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PERSPECTIVE

Rethinking move-away orders in the time of COVID-19

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In early 2020, a new plague struck the world and children suffered. COVID-19 caused confusion and inconsistencies in policies for government agencies, medical providers, schools and courts issuing child custody orders. At the onset of COVID-19, jurisdictions issued inconsistent orders, with some jurisdictions removing children from the care of front-line working parents and others finding parents in contempt for withholding a child against a court order. Given the sudden explosion of remote schooling and/or home-schooling, courts are considering novel custody arrangements involving more long-distance, equal-time share arrangements between parents living in different states.

So how should parents and courts approach a move-away case in the time of COVID?

A move-away order modifies a current custody arrangement to accommodate one parent's move to a different community. In a "move-away case," a change of custody is not justified simply because the custodial parent has chosen, for any sound good faith reason, to reside in a different location, but only if, as a result of relocation with that parent, the child will suffer detriment rendering it essential or expedient for the welfare of the child that there be a change. *Marriage of LaMusga*, 32 Cal. 4th 1072, 1099 (2004), citing *Marriage of Burgess*, 13 Cal. 4th 25, 34 (1996).

In determining whether to issue a move-away order, the court must conduct an evidentiary hearing and determine de novo the best interests of the child; this procedural



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safeguard may not be circumvented by identifying the order as “temporary.” *Andrew v. Superior Court*, 234 Cal. 4th 103, 107 (2015).

In the time of COVID-19, it may be necessary for courts to consider the effects of travel and increased exposure on the physical and mental well-being of the child under Family Code Section 3011(a) (1). According to the Centers for Disease Control and Prevention, over 600 children under the age of 18 have died in the U.S. to date from COVID-19. Vaccinations for children under the age of 12 are just now being administered. Infection with COVID-19 presents not only the risk of serious illness or death, but also long-term effects. Yet many young children are subjected to increased exposure to COVID-19 as they travel through crowded airports, on packed airplanes and congested subways, and through other public transportation hubs pursuant to move-away orders.

Family Code Section 7501(a) gives a custodial parent the right to change the residence of the child subject to the right of the court to restrain a removal that would prejudice the welfare of the child. The right of a custodial parent to move away with the child conflicts with the state’s policy of ensuring frequent and continuing contact with the noncustodial parent. Family Code Section 3020(b).

A parent with sole custody who seeks to move away and take the child has a right to change the child’s residence, subject to a court’s power to preclude a removal that would prejudice the child’s rights or welfare pursuant to Family Code Section 7501(a). In the sole custody situation, the custodial parent is not required to show a good reason for the move away. The objecting noncustodial parent must show that a change in custody is essential or expedient for the welfare of the child or that the move would be detrimental to the child. *Niko v. Foreman*, 144 Cal. App. 4th 344,

363 (2006); *LaMusga*, 32 Cal. 4th at 1096; *Marriage of C.T. & R.B.*, 33 Cal. App. 5th 87, 103 (2019); *Marriage of Seagondollar*, 139 Cal. App. 4th 1116, 1127 (2006).

In *Burgess*, the mother had temporary physical custody of the children and sought permanent physical custody in order to relocate to a new community 40 miles away. The California Supreme Court said, “in a matter involving immediate or eventual relocation by one or both parents, the trial court must take into account the presumptive right of a custodial parent to change the residence of the minor children, so long as the removal would not be prejudicial to their rights or welfare ... Accordingly, in considering all the circumstances affecting the ‘best interest’ of minor children, it may consider any effects of such relocation on their rights or welfare.” The relocating custodial parent is not required to show a change in circumstances. *Niko*, 144 Cal. App. 4th at 362-63.

When both parents share custody, however, matters become slightly more complex. Modification of a co-parenting arrangement is not a change of custody. The moving parent does not have the presumptive right to change the child’s residence, but at the same time, bears no burden of proving the move is essential or imperative. The opposing nonmoving parent need not show a substantial change in circumstances requiring a change in custody or that the move will be detrimental to the child. *Niko*, 144 Cal. App. 4th at 363-64.

When parents share joint physical custody under an existing order and one parent seeks to relocate with the child, the trial court must determine de novo what primary custody arrangement is in the children’s best interest. *Burgess*, 13 Cal. 4th at 40 n.12; *LaMusga*, 32 Cal. 4th at 1089; see also *Mark T. v. Jamie Z.*, 194 Cal. App. 4th 1115, 1127 (2011); discussed in *The Rutter Group*, Cal. Practice Guide,

Family Law Section 7.573.

The trial court must look to all the relevant circumstances bearing upon the child’s best interest. *Ruisi v. Thieriot*, 53 Cal. App. 4th 1197, 1204-06 (1997). State policy encouraging frequent visitation is but one relevant consideration. *Charisma R. v. Kristina S.*, 175 Cal. App. 4th 361, 390 (2009).

The relevant factors to be considered include the children’s ages (and, if age-appropriate, the children’s wishes); community ties; health and educational needs; the attachment and past, present and potential future relationship of the children with each parent; the anticipated impact of the move upon the children’s existing social, educational and familial relationships; and each parent’s willingness to facilitate frequent, meaningful and continuing contact with the other parent. *LaMusga*, 32 Cal. 4th 1072. These factors, commonly referred to as the “*LaMusga* factors,” are not exhaustive. *C.T. & R.B.*, 33 Cal. App. 5th at 106.

Notwithstanding concerns about COVID-19 exposure, parents are required to follow existing custody orders. The courts in *Andrew V. and Jane J. v. Superior Court*, 237 Cal. App. 4th 894 (2015), are illustrative of how courts must apply the correct standard as opposed to relying on a gut feeling or novel, yet irrelevant facts. In *Jane J.* the trial court concluded “It’s time [Father] had an opportunity to be the parent.” However, this is not the standard. Rather, as described in *LaMusga*, trial judges should be urged to consider the physical and mental impacts on children of potential exposure to COVID-19 if traveling long distances between custodial parents. Move-away orders requiring long-distance travel may impose potentially serious physical and mental burdens on young children.

According to the CDC, in 2020, mental health crises in children ages 12-17 resulting in emergency room visits increased by 31%

over the previous year, and by 24% for children ages 5-11. As recently as last month, the American Academy of Pediatrics, American Academy of Child and Adolescent Psychiatry, and Children’s Hospital Association have declared a national emergency in children’s mental health, citing the serious toll of the COVID-19 pandemic on top of existing challenges. “We are caring for young people with soaring rates of depression, anxiety, trauma, loneliness, and suicidality that will have lasting impacts on them, their families, their communities, and all of our futures,” said AACAP President Gabrielle A. Carlson, M.D.

The relevant case law emphasizes the need for children to have continuity and routine in their home life. Courts may wish to consider how this anxiety may be further exacerbated by a move-away order. *C.T. & R.B.*, 33 Cal. App. 5th at 105-07. Children’s anxiety is not limited to concerns regarding increased exposure to COVID during travel, rather, it encompasses when they will see their friends, whether they will lose an elderly grandparent because they choose not to get vaccinated or where a mask, the concern that their divorced parents may not agree on vaccinations or whether the child should attend in person-school, etc.

These anxieties are difficult for adults to handle, let alone children. Parents and judges might consider allowing children of appropriate ages express their concerns before the move-away order is put in place, and assuring the children that they will take the necessary precautions to protect their health.

Exposure to viruses and other disease carriers is nothing new. But the current pandemic puts a renewed focus on the challenges of long-distance parenting and the burdens it places on young children. This is an opportunity for both parents and judges to craft solutions to protect our younger generation.