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A Moving Case

Under What Circumstances May Custodial Parents Relocate?

Can a parent who has primary physical custody move away from the location of the other parent to the extent that it diminishes the nature and amount of contact the child has with the noncustodial parent? If so, under what circumstances? Can such a move be for convenience or desire only or primarily, or must it be based on some reasonable conclusion of necessity?" That is how the court in *Marriage of Burgess*, 32 Cal.App.4th 1786, 1798 (5th Dist. 1995), framed the issues it faced concerning the desire of a custodial parent to move to another county following the parties' reaching a mediated custody plan.

While move-away cases and their problems are not new, the appropriate standard to apply in resolving them still presents analytical difficulties for courts.

In *Burgess*, the parties reached what the court called "a partial agreement" for custody of their two children. The mother and father shared joint legal custody, and the mother was to have sole physical custody but with "liberal visitation" that, as the father testified, permitted him time with the children every day except Sundays. The parties had decided other aspects of custody and visitation, including holidays and the children's birthdays. They did not agree, however, on what the custody and visitation would be if the mother left the county. When she wanted to move with the children 40 miles from Tehachapi to Lancaster to take a new job, the father objected.

At the hearing, the mother testified that she had already committed to the Lancaster job, that it was a "career advancing type of move" and that the commute from her residence to her new job was 40 minutes. She also gave several reasons why she believed the move would benefit the children, including access to schools, extracurricular activities and medical facilities.

The father testified that he did not want his time with the children to be reduced, that the children might feel he had abandoned them and that it would be difficult to change his work hours, if necessary. If the mother moved, the father wanted primary custody.

The trial court held the move was in the children's best interest and gave "liberal reasonable visitation" to the father. He appealed, asserting that the court abused its discretion in permitting the move because it deprived him of "frequent and continuing contact with his children."

The California Court of Appeal cited *Marriage of Carlson*, 229 Cal.App.3d 1330 (5th Dist. 1991) (custodial parent's move with the children denied unless compelling reasons for the move outweigh loss of noncustodial parental contact), as the "well-settled standard by which an appellate court reviews custody and visitation orders." The court stated, "The precise test is whether any rational trier of fact could conclude that the trial court order advanced the best interests of the child. We are required to uphold the ruling if it is correct on any basis, regardless of whether it is the ground relied upon by the trial judge." *Burgess* at 1797, citing *Carlson* at 1337.

The court found that the mother's intended move would have an adverse impact on the father's 'beneficial' parental role.

After briefly reviewing the Legislature's intent as expressed in California Family Code statutes governing child custody, the court found "that it is the public policy of this state to assure minor children frequent and continuing contact with both parents after the parents have separated or dissolved their marriage ... except where the contact would not be in the best interest of the child."

The *Burgess* court looked to other move-away cases that required the relocating parent to show some form of necessity for the move. See *Marriage of McGinnis*, 8 Cal.App.4th 144 (2d Dist. 1992); *Marriage of Selzer*, 29 Cal.App.4th 637 (1st Dist. 1994). The court all but ignored *Marriage of Roe*, 18 Cal.App.4th 1483 (2d Dist. 1993), which disapproved the "expedient, essential or imperative" standard of *McGinnis* as limiting the trial court's discretion, but still found the mother proved necessity. *Roe* at 1489. *Burgess* differs from the previous cases by adding "detrimental impact" and defining what constitutes a necessary move.

The court generated its own analytical framework: "The primary criteria is the best interest of the child which the legislature has determined to have as a primary factor promoting contact of the child with both parents. A move only comes into question if it detrimentally impacts this objective, and that is dependent upon the ... relationship the parents have with the child: whether the proposed move ... would substantially disrupt the objecting parent's 'established patterns of care' of the child," and whether the disruption would significantly damage the emotional bonds between parent and child."

Under the first part of the analysis, the court stated that detrimental impact must be more than inconvenience to the noncustodial parent: it must result in harm to the child that a change in the visitation schedule cannot rectify. If the objecting parent can show the move would damage the relationship, "the trial court must look to the issue of necessity of the move. Assuming the move is necessary the trial court must balance what will be lost and/or gained if there is a transfer of custody. The fact that the nature and quantity of visitation will be reduced does not per se outweigh the impact on the child of a change of custody from the primary custodial parent. The court must weigh all factors in its final decision."

The court noted that "while the parent may retain the right to move, the parent does not necessarily have the right to take the children along or insist that the other parent accommodate the moving parent's choice," and the court must evaluate whether the primary physical custody should be transferred to the objecting parent.

The court determined that "necessary" does not mean "absolutely no other alternative." Instead, the court stated that what is necessary depends on a determination of "whether not moving would impose an unreasonable hardship upon a career or upon the individual because of the length of the commute or some other discernible imposition that it is unreasonable to expect the individual to endure or [that there is] a discernible benefit that it is unreasonable to expect the individual to forego."

The court added that the necessity may also be "a consequence of the child's needs. It is in this sense that we define the term 'necessary' as utilized in *Selzer* and, in our view, intended in *McGinnis*. Further, it is in this sense that we conclude the moving parent bears the burden of proof."

Applying this analysis to the facts of *Burgess*, the court found that the mother's intended move would have an adverse impact on the father's "beneficial" parental role. The mother's commute to her new job might impose an inconvenience on her, but it did not create a necessity as the court defined that term. Neither did the court find that the children would be substantially better off in the new county, regardless of their mother's assertions. Thus, the court reversed the trial court's ruling and ordered the court to reconsider its order permitting the mother to move the children.

It seems clear that the *Burgess* court's decision turned on two essential facts: The father saw the children all but one day per week, and he was a beneficially involved parent. The court was not willing to diminish the father's custodial periods substantially so the mother could reduce her commute to work. Had the father's custodial periods been less frequent, his involvement with the children less positive or the mother's relocation more extreme, the court might have decided differently.

Justice Vartabedian's dissent in *Burgess* urged that the majority improperly imposed a "change of circumstances" test (the majority's necessity test) on the move-away parent, even though there was no permanent custody order in place, and that only the best interests of the child should have been considered. The dissent suggested that the majority's test penalized the mother because she moved away gradually rather than immediately upon separation, and thus a pattern of visitation developed that the majority did not wish to disrupt.

If the dissent's penalty concept is correct, the message that flexibility and accommodation may prove detrimental should trouble parents and family law practitioners. While the dissent may have been technically correct as to the appropriate standard to apply in this case, the majority's approach seems reasonable. In effect, the majority did apply a best-interests test, with the focus being "frequent and continuing contact," and it is difficult to see how the test the dissent urged would have produced a different result in this case.

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