Forum

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Parents' Desires Shouldn't Trump Best Interests of Kids

By Fred Silberberg

When it comes to determining whether a divorced parent can relocate with minor children, California law is seemingly schizophrenic. A longstanding state policy ensures "frequent and continuing contact" between the children of divorced parents. The policy has been codified for many years in that the Legislature has declared the importance of ensuring close ties under Family Code Sections 3004 and 3020.

On the other hand, this codification has little meaning when one examines another statute stipulating that a parent entitled to custody has the right to change a child's residence, subject to the court's right to restrain a move that would be detrimental to the rights of the child (Family Code Section 7501).

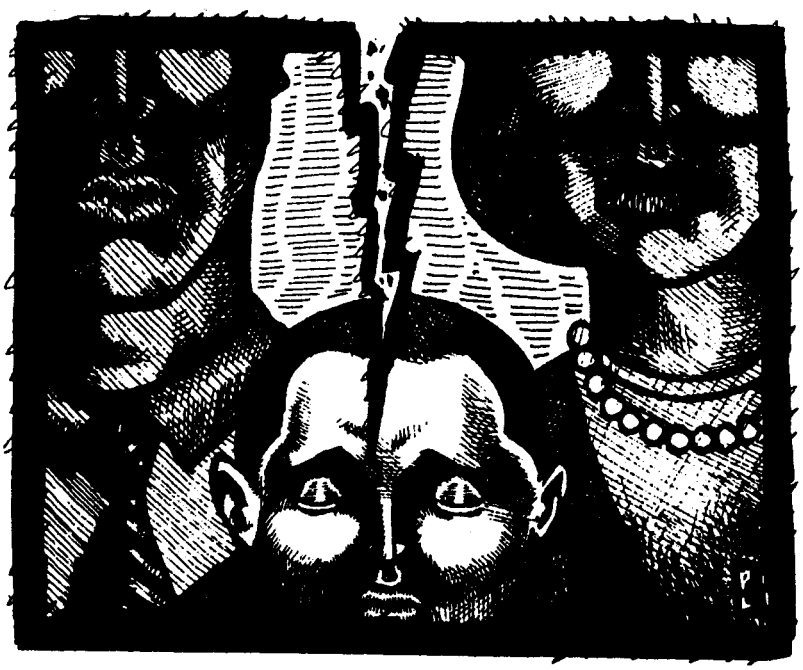
Ultimately, the rights of the child take a back seat to the desires of parents under existing case law, making the possibility of frequent and continuing contact a remote one in many cases.

Since 1996, the state Supreme Court tends to agree that the desires of parents to do what they want at the expense of their children is paramount. *Marriage of Burgess* 13 Cal.4th 25 (1996).

In deciding the landmark *Burgess* case, the court embraced the presumptive right of a parent to be able to move. This has resulted in cases of children being separated from their parents when the parent with primary custody decides that there are greener pastures beyond the Golden State.

The court now has a chance to correct this error, and if this panel has any concern about the welfare of children, it, hopefully, will do so when it issues its long-awaited ruling in *Marriage of LaMusga* in the next month or two.

We should pray that our present Supreme Court is a bit more child-centered than the 1996 court was. In deciding *Burgess*, the court had to determine whether a lower court could restrict a mother's move 40 miles away from Tehachapi to Lancaster where she had accepted a different job in the state prison system.



By allowing her to move with the children, the court made an egregious error when it declared that the custodial parent had a presumptive right to relocate. That presumptive right has been interpreted to allow parents with the higher percentage of custody time to take children away from the other parent for whimsical reasons, if they choose to do so.

Before *Burgess*, in order to move away a parent had to show a compelling reason, such as economic need. This made perfect sense. After all, it is one thing if a parent has to move because that is the only way that he or she can provide food and shelter for a child. It is quite another when a parent wants to move out of spite for the other parent, to keep a subsequent spouse happy, or simply because he or she wants to.

While it is true that society is ever-changing and increasingly mobile, children should not be treated as luggage to be carted from state to state. When we have children, we make commitments to them, and one of those commitments should be to foster an ongoing relationship between the children and the other parent (situations involving abuse or neglect excluded, of course).

The concept that a child needs both parents is a fairly basic one. Under *Burgess*, however, the interests of children are subordinate to the desires of their parents. The court apparently gave little thought to the long-term implications of its ruling.

While the parents in *Burgess* would, post-move, be 40 miles apart in a rural area where traveling between households was not all that time-consuming, the central importance of the right to move as determined by the court is equally applicable to the parent who wants to move from Manhattan Beach to Manhattan, N.Y.

Moreover, the *Burgess* court apparently gave no consideration to the fact that its decision would affect children of all ages. While "frequent and continuing contact" may be possible through electronic media or telephone with older children, it is impossible to have a telephone conversation with a 2-year-old. If we are going to continue to follow the principle espoused in *Burgess* and Family Code Section 7501, the Legislature will have to declare a new public policy as one of "frequent and continuing travel," as that would seem to be the only way to foster contact between parents and children in some of these situations.

The *LaMusga* case is a perfect example of how damaging the presumptive right to relocate can be for children. According to the custody evaluator who testified in *LaMusga*, the mother had been engaged in long-standing alienation and denigration of the father in the eyes of the children, resulting in their having a difficult relationship with him. She then remarried and had another child.

Her new husband decided to accept a position in Ohio, and she sought permission from the court to move the children there with her. The custody evaluator concluded that the mother's decision to do this would create problems no matter what the outcome.

If she prevailed in her request to relocate, the relationship between father and children would likely come to an end. If her request was denied, the children would be angry with their father for not allowing them to move with their mother and sister.

It was the prohibition of the mother's relocating the children to Ohio that brought the case to the Supreme Court. Had the mother made a commitment to live near the children's father until they graduated from high school, the situation could have been avoided and the children would not have been caught in the middle.

While certain groups have lobbied in support of a parent's presumptive right to move, claiming that restricting that right would negatively affect poor single parents, the law as it now exists elevates the rights of those parents who have no compelling reason to move above those of their children.

For example, in *Marriage of Bryant*, 91 Cal.App.4th 789 (2001), the mother was permitted to move the couple's 6- and 9-year-old children from Santa Barbara to New Mexico because she wanted to be near her parents and siblings for emotional support. She openly admitted that there was no economic reason justifying her move, in that she had sufficient trust funds on which to live. The court allowed her to relocate the children, leaving their father behind in Santa Barbara. The mother's need for "emotional support" from her family was given more weight than the children's need for emotional support from their father.

While the law is fluid and needs to change constantly to reflect the society in which we live, this is one area where turning the clock backward would be the appropriate thing to do. If economic need were a factor in permitting a move away, poor single parents would not be adversely affected, they would have a legitimate way out where truly necessary. Because economic need is no longer the controlling factor, children are adversely affected.

Our courts are supposed to protect the best interests of children. Existing law does not allow them to do that. While in the past a judge could order a change in custody to the remaining parent conditioned upon a move (which more often than not resulted in the move not taking place), that is no longer the case. Even the trial judge in *Bryant* said that while he believed he had to permit the move under existing law, the situation that would result was less than ideal.

Our Supreme Court needs to give thought to the impact that its ruling in *LaMusga* will have for children in California. The court needs to seize this opportunity to truly protect the interests of children, and to send a message to parents that they cannot do whatever they want simply because they want to.

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