified nor implemented the 1996 Convention. See also the HccH Preliminary Documents list.

custody, apply to the Superior Court located in the California county with jurisdiction over child custody.[29]

A parent wishing to relocate with a child subject to California jurisdiction may give the other parent informal notice and hope the parent consents. If the other parent consents, a custody order must be filed with the court. At present this may be accomplished by completing, filing, and serving California Judicial Council Forms FL – 355 (Stipulation and Order for Custody), FL – 341 (Child Custody Attachment), FL – 341(C) (Vacation and Holiday Schedule), FL 341(D (Additional Child Custody Provisions) and FL 341(E) (Joint Legal Custody Attachment)).[30]

If the left behind parent does not consent, the relocating parent must file in the Superior Court located in the county where the child or the other parent resides and serve the other parent with Request for Order (FL – 300). Filing and serving this form gives notice of the proceeding to the other parent and initiates the judicial process leading to an order permitting the relocation with the minor child or the granting of physical custody to the left behind parent leaving the relocating parent free to move.

Mediation/Recommending Child Custody Counseling

Notice includes the filing and service of California Judicial Council form FL – 300. The service of this form triggers mandatory "mediation" or "recommending counseling" regarding the relocation. Mediation or Recommending Counseling are conducted at an agency of the court, Family Court Services ("FCS"), staffed by mental health professionals with various credentials and levels of experience. Many FCS personnel have extensive experience with child custody but may never have worked on an international relocation case. If the mediator or

---

[29] Relocation over the objection of the other parent entitled to custody without court order is a "wobbler" (misdemeanor or felony depending on the facts). See California Penal Code §278.5: "(a) Every person who takes, entices away, keeps, withholds, or conceals a child and maliciously deprives a lawful custodian of a right to custody, or a person of a right to visitation, shall be punished by imprisonment in a county jail not exceeding one year, a fine not exceeding one thousand dollars ($1,000), or both that fine and imprisonment, or by imprisonment pursuant to subdivision (h) of Section 1170 for 16 months, or two or three years, a fine not exceeding ten thousand dollars ($10,000), or both that fine and imprisonment. (b) Nothing contained in this section limits the court's contempt power. (c) A custody order obtained after the taking, enticing away, keeping, withholding, or concealing of a child does not constitute a defense to a crime charged under this section.

[30] In California family law, Uniform Parentage Act, and Domestic Violence cases are heavily dependent on forms. The forms are published by the California Judicial Council and subject to revision every 30 June and 1 January. Not all forms are revised biannually. Current forms are available at: http://www.courts.ca.gov/forms.htm for current forms. Some forms are mandatory. For a list of mandatory forms see http://www.hcch.net/upload/wop/abduct2012pd11e.pdf.

recommending child custody counselor lacks experience in international relocation cases, the attorney does well to carefully assist his or her client in presenting to relevant facts and law to the mediator/recommending child custody counselor.[31] Even if parents present persuasive facts supporting their interest in a relocation case, relocation cases may exit FCS not with a recommendation but with a recommendation for a full child custody evaluation. Parents hopeful of solving their relocation dispute without litigation may, therefore, do well to agree to a private mediator or private recommending counselor with experience in cross international relocations.

What is the difference between a FCS mediator and a FCS recommending child custody counselor? The difference is in the outcome of the FCS process. California mediations are confidential whereas recommending counseling is not. [32] Mediation occurs in one-half of the 58 administrative subdivisions in California known as counties and Recommending Child Custody Counseling occurs in the other 29. In mediating counties, if the parents do not reach agreement, the FCS process ends. In recommending child custody counties, if the parents do not reach agreement, the Recommending Custody Counselor makes written recommendations regarding child custody to the trial judge subject to cross-examination.[33] The recommendations, if imposed by the judge, will be temporary, subject to modification after a

---

[31] Fam. Code §3170: " (a) If it appears on the face of a petition, application, or other pleading to obtain or modify a temporary or permanent custody or visitation order that custody, visitation, or both are contested, the court shall set the contested issues for mediation. See also, Fam. Code §20019: "Where it appears from a party's application for an order under this chapter or otherwise in the proceedings that the custody of, or visitation with, a minor child is contested, the court shall set those issues for mediation pursuant to Section 3170. The pendency of the mediation proceedings shall not delay a hearing on any other matter for which a temporary order is required, including child support, and a separate hearing, if required, shall be scheduled respecting the custody and visitation issues following mediation in accordance with Section 3170. However, the court may grant a continuance for good cause shown.

[32] California Evid. Code §1119: "Except as otherwise provided in this chapter: (a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given. (b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or mediation consultation shall remain confidential."

[33] *McLaughlin v. Superior Court* (1983) 140 Cal.App.3d 473.

child custody evaluation has been conducted and the non-relocating parent has been afforded the right to a full evidentiary trial.[34]

FCS "mediation" or recommending counseling sessions generally occur within 60 – 90 days of the filing and serving of the Request for Orders depending on the FCS work load.[35] Mediation and recommending child custody counseling generally consist of one 1 – 3 hour orientation program in which interparental cooperation and communication are stressed and a 1 – 3 hour meeting. If domestic violence is alleged the "mediation" occurs on different days for each parent. If circumstances warrant, the initial RFO hearing date may be postponed until after the FCS mediation/recommending counseling. The initial hearing on the RFO is not an evidentiary trial. In Recommending Child Custody counties the initial hearing is a summary proceeding based on the recommending child custody counselor's written report, argument of counsel, and perhaps brief testimony from the parents. In Mediation counties, the initial hearing will be based on limited testimony from the parents and argument of counsel.

At an RFO hearing, the court may make temporary orders including granting permission to temporarily relocate with a minor child, appointment of a joint child custody evaluator, setting of a judicially supervised settlement conference several weeks or months in the future, and possibly the setting of a future trial date. Trial dates may be 3, 6, or more months after the RFO hearing to allow time to complete a child custody evaluation by a psychologist or other mental health professional. Child custody reports may cost $5,000 to $35,000 or more. The cost of the child custody report is paid by the parents. The court has discretion both before and after trial to allocate the cost between the parents both before and after trial. Child custody evaluators must meet minimum standards.[36]

Only in joint physical custody cases, cases where the left behind parent has substantial parenting time with the minor child, does the left behind parent have a right to an evidentiary hearing. [37]

<u>Learning from others</u>

---

[34] For further information on the process see Fam. Code §20038.

[35] FCS personnel may interview children if deemed appropriate or necessary. Fam. Code §3180.

[36] Child custody evaluators must meet at least the standards stated on Judicial Council Forms FL 325 and 326.

[37] *In re Marriage of Brown & Yana* (2006) 37 Cal.4th 947. [Non-custodial parent objecting to a move-away has no right to an outside evaluation without a prima facie showing of detriment from the move. As a rough rule of thumb, 30% or more parenting time will generally mandate a full evidentiary hearing on relocation.

As an aid to the attorney representing a client in a California cross-border relocation case, we review *F.T. v. L.J*. (2011) 194 Cal.App.4th 1. Because *F.T.* illustrates many, but not nearly all, of the complex twists relocation cases can take, we offer the caution that the difficulty of a relocation case is limited only by the ingenuity of the parents and their attorneys. Before reviewing *F.T.* we point out that when *F.T*. was decided and at present, under decisional law, California courts must assume that a parent requesting court permission to relocate will relocating and child will change, either the child will relocate or the left behind parent will become the primary parent. In addition, current California law requires California trial courts to consider all relevant factors in relocation cases, not just the effect on noncustodial parent's relationship with child.

When F.T.'s and L.J.'s child, J.J., was 13 months old, his mother burned his arm with a hot curling iron to teach him a lesson. When F.T. picked up his son at L.J.'s the evening she burned J.J., he observed J.J.'s burn and took J.J. to a hospital where an employee called Child Protective Services (CPS) and the police. Thereafter, father cared for J.J. and mother had supervised visits. F.T. then filed a paternity action under the California Uniform Parentage Act. At FCS recommending child custody counseling, J.J.'s parents did not agree on custody and the FCS recommending counselor recommended father have sole legal and primary physical custody with mother having supervised visits. In April 2007, J.J.'s mother and father agreed to an order incorporating the recommendations of the FCS recommending child custody counselor. Mother agreed to and began paying father $740 per month child support.

In September 2007, father filed and served a RFO asking permission to move to Texas with J.J. Father alleged he had 3 other children, an ex-wife, extended family, better job opportunities, and a lower cost of living in Texas. Mother was granted unsupervised visits with J.J. as she had then pleaded guilty to one count of misdemeanor battery on J.J. and had been placed on probation for four years. The recommending counselor also reported mother had one other child who resided with paternal grandparents. FCS recommended that J.J. move with his father.

In February 2008, the trial court appointed an expert, a psychologist, to conduct a psychological evaluation of father, mother and J.J. Seven months later, in September 2008, the psychologist reported moving from California to Texas would likely disrupt J.J's relationship with his mother who was then pregnant and could not travel to Texas to visit J.J. if he moved there. The psychologist opined mother's burning J.J. reflected "rash impulsivity, profound insensitivity, and severe misjudgment," but did "not suggest broader abusive intent." The psychologist recommended incrementally expanded visitation for mother. The trial court adopted the psychologist's recommendations "without prejudice" pending an evidentiary hearing.

Father then changed his relocation request to relocate to the state of Washington as he planned to marry a woman who lived there. After a return to FCS, the FCS Recommending Counselor recommended against permitting J.J. to move with father and Father continue to have full custody of J.J.

Father's relocation change led to a supplemental report from the psychologist who made the initial family study. The report confirmed father wanted to move to Washington to live with his new wife and her child. The psychologist reported father and mother were co-parenting better and their communications with each other had greatly improved. The psychologist felt unable to opine whether J.J. should move with his father.

After a March 2010 evidentiary hearing the trial court found father was J.J.'s primary caretaker, the sole issue was what custody order was in J.J.'s best interest, and denied father's request to relocate with J.J. The trial judge also found a "likelihood of erosion of ties to [mother] if the move is granted" which would adversely impact J.J.'s relationship with his mother. In addition, the trial judge found father's reasons for relocating not a "sufficiently necessary reason" to move J.J. The trial judge noted father had not testified that he would relocate even if his request were denied. Father appealed and the Court of Appeal reversed and remanded with the trial court assume father would move with or without J.J. and consider all relevant factors, not just effect on mother's relationship with J.J. if he moved with his father to the state of Washington.

The trial judge was reversed because he assumed that father would not move without J.J., thereby failing to decide if moving was in J.J.'s best interests. The question California judges must currently decide in relocation cases is not whether the parent may be "permitted" to move with a minor child, but what parenting plan is in the child's best interest when the custodial parent moves. The trial judge was also reversed because he found father's reasons for relocating were not sufficiently "necessary." In California a custodial parent is not required to show a planned relocation is "necessary." Reasons for relocation are considered in California only when "'one reason for the move is to lessen the child's contact with the noncustodial parent. Even when the motive for relocation is to reduce the other parents contact with a child, such motive is only one factor trial judges must consider in determining whether a change in custody is in a child's best interests.

It is important to note that after *F.T. v. L.J*. a trial court's decision on relocation may not be based solely on whether the proposed move could be detrimental to the child's relationship with the left behind parent. Detriment to a child from loss of relationship with the left behind parent is a factor in the decision, but not the only factor trial judges must consider in relocation cases.

Interestingly, because it underscores how difficult it is for attorneys, trial judges, and appellate justices to consider all relevant evidence, J.J.'s need for continuity of contact with both parents and stability was not discussed in the in the appellate decision.[38]

F.T. v. L.J. illustrates many of the problems with relocation litigation the trial attorney representing a parent in a cross border case may wish to explain to his or her client. F.T. requested to relocate in September 2007 when J.J. was a year-and-a-half old. His appeal was decided three and one-half years later, March 2011, when J.J. was 5 years old. The appeal resulted in a *de novo* trial, presumably with new evaluations and reports. Another lesson *from F.T. v. L.J.* is to make sure that the child custody evaluator is given clear instructions in your relocation cases.[39]

California Child Custody Preferences

In California initial child custody orders are based on the "best interests of the children" determined from, many factors and facts, including but not limited to the following factors:

1. The health, safety, and welfare of the child; and
2. Any history of abuse by one parent or any other person seeking custody against:
    a. Any child to whom he or she is related, or as to whom he or she has had a caretaking relationship, no matter how temporary;
    b. The other parent; or
    c. A parent, current spouse, or cohabitant of the person seeking custody, or a person with whom the parent or person seeking custody has a "dating or engagement relationship;
3. The nature and amount of contact with both parents [except a parent's voluntary move out of the family residence is not considered under certain circumstances]. and

[38] Cf. California Fam. Code 3020(b): (b) The Legislature finds and declares that it is the public policy of this state to assure that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy, except where the contact would not be in the best interest of the child, as provided in Section 3011. Cf. discussion of Fam. Code §3020 infra.

[39] See also *In re Marriage of Seagondollar* (2006) 139 Cal.App.4th 1116 [err to appoint expert to conduct Cal. Evid. Code §730 (as the court's expert) evaluation without specifying purpose or of the appointment].

4. The habitual or continual illegal use of controlled substances or habitual or continual abuse of alcohol or prescribed controlled substances by either parent.[40]

In relocation cases, arguably the most important factor to be considered – not mentioned in §3011 -- is whether the relocating parent will continue to support the child's relationship with the other parent following the move. *In re Marriage of LaMusga* (2004) 32 Cal.4th, discussed infra.

California relocation law

California law on relocation has changed over the years. Recently, the law has moved in the direction of making relocation easier than it used to be (unless the status quo is joint custody; see below), but the pendulum may be swinging back the other way just a little. Demonstrating to the court how the existing case law supports one's client's position does not guarantee a successful outcome in a relocation case, but counsel who omit or neglect this task do so at their peril.

Recent California relocation law begins in 1979 with *In re Marriage of Carney* (1979) 224 Cal.3d 725, a non-relocation case. Carney held continuity and stability for a child meant remaining in the same location rather than remaining with the same custodial parent.[41] Even a dozen years later, *Carney* held sway preventing a custodial mother from moving with children to Pennsylvania because "frequent and continuing contact" with both parents trumped mother's relocation reasons.[42] A similar result occurred a year later in *In re Marriage of McGinnis* (1992)

---

[40] Cal. Fam. Code §3011(a), (b), (c), and (d).

[41] In *Carney*, the non-custodial mother moved for a change of custody to her following an accident to the father which rendered him a paraplegic. In reversing the trial court's decision in favor of mother, the California Supreme Court reasoned it was in the best interests of the minor children to remain with their custodial parent, even though that parent became physically challenged. In an interesting and telling quote, the court added: "Contemporary psychology confirms what wise families have perhaps always known-that the essence of parenting is not to be found in the harried rounds of daily carpooling endemic to modern suburban life, or even in the doggedly dutiful acts of 'togetherness' committed every weekend by well-meaning fathers and mothers across America. Rather, its essence lies in the ethical, emotional, and intellectual guidance the parent gives to the child throughout his formative years, and often beyond. The source of this guidance is the adult's own experience of life; its motive power is parental love and concern for the child's well-being; and its teachings deal with such fundamental matters as the child's feelings about himself, his relationships with others, his system of values, his standards of conduct, and his goals and priorities in life." Id. 739.

[42] *In re Marriage of Carlson* (1991) 229 Cal.App.3d 1330. Cf. current California Family Code §3020(b) *supra*.

7 Cal.App.4th 473 where the relocating parent was required to prove the proposed relocation "imperative" and "essential or expedient" for the children's welfare.

The *Carne*y standard changed in 1996 in *In re Marriage of Burgess* (1996) 13 Cal 4th 25. which held that a custodial parent had a presumptive right to relocate with children, and that the non-custodial parent carries the burden of proving that his active role was 'essential' to the children's well-being. The California Supreme Court carved out an exception in its famous footnote 12, "A different analysis may be required when parents *share* joint physical custody of the minor children under an existing order and in fact, and one parent seeks to relocate with the minor children. In such cases, the custody order "may be modified or terminated upon the petition of one or both parents or on the court's own motion if it is shown that the best interest of the child requires modification or termination of the order."[43]

Burgess was somewhat softened by in *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072. In *LaMusg*a the California Supreme Court affirmed a custodial parent's presumptive right to move and made clear a custodial parent does not bear an initial burden of proving the proposed relocation is "necessary." However, the California Supreme Court went on to state in its decision that the presumptive right to relocate is not an automatic right to move. If the noncustodial parent makes a prima facie case that the move will be detrimental to the child (is not in the child's best interests), then the court may utilize its discretion to make custody orders that are in the child's best interests. While, at present, it seems the legal standard is a child's best interests will normally be served by remaining in the custodial parent's custody, after *LaMusga* California the trial courts will have to weigh relocation evidence on a case by case basis without a "Burgess mandate" favoring a child's relocation with the primary custodial parent.

The following conclusions, drawn from *LaMusga* may be helpful to attorney representing parents or children in California relocation cases:

1. The custodial parent does not have to establish that a planned move is necessary.

2. The 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.

3. The impact of a proposed move on a child is relevant in determining if the move would cause detriment to the child.

[43] Codified as Fam. Code, §3087.

4. The facts relevant to determining the detriment to the child from relocation may, if weighed along with all relevant factors, be sufficient to justify a change in custody.

5. If the noncustodial parent establishes the move is detrimental to the child, the trial judge must determine if a change in custody is in the best interests of the children.

6. A change in custody is “essential or expedient” if it is in the best interests of the child."

7. Conditional change of custody orders are permissible so long as their primary purpose is not to coerce a custodial parent into not relocating.

8. Past parental conduct is relevant to custody orders that are in the best interests of the children.

9. Reasons for a proposed move are relevant even if the custodial parent is acting in good faith.

10. Relocations are not amenable to inflexible rules.

Child’s input on relocation

Effective January 1, 2012, Cal. Fam. Code §3042, provides:

(a) “If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody or visitation, the court shall consider, and give due weight to, the wishes of the child in making an order granting or modifying custody or visitation.

(b) In addition to the requirements of Evid. Code §765 (b)[44], the court shall control the examination of a child witness so as to protect the best interests of the child.

(c) If the child is 14 years of age or older and wishes to address the court regarding custody or visitation, the child shall be permitted to do so, unless the court determines that doing so is not in the child's best interests. In that case, the court shall state its reasons for that finding on the record.

[44] Concerning special procedures for questioning witnesses under the age of 14.

(d) Nothing in this section shall be interpreted to prevent a child who is less than 14 years of age from addressing the court regarding custody or visitation, if the court determines that is appropriate pursuant to the child's best interests.

(e) If the court precludes the calling of any child as a witness, the court shall provide alternative means of obtaining input from the child and other information regarding the child's preferences.

(f) To assist the court in determining whether the child wishes to express his or her preference or to provide other input regarding custody or visitation to the court, a minor's counsel, an evaluator, an investigator, or a mediator who provides recommendations to the judge pursuant to [Fam. Code §3183] shall indicate to the judge that the child wishes to address the court, or the judge may make that inquiry in the absence of that request. A party or a party's attorney may also indicate to the judge that the child wishes to address the court or judge.

(g) Nothing in this section shall be construed to require the child to express to the court his or her preference or to provide other input regarding custody or visitation.

(h) The Judicial Council shall, no later than 1 January 2012, promulgate a rule of court establishing procedures for the examination of a child witness, and include guidelines on methods other than direct testimony for obtaining information or other input from the child regarding custody or visitation."

Despite Fam. Code §3042, family law judicial officers may be reluctant to directly hear a child's testimony, on relocation or on any other disputed parenting issue because of the belief that children should not testify for or against a parent in a marital dissolution case. It is believed that so testifying is damaging to child witnesses and damaging to the parent-child relationship.

California trial judges may rely on California Evid. Code §765 which grants the court authority to control questioning of a witness to make such questioning as "effective for the ascertainment of the truth" to prevent children from testifying and counsel may do well to anticipate such objection being raised sua sponte.

Other factors considered in California relocation cases

It is important relocation counsel be aware that in relocation cases California courts often appoint a child custody evaluator as the court's expert to avoid subjecting children to interviews and observations by multiple experts. Parents may agree to one expert because of the expense and lure of having a "neutral" expert. This is accomplished by appointing the child custody evaluator under Evid. Code §730 as the "court's expert". Such appointments are encouraged by child custody experts because appointment pursuant to Cal. Evid. Code §730 provides quasi-judicial immunity – given the nature of child custody litigation and especially relocation litigation, quasi-judicial immunity may be a prerequisite to retaining a qualified expert.

Generally in California, litigants who agree to a "§730 expert" may call another expert to impeach an Evid. Code §730 expert's testimony.[45] However, family law courts are reluctant to appoint an Evid. Code §733 expert in child custody cases and such courts cite protecting children from the stress and anxiety of a second custody investigation as justification for not appointing a §733 expert in child custody cases. There is no right to an Evid. Code §733 expert in child custody cases.[46] Thus, it is incumbent on counsel to help the client make their best case with the Evid. Code §730 expert and explain this danger to the client before the client agrees to appointment of a "730" child custody expert.

Common relocation case fact patterns

Relocation for career or economic purposes

Many relocation cases arise when a parent is transferred by his employer from one location to another, perhaps against his or her wishes, or when a parent has an opportunity to obtain a promotion by relocating. In other cases, a parent is, or claims to be, unable to pay his or her living expenses because of the high cost of living in many parts of California; such a parent may have relatives in another jurisdiction that can help with expenses and/or child care, or may simply wish to move someplace less expensive. Not all such requests are made in good faith; the relocating parent may have asked the employer for a transfer, or may be exaggerating his or her inability to survive financially in California.

Relocation requests have recently been allowed in California in cases in which the relocating parent was required to move for his or her employment.[47] For example, a mother's request to relocate to Colorado was approved where her father had cut off his financial assistance to

[45] Cal. Evid. Code §733.

[46] *Niko v. Foreman* (2006) 144 Cal.App.4th 344.

[47] *In re Marriage of Burgess, supra* [mother sought to move with the children to a town 40 minutes away due to job transfer]; *In re Marriage of Whealon* (1997) 53 Cal.App.4th 132.

her, rendering her unable to meet her living expenses in California, and she had an offer of a job in Colorado.[48] In *Mark T. v. Jamie Z.* (2011) 194 Cal.App.4th 1115, the trial court denied a mother's request to move with the child to Minnesota, where her family would assist her financially and the California Court of Appeal reversed, noting that the trial court had reasoned in a manner not permitted under California law that it could coerce mother into staying in California by forbidding the child from moving.

Even if the reason for the move is a "good faith" reason, there may be circumstances affecting the best interests of the child that prevent relocation. In *In re Marriage of Melville* (2004), the mother of a child with Down's Syndrome and a heart condition lost her job and asked to relocate with the child to Oregon for economic reasons. The trial court denied the move, noting that it was in the child's best interest to continue living in California. The Court of Appeal affirmed, noting that the child would also have better educational opportunities, and superior medical care, in California.[49]

In some cases a "bad faith" reason for relocation may be coupled with a court finding relocation suggests the relocating parent will interfere with a child's relationship with its left behind parent. This occurred in *Cassidy v. Signiorelli* (1996) 49 Cal.App.4th 55, where mother's justification for relocation with child to Florida was to pursue a career as a parapsychologist. In that case mother had never worked as a parapsychologist and did not have a job in Florida.

Relocation for new partner

Relocation may be presented as necessary because a new significant other has opportunity for a promotion by relocating or who is required to transfer as a condition of keeping his or her job. If the relocating parent's new family is having trouble meeting expenses, it may be the new mate's family who is going to provide financial help and free or low-cost child care. Reasons relating to the circumstances of a new mate may, of course, meet the "good faith" test, but the remaining parent still must be given an opportunity to prove that the proposed move would be detrimental to the children.[50]

<u>Child Abuse and Relocation</u>

48 *Niko v. Foreman, id.*

49 A very interesting decision considering cutbacks in programs for children with Downs Syndrome resulting from the decrease in the birthrate of such children and state budget cuts.

50 *LaMusga, supra* [reversing decision allowing a proposed move on the ground that it would be detrimental on the facts presented; see Section 4.1.2, above].

The California Legislature has found that there is a strong connection between domestic violence and child abuse.[51] Accordingly, any history of child abuse involving either or both of the parties may affect the court's determination in a relocation case. There may be interplay between presumption in favor of sole custodial parents per *Burgess, supra*, and California's strong policy in favor of limiting an abusive parent's access to the child or children. When the custodial parent wants to move and the remaining parent is the abuser or past abuser, the determination is often easy. In a joint custody situation where one parent demonstrates abuse by the other parent, that showing may tip the balance. But in a non-joint-custody situation in which the custodial parent seeks to relocate but is also shown to have been abusive, the presumption in favor of the custodial parent's right to determine the child's residence[52] may conflict with the statutory rules limiting and/or prohibiting the court from awarding custody to an abusive party. Those statutes are discussed in this section.

Limitations on Access of Abusive Parent

As noted, *supra*, in determining the best interests of the child, the court must consider any history of abuse by a person seeking custody against any child to whom he or she is related, or as to whom he or she has had a caretaking relationship, no matter how temporary; the other parent; or a parent, current spouse, or cohabitant of the person seeking custody, or a person with whom the parent or person seeking custody has a "dating or engagement relationship.[53] Notwithstanding the express policy of the State of California to assure frequent and continuing contact between the child and both parents[54], the court's primary concern is the health, safety, and welfare of children and the Legislature has declared that the perpetration of child abuse or domestic violence in a household where a child resides is detrimental to the child[55].A person who is a registered sex offender, or who is convicted of assault on a child, battery on a child, or child molestation may not be awarded custody of, or visitation with, a child, unless the court finds that there is no significant risk to the child and states its reasons for so finding in writing or on the record in open court[56]. If anyone residing in the household of a party has been convicted of a felony in which the victim was a minor, and as a result has been required to register with the state as a sex offender, that party may not be awarded custody or visitation

51 Cal. Pen. C. §13732.
52 Cal. Fam. Code §7501.
53 Cal. Fam. Code. §3011.
54 Cal. Fam. Code §3020(b).
55 Cal. Fam. Code §3020(a).
56 Cal. Fam. Code§3030(a)(1).

with a child, unless the court finds that there is no significant risk to the child and states its reasons in writing or on the record[57].

No person convicted of rape may be awarded custody or visitation with a child who was conceived as a result of the crime.[58] If a party seeking custody has been convicted of the murder of the child's other parent, that party may not be awarded custody or visitation with the child, unless the court finds that there is no significant risk to the child and states its reasons in writing or on the record.[59] In determining whether there is significant risk to the child, the court may consider the wishes of the child if he or she is of sufficient age and reason to form an intelligent preference[60]; credible evidence that the convicted parent was, him- or herself, a victim of abuse by the deceased parent[61] ; and/or expert testimony that the convicted parent experiences intimate partner battering[62].

By statute, California courts are "encouraged" to make a reasonable effort to ascertain whether or not there are any emergency protective orders, protective orders, or other restraining orders in effect concerning the parties or the child. Courts are also "encouraged" not to make a custody or visitation order that is inconsistent with any such protective order or restraining order, unless the court makes both of the following findings:

1. The custody or visitation order cannot be made consistent with the emergency protective order, protective order, or other restraining order; and
2. The custody or visitation order is in the best interest of the minor[63].

When custody or visitation is granted to a parent in a case in which domestic violence is alleged and a protective order or restraining order has been issued, the custody or visitation order must specify the time, day, place, and manner of transfer of the child for custody or visitation to limit the child's exposure to potential domestic conflict or violence, and to ensure the safety of all family members. If is staying in a place designated as a shelter for victims of domestic violence, or in other confidential location, the order concerning exchanges of the child must be designed to prevent disclosure of the location of the shelter or other confidential location. Cal. Fam. Code §§3031(b), 6323(c). If the court is making a custody determination at a time when a

---

57 Cal. Fam. Code§3030(a)(2).

58 Cal. Fam. Code §3030(b)..

59 Cal. Fam. Code §3030(c).

60 Cal. Fam. Code §3030(c)(1). The language of §3030(c)(1) regarding the child's age and capacity to reason is similar to the language of §3042(a) regarding the child's ability to provide input regarding a custody determination.

61 Cal. Fam. Code §3030(c)(2).

62 Cal. Fam. Code §3030(c)(3).

63 Cal. Fam. Code §3031(a).

protective order or a restraining order is in effect, it must consider whether the best interest of the child requires that the perpetrator's access to the child should be supervised, suspended, or denied. Cal. Fam. Code §§3031(c), 6323(d).

Presumptions and Relocation

If the court finds that a party seeking custody of a child has perpetrated domestic violence against the other party, against the child, or against the child's siblings within the previous five years, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to the perpetrator is detrimental to the best interest of the child, pursuant to Section 3011. This presumption may be rebutted by a preponderance of the evidence.[64]

In determining whether the presumption set forth in subdivision (a) has been overcome, the court must consider the following:

1. Whether giving sole or joint physical or legal custody of a child to him or her is in the best interest of the child. In determining the best interest of the child, the preference for frequent and continuing contact with both parents[65] or with the noncustodial parent[66] may not be used to rebut the presumption.

2. Whether the perpetrator has successfully completed an approved batterer's treatment program.

3. Whether the perpetrator has successfully completed a program of alcohol or drug abuse counseling if the court determines that counseling is appropriate.

4. Whether the perpetrator has successfully completed a parenting class if the court determines the class to be appropriate.

5. Whether the perpetrator is on probation or parole, and whether he or she has complied with the terms and conditions of probation or parole.

6. Whether the perpetrator is restrained by a protective order or restraining order, and whether he or she has complied with its terms and conditions.

7. Whether the perpetrator of domestic violence has committed any further acts of domestic violence.

---

64 Cal. Fam. Code §3044(a).
65 Cal. Fam. Code §3020(b).
66 Cal. Fam. Code §3040(a)(1).

There is no published appellate decision in California in which the presumption in favor of an abusive custodial parent's right to determine the child's residence has come up against the presumption against awarding custody to such a parent, as expressed in Cal. Fam. Code §3044. However, the strength of the legislative policy expressed in Cal. Fam. Code §§3011(b) and 3020(a), it is the opinion of the authors that §3044 would most likely be controlling in such a case.

The Court may not consider a parent's absence or relocation from the family residence due to domestic violence as a factor in determining custody or visitation if:

1. The absence is of short duration and the court finds that, during that period, the absent parent has demonstrated an interest in maintaining custody or visitation; that parent maintains, or makes reasonable efforts to maintain, regular contact with the child; and his or her behavior demonstrates no intent to abandon the child; or

2. The party is absent or has relocated because of actual or threatened domestic or family violence by the other party.[67]

In determining the risk of abduction of a child, the court is to consider, among other factors, whether the parent about whom the fear of abduction is expressed has a history of a lack of parental cooperation, or whether there is substantiated evidence that such parent has perpetrated domestic violence[68]. California law also provides that custody orders should not be granted or modified ex parte unless there has been a showing of immediate harm to the child, such as acts of domestic violence or sexual abuse of the child[69].

To discourage parents from making false allegations of child abuse in order to gain a perceived advantage in child custody cases, including relocation cases, California law permits the Court to impose financial sanctions against a parent who knowingly makes a false allegation of child abuse or neglect[70]. The Court may also order supervised visitation for a parent, based on substantial evidence that such parent, with the intent to interfere with the other parent's lawful contact with the child, made a report of child sexual abuse, during a child custody proceeding or at any other time, that he or she knew was false at the time it was made. Any limitation of custody or visitation, including an order for supervised visitation, pursuant to this subdivision, or any statute regarding the making of a false child abuse report, is to be imposed

67 Cal. Fam. Code §§3046(a)-(a)(2).
68 Cal. Fam. Code §3048(b)(1)(G).
69 Cal. Fam. Code §3064.
70 Cal. Fam. Code §3027.1.

only after the court has determined that the limitation is necessary to protect the health, safety, and welfare of the child, and the court has considered the state's policy of assuring that children have frequent and continuing contact with both parents.[71] However, the court is not permitted to order supervised visitation solely because a parent (1) lawfully reported suspected sexual abuse of the child; (2) otherwise acted lawfully, based on a reasonable belief to determine of his or her child was the victim of sexual abuse; or (3) sought treatment for the child from a licensed mental health professional for suspected sexual abuse[72].

Uniform Child Custody Jurisdiction and Enforcement Act[73]

It may be helpful to counsel considering relocation litigation in California to have a working understanding when California will exercise jurisdiction over a child custody controversy. Whether California will exercise jurisdiction over a child custody case is determined by California's enactment of the Uniform Child Custody Jurisdiction Enforcement Act ("UCCJEA"), enacted in California as Fam. Code §§3400 *et seq*.[74] The UCCJEA, in one form or another, has been enacted in 49 of the 50 U.S. states. The lone holdout is Massachusetts, follows the Uniform Child Custody Act ("UCCJA"), the predecessor statute to the UCCJEA, and is considering again in 2013 adopting the UCCJEA.

Under the UCCJEA, only one U.S. state has jurisdiction over child custody as such the UCCJEA is designed to prevent multiplicity of custody proceedings. The UCCJEA limits the number of enforceable custody orders among the 50 states to one order.[75] Basing a custody decision on the UCCJEA generally insures the one custody decision will be enforced in all of the other 49 U.S. states.[76]

---

71 Cal. Fam. Code §3027.5(b)..

72 Cal. Fam. Code 3027.5(a).

73 California applies the UCCJEA to "foreign" (i.e., other country) custody decrees to determine whether it has child custody jurisdiction. A very important provision of the UCCJEA is if California exercises jurisdiction over child custody, California may have exclusive continuing jurisdiction for many years after a child has left the jurisdiction while one parent continues to reside in California.

74 The Uniform Law Commission provides states with non-partisan, well-conceived, and well drafted legislation that brings clarity and stability to critical areas of state statutory law. See http://www.uniformlaws.org.

75 Judicial Council form FL- 105, which must be filed and served in all child custody cases, requires each parent to identify, under penalty of perjury if a child custody proceeding involving the children of the California are pending in any other jurisdiction.

76 The UCCJEA ensures child custody orders and judgments are made in conformity with the Federal Parental Kidnapping Prevention Act (FPKPA) so a State's child custody order or judgment is enforceable in all States. The UCCJEA was enacted because the jurisdiction under the UCCJA could be different than required by the FPKPA which created enforcement problems. The UCCJEA is not a

The purpose of the UCCJEA is not only to determine which state has jurisdiction over child custody. A co-equal purpose is so custody judgments (whether of California or any of the other 49 U.S. states) are enforced in all of the other 49 U.S. states. In the United States, state court judgments are enforced beyond the geographic boundary of the state under federal law (or comity). United States Constitution, Article IV, Sec. 1, requires each state to give "Full Faith and Credit [to] the public acts, records and judicial proceedings of every other state."[77] However, Article IV, Section 1 and its enabling legislation, 28 U.S.C. §1738, have both consistently been interpreted by the United States Supreme Court as not applicable if the issuing state's judgment or order was not "final." As custody orders are never truly "final" (state child custody orders and judgments are always subject to modification in light of changed circumstances by the court that originally rendered them), the United States Supreme Court held that custody decrees were not res judicata nor entitled to full faith and credit.[78] To remedy this problem, the United States Congress enacted the Federal Parental of Kidnapping Prevention Act (FPKPA) 28 U.S.C. §1738A to govern interstate enforcement of state custody orders and judgments. Under the F PKP A, a child custody order or judgment is enforceable in all states if the order or judgment is made in conformity with the FPKPA, the principal feature of which favors the custody orders of a child's home state.

Under the UCCJEA, there are five types of jurisdiction over a child custody dispute, four of which result in one state, and one sate only, having exclusive and exclusive continuing jurisdiction over child custody: home state, significant connection, more appropriate forum, vacuum, and emergency.[79]

---

substantive custody statute, rather it determines which State has jurisdiction to make and modify child custody decrees.

[77] "The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto. The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form. Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

[78] *Halvey v. Halvey* (1947) 330 U.S. 610; *Kovacs v. Brewer (1958)* 356 U.S. 604; and *Ford v. Ford* (1962) 371 U.S. 187.

[79] UCCJEA cases have priority for hearing in California courts: "If a question of existence or exercise of jurisdiction under this part is raised in a child custody proceeding, the question, upon request of a party, must be given priority on the calendar and handled expeditiously." §3407.

Home State Jurisdiction: Under its version of the UCCJEA, California has exclusive jurisdiction to make an initial child custody order if California is the child's home state on the date of the commencement of the proceeding, California was the home state of the child within six months before the commencement of the proceeding/the child is absent from the state and a parent or person acting as a parent continues to live in the state. If a child is less than 6 months of age at the filing of a child custody proceeding, the infant's home state is where the infant resided since birth.

Significant Connection Jurisdiction: If a child does not have a home state, California may exercise exclusive child custody jurisdiction if the child has sufficient ties to California and substantial evidence concerning the child's past, present, and future care is available in California. A child need not be physically present in California for California to exercise exclusive significant connection jurisdiction. The applicable California statute is:

More Appropriate Forum: California may exercise exclusive child custody jurisdiction if the state with home state jurisdiction or significant connection jurisdiction declines to exercise jurisdiction.

Default or Vacuum Jurisdiction: California may exercise jurisdiction if no other state could exercise UCCJEA jurisdiction. This "catchall" provision ensures parents have a forum where their custody dispute can be determined.

Temporary Emergency Jurisdiction: California may exercise jurisdiction over child custody when a child is physically abandoned in California when a child is physically present in California and his or her sibling or parent has recently been mistreated or abused or is presently threatened with mistreatment or abuse. In such a circumstance, California may exercise emergency jurisdiction and make temporary orders even if a proceeding has been commenced in another state. If there is temporary emergency jurisdiction, the California's enactment of the UCCJEA requires the California judge considering assuming temporary emergency jurisdiction to immediately contact a judge in the other state to resolve the emergency, protect the safety of the child and parties, and determine the duration of its temporary orders.

Unjustifiable Conduct

Unjustifiable conduct may defeat custody jurisdiction under the UCCJEA in California. If California is a child's home state or has otherwise acquired jurisdiction because a party to the

proceeding has "engaged in unjustifiable conduct" (for example by abducting the child and hiding in California for 6 months), California will normally decline jurisdiction.

"Mirror Orders"

The California version of a "mirror order" is to register the foreign order. If there is no opposition to registration, the existing order is registered (filed) by filing and serving California Judicial Council FL 580 with the "foreign" decree. The other parent then has 20 calendar days (from service in California, longer if served outside California) to file opposition. If service is proper and the other parent does not file an objection (on Judicial Council Form FL 585, Request for Hearing on Registration of Out of State Custody Decree), the degree is enforceable in California and entitled to full faith and credit in each of the other 49 U.S. states.

If the other party objects to registration by filing form FL 585, a hearing is required before the decree is enforceable.

Registration does not bestow jurisdiction on California to modify another state's or country's custody decree.

Relationship between the law on international relocation and the incidence of child abduction

It is beyond the scope of this article to discuss the incidence of abductions to and from California abroad. For information on the scope and nature of such abductions see http://travel.state.gov/pdf/2010OutgoingCaseStats4-27-2011.pdf which lists the number of abductions of children from the U.S. in 2010 and the aggregate number of children involved in the abductions by country.[80]

Anticipated developments United States/California

Appeals: Relocation stayed pending appeal

On December 5, 2012, the United States Supreme Court heard oral argument in Chafin v. Chafin, docket 11-15355-CC and is scheduled to publish its decision February 6, 2013, its decision on whether a child is at risk of being re-returned to the United States in circumstances where an appeal is lodged after the child's return under the Hague Convention to another county. The United States District Courts of Appeal are split on that issue.

[80] More children are abducted from the U.S. to Mexico than to any other country.

In that case, Jeffrey Chafin, a U.S. Army sergeant, married a United Kingdom citizen in Scotland with whom he had one child, who has dual citizenship, United States and United Kingdom. In February 2010, Lynne Chafin traveled to Alabama with her and Sgt. Chafin's child with intent to return to Scotland in May 2010 for their child to attend school. Before Mrs. Chafin and their daughter left the U.S., Sgt. Chafin filed a Petition for Dissolution of Marriage in Alabama and obtained an order preventing the child from leaving the U.S. Mrs. Chafin filed a motion in U.S. federal district court requesting to return to Scotland with the child and citing The Hague Convention on Prevention of International Child Abduction. The district court held that the child was being unlawfully detained in the U.S. and Ms. Chafin and child returned to Scotland. Sgt. Chafin appealed, and the U.S. Court of Appeals for the Eleventh Circuit dismissed the issue as moot because the child had returned to Scotland. As the intent of the Convention is to secure the prompt return of children to the correct jurisdiction and unnecessary delay makes return more difficult, this is an important issue.[81]

At oral argument December 6, 2012, the justices seemed to struggle to find a solution to the dilemma the case presents. The concept that a non-United States citizen may escape U.S. appellate court jurisdiction by simply getting on a plane is problematic. Ms. Chafin's lawyer argued "There can be no re-return" order from the U.S. courts and father in this case may only plead his case in Scottish courts. Justice Ruth Bader Ginsburg commented that the point of the Hague Convention is to stop shuttling of children from country to country during custody disputes and the Hague Convention was mean to prevent re-return and further litigation of child custody where the child has been back in Scotland for 14 months where Scotland is a proper place to determine custody under the Convention.

Interesting the California law seems to favor the Eleventh Circuit decision in *Chafin*, as California's automatic 30 day stay after judgment on orders permitting removal of a minor child from California does not apply to return of children to a sister state or another country made pursuant to the UCCJEA, FPKPA or Hague Convention.[82]

Rise of private judging

The difficulty of, the delay in, and the discouraging nature of relocation cases seems to be giving rise to an increase in number of relocation case in which parents mediate their disputes. For several years California courts have been enduring significant budget cuts. As reductions in the California judicial budgets become deeper and deeper, family law judicial officers are hard pressed to process even cases with relatively simple issues. International relocation cases

[81] *Friedrich v. Friedrich (Friedrich II)* 6th Cir. 1996 (78 F.3d 1060, 1063 fn. 1.

[82] California Code of Civ. Pro. §917.7

litigated in California public courts face longer and longer delays in addition to delays which were intolerable under the best of judicial circumstances.

To fill the void, the practice of private judging is growing in California family law cases. In private judging, parties pay a lawyer or retired judge to act as the judge in their case with the same procedural and appellate provisions as if the cased were litigated in the public judicial system.

Rise of mediation

In addition to private judging, self-directed solutions through mediation with mediators trained in international relocation law are beginning to emerge in California. With more international relocation cases, mediators trained in international relocation issues are developing the skills to help parents settle more and more international relocation cases. This is a trend the authors strongly support.

Conclusion

International relocation cases are difficult to litigate anywhere, and California is no exception. Because these cases are fact driven, they present the family lawyer with challenges that are greater than those found in other types of family law cases.

Outcomes are difficult to predict, and a client who is already emotionally charged may well become more so upon learning that counsel is unable to give any meaningful assurance about the likely result. There are evidentiary challenges as well, because in many cases a good deal of evidence is found in the jurisdiction to which the relocating parent plans to move. Finally, counsel handling these cases are burdened with the realization that the result is likely to have a long-lasting impact on the lives of the children involved, and on the long-term relationship between the parents. Relocation cases, particularly those involving prospective moves outside the forum jurisdiction, demand the lawyer's best efforts in maintaining a sensitive "bedside manner. They also require the highest standards of professional conduct toward the other participants – the court, any mental health professionals involved, opposing counsel, and, yes, the opposing party.

At the same time, international relocation cases also present family lawyers with rewards not found in other types of cases. To those of us who chose family law because we wanted to "make a difference," these cases give us numerous opportunities to do so. Many of these matters involve cultural differences which them more interesting than other cases, while also requiring us to demonstrate a knowledge of, and sensitivity to, multicultural issues. Finally,

international relocation cases allow family lawyers to think creatively about solutions to difficult problems, both inside and outside the courtroom.

As the California courts have recognized, these are not “one size fits all” cases. The best solutions are tailored to the facts of each case and the needs of all of the family members involved, especially the children.

[End of article]