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**PRESUMPTIONS, BURDENS, AND STANDARDS, OH MY:  
IN RE MARRIAGE OF LAMUSGA'S SEARCH FOR A  
SOLUTION TO RELOCATION DISPUTES**

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I. INTRODUCTION

The nuclear family and the traditional childhood home are becoming increasingly rare. The once-dominant picture of two parents living in one home, raising children together, is fading. In its wake, today's family experiences first and second marriages, job transfers, and cross-country employment opportunities. Approximately one in five Americans changes residences each year, with the bulk of relocations attributed to economic necessity and remarriage.<sup>1</sup> In such an environment, family law must evolve to accommodate the varying interests of mobile custodial parents and noncustodial parents seeking to protect their relationships with their children.

In an increasingly mobile society in which more than half of all marriages end in divorce,<sup>2</sup> courts have struggled to determine custodial rights in the event of the custodial parent's desire to relocate with the children to another area or state. In determining custodial rights, courts must balance the interests of multiple parties—the custodial parent, the noncustodial parent, and the child—in the face of what are often conflicting wishes by both parents.<sup>3</sup> Relocation by the custodial parent following a divorce can compound feelings of resentment between and toward the parents. The custodial parent wants to be free to move rather than be “held hostage” by the noncustodial parent. In turn, the noncustodial parent feels that the relocation may threaten his or her visitation rights and relationship with the child.<sup>4</sup>

These conflicting wishes play themselves out in litigation. Consider

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1. *In re Marriage of Burgess*, 913 P.2d 473, 480 (Cal. 1996) (citing Carol S. Bruch & Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 FAM. L. Q. 245, 248 (1996)).

2. *Id.*

3. Connie Peterson, *Relocation of Children by the Custodial Parent*, 65 AM. JUR. TRIALS 127, § 1 (2005).

4. Janet Leach Richards, *Children's Rights v. Parents' Rights: A Proposed Solution to the Custodial Relocation Conundrum*, 29 N.M. L. REV. 245, 245 (1999).

the following: Susan and Gary LaMusga married in 1988 and had two sons together.<sup>5</sup> In 1996 the couple divorced, and Susan requested sole, physical custody, while Gary requested joint legal and physical custody.<sup>6</sup> In order to evaluate the child custody situation, the Superior Court of Contra Costa County appointed a licensed psychologist.<sup>7</sup> After a hearing, the superior court gave joint legal custody to the parents and granted the mother “primary physical custody.”<sup>8</sup> Subsequently, Susan married another man and gave birth to another child; Gary also married again.<sup>9</sup>

In preparation for a move from California to Ohio in 2001, Susan filed an order requesting modification of the visitation schedule to allow her to relocate with their children.<sup>10</sup> Susan wished to relocate to Ohio, where she had family, in order for her new husband to accept a “more lucrative” position.<sup>11</sup> Gary objected to this order, arguing that such a move would alienate his children and “would result in his ‘being lost as their father.’”<sup>12</sup>

In *In re Marriage of LaMusga*,<sup>13</sup> the Supreme Court of California affirmed the superior court’s order transferring the primary physical custody of the children to their father, contingent upon their mother moving to Ohio, reversing the Court of Appeal for the First District.<sup>14</sup> By denying the custodial parent’s presumptive right to relocate and failing to consider the best interests of the children in the conditional custody change, the Supreme Court of California’s decision unfairly burdened the custodial parent. Such an order forces a custodial parent to choose between relocating to enhance her quality of life and giving up custody, or remaining in the same location and retaining custody. The *LaMusga* court’s conditional order also failed to consider the important public policy encouraging continuity and stability in children’s custodial arrangements.

This Casenote primarily discusses the future impact of the *LaMusga* ruling on similarly situated parents in California and jurisdictions that find this ruling persuasive. This Casenote is divided into five parts. Part

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5. *In re Marriage of LaMusga*, 88 P.3d 81, 85 (Cal. 2004).

6. *Id.*

7. *Id.*

8. *Id.* at 86.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 100.

II discusses the relevant precedent, the applicable standards in California, and the approaches used by other jurisdictions regarding the relocation of custodial parents. Part III outlines the procedural history and describes both the majority and dissent's reasoning in *In re Marriage of LaMusga*. Part IV analyzes the opinion in *LaMusga* and the effects of its approach on similarly situated parents. Part V concludes that California must place the best interests of the children at the forefront of its consideration, without unduly emphasizing burdens or presumptions favoring either parent.

## II. STANDARDS IN CALIFORNIA AND OTHER JURISDICTIONS

### A. California's Standard

In the 1996 case of *In re Marriage of Burgess*,<sup>15</sup> the Supreme Court of California sought to clarify the applicable standard in “move-away” cases.<sup>16</sup> The court held that the custodial parent has a presumptive right to change residences with their children, as long as such relocation would not prejudice the children's rights or welfare.<sup>17</sup> A change in custody in a “move-away” case is justified only if the relocation will be detrimental to the child, making it “essential or expedient for the welfare of the child that there be a change.”<sup>18</sup> The Supreme Court of California held that the noncustodial parent bears the burden of persuasion to show that the custodial change is in the child's best interests.<sup>19</sup> In defining this burden of persuasion, the Supreme Court of California emphasized the child's interest in custodial and emotional stability.<sup>20</sup>

The court then discussed the underlying policy for such a standard, recognizing many relevant conditions often present in modern-day society: the frequency of residence changes, both parents' employment

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15. *In re Marriage of Burgess*, 913 P.2d 473, 481 (Cal. 1996).

16. *Id.* at 481 n.8. This case involved an initial custody arrangement, in which the mother had temporary physical custody and planned to relocate to a new city forty miles away. In footnote 8, the Supreme Court acknowledged that the facts of the case involved an initial custody determination, but indicated that the opinion's analysis also applied to modifications of permanent custody orders. The Supreme Court found that both types of custody hearings—initial and permanent—were interrelated. Therefore, the opinion addresses both types of custody hearings in order to set clear precedent for courts of appeal. *Id.*

17. *Id.* at 478.

18. *Id.* at 482 (quoting *In re Marriage of Carney*, 598 P.2d 36 (Cal. 1979)).

19. *Id.* at 482.

20. *Id.*

needs, educational opportunities, and residing with a new spouse.<sup>21</sup> In considering these conditions, the court acknowledged that it was “unrealistic” to expect divorced parents to stay in the same area or for courts to “exert pressure” on divorced parents to remain in the same location.<sup>22</sup> The court also noted the public interest in minimizing expensive litigation over custody matters and discouraging trial courts from “micromanag[ing]” parents’ decisions concerning careers and family.<sup>23</sup>

The court’s opinion granted trial courts broad discretion regarding custodial modification in “move-away” cases. When the noncustodial parent does not establish prejudice and the custodial change is not “essential or expedient for the welfare of the child,”<sup>24</sup> the trial court may increase the noncustodial parent’s visitation during school vacations, require the custodial parent to pay transportation expenses or provide to the noncustodial parent’s residence, or modify the visitation schedule to allow longer visitation periods.<sup>25</sup>

The California legislature expressly codified the result of *In re Marriage of Burgess* in California Family Code § 7501, which states that the custodial parent has “a right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child.”<sup>26</sup> The legislature thus adopted the *Burgess* ruling as the public policy and the law of California.<sup>27</sup> The best interests of a child cannot be determined by a fixed standard.<sup>28</sup> More generally, a court may modify a custody order when circumstances change.<sup>29</sup> Changed circumstances encompass many factors, including the child’s preference, frustration of the noncustodial parent’s visiting rights by the custodial parent, and other matters affecting the child.<sup>30</sup> According to the statute, the trial court has wide discretion in its decision whether to allow the children’s relocation, from permitting relocation to a foreign country to imposing reasonable restrictions on the relocation of the child from a particular county within

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21. *Id.* at 480.

22. *Id.*

23. *Id.* at 481.

24. *Id.* at 484.

25. *Id.*

26. Cal. Fam. Code § 7501 (West 2005).

27. *Id.*

28. 33 CAL. JUR. 3d *Family Law* § 937.

29. *Id.*

30. *Id.*

the state.<sup>31</sup> The Supreme Court of California applied this standard in *LaMusga*.<sup>32</sup>

*B. Alternative Standards in Other Jurisdictions*

This section will discuss other jurisdictions' presumptions concerning the best interests of the child, the burdens of proof required by various jurisdictions in "move-away" cases, and the underlying policies of the different approaches.

Historically, most states sought to discourage relocation of a child by the custodial parent.<sup>33</sup> However, an increasing number of states now presume that the best interests of the child are served by affirming the custodial parent's decision to relocate with the child.<sup>34</sup> The growing trend in state jurisdictions is to favor the custodial parent's presumptive right to relocate, barring any bad faith motives or attempts to limit access by the noncustodial parent.<sup>35</sup> The underpinnings for such a presumption involve the custodial parent's constitutional right to travel, the best interests of the child, and the res judicata effect of the court's initial award of custody to that parent.<sup>36</sup> The presumptive right to relocate also stems from specific attributes of a custodial or noncustodial parent: the ability of the custodial parent to make decisions on behalf of the child, the opportunity to modify visitation arrangements to facilitate the noncustodial parent's relationship with the child, and the asymmetric restraint of movement for the custodial parent and lack of restraint for the noncustodial parent.<sup>37</sup>

Some courts that applied the presumptive right to relocate considered sociological research in formulating the policy behind their decisions. The social science literature relied upon by the *Burgess* court indicates that when a child's parents live separately, the most important factor for a child's welfare is the child's relationship with his or her primary caretaker.<sup>38</sup> In addition, research shows that the duration or frequency of a noncustodial parent's visits does not have a significant impact on

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31. 22 CAL. JUR. 3d *Family Law* § 938.

32. *In re Marriage of LaMusga*, 88 P.3d 81, 94 (Cal. 2004).

33. Peterson, *supra* note 3, § 3.

34. *Id.* See, e.g., *Newhouse v. Chavez*, 772 P.2d 353, 357 (N.M. Ct. App. 1988), *cert. denied*, 769 P.2d 731 (N.M. 1989) (noting "the right of a custodial parent to relocate, except where the move would clearly be contrary to the best interests of the child"); see generally *Taylor v. Taylor*, 849 S.W.2d 319 (Tenn. 1993).

35. Peterson, *supra* note 3, § 3.

36. *Id.*

37. *Id.* § 42.

38. Bruch & Bowermaster, *supra* note 1, at 247.

the child's emotional well-being.<sup>39</sup> Research shows that during relocation, although the child experiences the losses inherent in relocation, the child's relationship with the primary caretaker remains intact.<sup>40</sup> However, other social science literature suggests that children develop close attachments to both parents normally,<sup>41</sup> and that it is favorable for children to have the opportunity to begin and maintain those close attachments.<sup>42</sup> Also, some sociological literature disputes the assertion that the frequency of the noncustodial parent's visits does not have a significant impact on the child's emotional well-being.<sup>43</sup> Those studies indicate that "the highest quality relationships are maintained with access arrangements that promote a breadth of involvement between parent and child."<sup>44</sup>

Although the modern trend granting a custodial parent the presumptive right to relocate is not without its critics, the alternate restrictive standard opposing relocation is seriously flawed. Restrictive standards opposing relocation inhibit a custodial parent's ability to make future plans.<sup>45</sup> Also, the burden of litigation involved with the relocation of the custodial parent can be costly and time consuming, often to the detriment of the custodial parent's interests.<sup>46</sup> Arguments for a more restrictive regime governing the custodial parent's ability to relocate with the child cite the difficulties inherent in long-distance relocations.<sup>47</sup> The financial abilities of either parent to cover long-distance transportation costs dictate the frequency with which the child will visit the noncustodial parent.<sup>48</sup>

The burden of proof required in supporting or objecting to a change in custody due to relocation varies among states.<sup>49</sup> In some jurisdictions,

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39. *Id.* at 262.

40. *Id.* at 264.

41. Richard A. Warshak, *Social Science and Children's Best Interests in Relocation Cases: Burgess Revisited*, 34 FAM. L. Q. 83, 85 (2000).

42. *Id.*

43. *Id.* at 89-95.

44. *Id.* at 93.

45. Bruch & Bowermaster, *supra* note 1, at 264. The authors cite several situations where custodial parents may not be able to make decisions without jeopardizing primary custody: obtaining new employment, relocating closer to family, enrolling in an educational program in another geographical area, escaping hostility directed at the custodial parent or child, locating affordable housing, remarrying, or relocating with a new spouse on a job transfer. *Id.*

46. *Id.* The time-consuming nature of this litigation could impact the custodial parent's custody, if the commitments made by the custodial parent require a timely response. *Id.*

47. Jennifer Gould, *California's Move-Away Law: Are Children Being Hurt by Judicial Presumptions that Sweep Too Broadly?*, 28 GOLDEN GATE U. L. REV. 527, 554 (1998).

48. *Id.*

49. Richards, *supra* note 4, at 249-50.

custodial parents have the burden of proof to show that the relocation is in the *child's* best interests.<sup>50</sup> In *Harder v. Harder*, the Nebraska Supreme Court held that in order for the custodial parent to relocate, that parent must show that there is a legitimate reason for the relocation and that continuing to live with the parent is in the child's best interests.<sup>51</sup> In its ruling, the court indicated that the custodial parent should not be "placed in a position of deciding between custody of a child and a different career, whether it is job-related or matrimonial."<sup>52</sup> Similarly, in *Rozborski v. Rozborski*,<sup>53</sup> an Ohio appellate court held that the moving party bears the burden of proving that the proposed relocation is in the child's best interest.<sup>54</sup>

Other states place the burden of proof on the noncustodial parent to show that the proposed relocation is detrimental to the child or done in bad faith.<sup>55</sup> For example, in *Silbaugh v. Silbaugh*,<sup>56</sup> the Minnesota Supreme Court held that in order to defeat the custodial parent's presumptive right to relocate, the noncustodial parent must show either that the relocation "is not in the child's best interests *and* would endanger the child's health and well-being," or that the relocation is intended to interfere with the noncustodial parent's visitation rights.<sup>57</sup> In applying this standard, the Minnesota Supreme Court acknowledged the concerns of the noncustodial parent, but emphasized the child's best interests and "need for a sense of stability in their familial arrangements."<sup>58</sup>

Some states do not expressly assign a burden of proof; instead, these jurisdictions rely on the courts to determine the best interests of the child.<sup>59</sup> For example, in *Jaramillo v. Jaramillo*,<sup>60</sup> the Supreme Court of

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50. *Id.* at 250-51.

51. 524 N.W.2d 325, 328 (Neb. 1994).

52. *Id.* at 329.

53. 686 N.E.2d 546 (Ohio Ct. App. 1996).

54. *Id.* at 547. In this case, the custodial parent requested to relocate from Ohio to Pennsylvania. The court held that the custodial parent failed to satisfy her burden of proof and affirmatively show that the move was in the children's best interests; in addition, the custodial parent failed to rebut the psychologist's conclusion that the move was not in the best interests of the children. *Id.* Also, both parents had a shared parenting agreement that stipulated that both parties would remain in the county, unless both parties consented to a relocation or upon court approval. *Id.* at 546-47.

55. Richards, *supra* note 4, at 250.

56. 543 N.W.2d 639 (Minn. 1996).

57. *Id.* at 641.

58. *Id.* at 641-42.

59. Richards, *supra* note 4, at 250; *see also* Tropea v. Tropea, 665 N.E.2d 145, 150 (N.Y. 1996) ("While the respective rights of the custodial and noncustodial parents are unquestionably significant factors that must be considered . . . it is the rights and needs of the children that must be accorded the greatest weight.").

New Mexico declined to assign a burden of proof, stating that such “procedural formalism” harms both parents’ rights and clouds the court’s vision of the particular facts in determining the child’s best interests.<sup>61</sup> Specifically, the court stated:

[W]e believe that allocating burdens and presumptions in this context does violence to *both* parents’ rights, jeopardizes the true goal of determining what in fact *is* in the child’s best interests, and substitutes procedural formalism for the admittedly difficult task of determining, on the *facts*, how best to accommodate the interests of all parties before the court, both parents and children.<sup>62</sup>

In its reasoning, the *Jaramillo* court acknowledged the custodial parent’s constitutional right to travel and the noncustodial parent’s right to “close association and frequent contact” with his or her child.<sup>63</sup> However, the court recognized a presumption in favor of an existing joint custody arrangement, in order to give effect to *res judicata* and further the state policy favoring joint custody.<sup>64</sup> In declining to establish a burden of persuasion for either the custodial or noncustodial parent, the court recognized the risk that adversarial proceedings between parents may subordinate the child’s interests.<sup>65</sup>

Some jurisdictions recognize neither a custodial parent’s presumptive right to relocate nor a noncustodial parent’s presumptive right to object to such relocation.<sup>66</sup> Courts that have adopted such an approach rely on a case-by-case analysis due to the fact-specific nature of “move-away” cases.<sup>67</sup> However, problems may arise when there is not a presumption for or against relocation.<sup>68</sup> Without a presumption, the factual

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60. 823 P.2d 299 (N.M. 1991).

61. *Id.* at 305.

62. *Id.*

63. *Id.* at 306.

64. *Id.* at 307.

65. *Id.* at 307-08 (“When, however, the interests of a third party (or parties—the children) are not only significantly affected by the outcome of the litigation but indeed are paramount in determining that outcome, placing on one party the burden of establishing that his or her interests are the ones that should be vindicated can subordinate the interests of the third party— who may be absent and may not even be represented—in the clash over the other two parties’ competing hopes and desires.”).

66. J. Thomas Oldham, *Limitations Imposed by Family Law on a Separated Parent’s Ability to Make Significant Life Decisions: A Comparison of Relocation and Income Imputation*, 8 DUKE J. GENDER L. & POL’Y 333, 335 (2001). The author of this article points to several cases in which the courts have adopted an approach without presumptions favoring either parent: *Baures v. Lewis*, 27 Fam. L. Rep. (BNA) 1287 (N.J. 2001); *In re Marriage of Smith*, 665 N.E.2d 1209 (Ill. 1996); *Love. v. Love*, 851 P.2d 1283 (Wyo. 1993); *Schwartz v. Schwartz*, 812 P.2d 1268 (Nev. 1991).

67. *Id.*

68. Charles P. Kindregan, Jr., *Family Interests in Competition: Relocation and Visitation*, 36 SUFFOLK U. L. REV. 31, 45-46.



complexities of each case can consume judicial resources.<sup>69</sup> A court's examination of whether the relocation is in the best interests of the child may increase indeterminacy, with such a fact-intensive analysis.<sup>70</sup> In addition, the increased amount of litigation necessary to resolve these issues may harm children in these contested relocation proceedings.<sup>71</sup> Such litigation may also be costly, to the ultimate detriment of the child.<sup>72</sup> One critic argues that courts proceeding without a presumption may in fact favor the noncustodial parent's objection to the relocation.<sup>73</sup> This de facto preference for non-relocation may occur as the court places a greater evidentiary burden on the relocating custodial parent with a focus on the life decisions being made by that parent.<sup>74</sup>

On the other hand, fact-intensive examination of relocation cases may be favorable to presumptive or bright-line approaches in some instances.<sup>75</sup> Arguments in favor of a fact-intensive inquiry are based on social science literature suggesting that the impact of relocation on children depends on multiple factors.<sup>76</sup> Therefore, by examining the facts of each case, a court can better determine a particular child's best interests and tailor its decision appropriately.<sup>77</sup>

Some have argued that relocation of custodial parents should be kept out of the courts to the greatest extent possible.<sup>78</sup> The support for these arguments relies on the premise that the parents ultimately know what is in the best interests of their children.<sup>79</sup> Implicit in this argument is the belief that trial courts are unable to predict the future impact of relocation on each individual member of the family and discern what the child's best interests are.<sup>80</sup> In addition, experts and those who conduct the social science studies are unable to predict how a relocation would affect any individual family.<sup>81</sup> Instead of engaging in litigation, this argument suggests that families should use counseling, education, and

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69. *Id.*

70. Janet Leach Richards, *Resolving Relocation Issues Pursuant to the ALI Family Dissolution Principles: Are Children Better Protected?*, 2001 BYU L. REV. 1105, 1117 (2001).

71. *Id.*

72. *Id.*

73. Kindregan, *supra* note 68, at 46.

74. *Id.* at 46-47.

75. Warshak, *supra* note 41, at 84.

76. *Id.* These factors include the impact of the relocation on both parents, the children's feelings about the relocation, and other factors unique to each situation. *Id.* at 97-111.

77. *Id.*

78. Lucy S. McGough, *Starting Over: The Heuristics of Family Relocation Decision Making*, 77 ST. JOHN'S L. REV. 291, 295 (2003).

79. *Id.*

80. *Id.* at 293.

81. *Id.* at 294.

mediation in order to resolve these disputes.<sup>82</sup>

### III. *IN RE MARRIAGE OF LAMUSGA*

#### A. *The Superior Court and Court of Appeal*

In *LaMusga*, the superior court sought to determine what was in the best interests of the children. In response to Susan's motion requesting modification of the visitation schedule, the court reappointed the psychologist in order to conduct an evaluation of whether Susan's relocation with the children was in their best interests.<sup>83</sup> The psychologist found that the children were aware of the conflict between their parents and had conflicting attitudes toward their parents, but seemed "to take the mother's side."<sup>84</sup> The psychologist noted that the relocation would improve the family's quality of life, that the children shared a close relationship with Susan's new husband and daughter, and that the children had their own desire to move.<sup>85</sup> On the other hand, the psychologist noted Gary's concern that the relocation would be detrimental to his relationship with his children, and indicated that the move could create "a more detached and disconnected state with their father."<sup>86</sup> However, the psychologist also found that the relocation's negative impact "must be balanced" with the impact resulting from custody being transferred to Gary.<sup>87</sup> The psychologist observed that Susan had retained primary physical custody of the children since the divorce and that the children may experience a "significant loss" if Susan moved without them.<sup>88</sup>

The superior court framed the issue presented in this case: "whether there is sufficient evidence at this point to determine, one, that the best interests of the children is served by relocating with Mother to Ohio, or whether the best interests are served by the—a change of physical custody if [the mother] is to relocate."<sup>89</sup>

The superior court found bolstering the "tenuous and somewhat detached relationship" between the boys and their father to be of

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82. *Id.* at 295.

83. *In re Marriage of LaMusga*, 88 P.3d 81, 87 (Cal. 2004).

84. *Id.* at 87.

85. *Id.*

86. *Id.* at 88.

87. *Id.* at 87.

88. *Id.*

89. *Id.* at 89.

“primary importance.”<sup>90</sup> Based on this, the court decided that the relocation would be detrimental to the children’s welfare because it would not support “frequent and continuing contact” with their father.<sup>91</sup> The court held that if Susan wanted to relocate, physical custody of the children during the school year would be given to Gary.<sup>92</sup>

Susan appealed this order to the court of appeal, which reversed the lower court’s order transferring physical custody to Gary if Susan relocated.<sup>93</sup> The court of appeal denounced the lower court’s attempt to punish Susan for reinforcing the children’s negative comments about their father by denying her the presumptive right to relocate.<sup>94</sup> In response to this, the court of appeal found that a “history of disharmony and lack of cooperation between the parents does not permit the court to put aside the custodial parent’s presumptive right to move as punishment for such behavior.”<sup>95</sup> In clarifying this position, the court of appeal explained that:

Although such conduct may be less than estimable, it does not ipso facto deprive her of her presumptive right to move with the children. The right is defeated only by a “substantial” showing that the move will cause such detriment to the child that a change in custody is essential for the child’s welfare.<sup>96</sup>

The court of appeal found that the lower court failed to account for the disruption that the custodial change would cause.<sup>97</sup> It also found that the lower court’s remarks did not “reflect a true ‘best interest’ of the child custody evaluation because they do not give any weight to the presumption favoring continuation of the existing custodial arrangement so that the stability and continuity of the child’s environment is not disrupted.”<sup>98</sup> The court of appeal found that the lower court focused only on the relocation’s effect on the children’s relationship with their father.<sup>99</sup> In response, the court of appeal noted that there is always a substantial, negative impact on the relationship between the noncustodial parent and the child when the custodial parent relocates;

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90. *Id.*

91. *Id.*

92. *Id.* at 89.

93. *In re Marriage of LaMusga*, No. A096012, 2002 WL 968837, at \*1 (Cal. Ct. App.), *rev’d*, 88 P.3d 81 (Cal. 2004).

94. *Id.* at \*6.

95. *Id.*

96. *Id.* (quoting *In re Marriage of Burgess*, 913 P.3d 473, 482 (Cal. 1996)).

97. *Id.* at \*7.

98. *Id.*

99. *Id.*

however, the court recognized that if that impact required a change in custody, it would never allow the custodial parent to relocate.<sup>100</sup>

The court of appeal held that the father did not satisfy the “substantial” burden of proving that the relocation’s detrimental impact on the children requires a change in custody for the children’s welfare.<sup>101</sup> The court reached this result because the psychologist’s report did not examine “whether it was essential for the children’s welfare to transfer custody to Father if Mother moved to Ohio.”<sup>102</sup> In addition, the psychologist did not conclude whether the children would be negatively impacted by the relocation, but only observed that the relocation may result in some detriment.<sup>103</sup> The court of appeal examined how the underlying policy impacted the consideration of detriment: “Given the paramount importance of maintaining a stable and continuous custodial arrangement, the detriment to the children of losing their primary caregiver and their established pattern of care and emotional bonds with her outweighs the detriment of possibly jeopardizing a relationship with the noncustodial parent.”<sup>104</sup>

The court of appeal rejected the lower court’s conditional order to transfer physical custody to the father, characterizing the order as “calling the relocating parent’s bluff.”<sup>105</sup> The court also noted the absence of statutory support for testing parental attachment to the children. The court of appeal reversed the lower court’s order and held that the custodial parent cannot be prevented from changing the children’s residence, when the custodial parent is acting in good faith in deciding to relocate and the noncustodial parent has not shown that the relocation will have a detrimental impact on the child, making a change of custody essential.<sup>106</sup>

#### *B. The Supreme Court of California’s Majority Opinion*

The Supreme Court of California held that the court of appeal erred in finding that the superior court placed an “undue emphasis” on the detriment caused by the potential relocation on the relationship between the children and their father.<sup>107</sup> The court agreed that while a parent’s

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100. *Id.*

101. *Id.* at \*8.

102. *Id.*

103. *Id.* at \*9.

104. *Id.*

105. *Id.*

106. *Id.* at \*\*9-10.

107. *In re Marriage of LaMusga*, 88 P.3d 81, 94 (Cal. 2004).

past conduct should not be punishable by transferring custody, the parent's past conduct can be used as a factor for determining the custody arrangement that is in the best interests of the children.<sup>108</sup> However, the court determined that the lower court did not act in order to punish either parent.<sup>109</sup> Additionally, the Supreme Court of California indicated that the superior court misspoke when it found "that the mother might have had a presumptive right to relocate with the children if the parents had co-parented cooperatively."<sup>110</sup> The court recognized the custodial parent's presumptive right to relocate unless the proposed relocation "would result in 'prejudice' to [the children's] 'rights or welfare.'"<sup>111</sup> However, the superior court's "imperfect choice of words" did not show that it applied the incorrect standard.<sup>112</sup> Factoring the parents' past conduct into its decision, the Supreme Court of California found that the parent's history of uncooperative parenting indicated that the relocation would negatively impact the children.<sup>113</sup>

The court agreed with the court of appeal that a detriment to the relationship between the children and the noncustodial parent does not require a change in the custody arrangements.<sup>114</sup> However, trial courts have wide discretion in the decision to change custody, when faced with such detriment, and when the custodial change is in the best interests of the children.<sup>115</sup> The court found that the "mere fact that the custodial parent proposes to change the residence of the child does not automatically constitute 'changed circumstances' that require a reevaluation of an existing custody order."<sup>116</sup> To receive a reevaluation of a custody order, the noncustodial parent must show that the relocation will cause detriment to the child.<sup>117</sup> However, the court found that the court of appeal's standard placed "too great a burden on the noncustodial parent," because it altered the standard used in California precedent.<sup>118</sup> The court of appeal held that "the father bore the burden of showing 'that modification of custody is essential for the child's

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108. *Id.* at 95.

109. *Id.*

110. *Id.* Specifically, the court stated that "[t]he superior court did misspeak, however, in stating that the mother might have had a presumptive right to relocate with the children if the parents had co-parented cooperatively."

111. *Id.*

112. *Id.*

113. *Id.* at 95-96.

114. *Id.* at 96.

115. *Id.*

116. *Id.* at 97.

117. *Id.*

118. *Id.*

welfare.”<sup>119</sup> The Supreme Court of California based its decision on California precedent dictating that “a change of custody in a move-away case is justified 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.”<sup>120</sup> The court found that by imposing the requirement that the noncustodial parent show a change in custody is essential for the children’s welfare, the court of appeal imposed an “artificial requirement.”<sup>121</sup>

The court addressed the issue of bad faith in move-away cases.<sup>122</sup>

Even if the custodial parent has legitimate reasons for the proposed change in the child’s residence and is not acting simply to frustrate the noncustodial parent’s contact with the child, the court still may consider whether one reason for the move is to lessen the child’s contact with the noncustodial parent and whether that indicates, when considered in light of all the relevant factors, that a change in custody would be in the child’s best interests.<sup>123</sup>

The Supreme Court of California examined the lower court’s finding that Susan’s stated reasons for relocation were legitimate—for job opportunities, quality of life, and residence near family.<sup>124</sup> The lower court, however, also found that Susan may have had an underlying reason for relocating: to remove the children and herself from frequent interactions with Gary.<sup>125</sup> While the Supreme Court of California found that relocation cases require a lower court to determine, in its discretion, custody arrangements that are in the best interests of the children, the lower court should also consider the following factors: stability and continuity in the custodial arrangement, the distance involved in the relocation, the children’s ages, the children’s relationship with both parents; the parents’ relationship with one another, the wishes of the children if they are mature enough, the children’s maturity, the reasons for the proposed relocation, and the current custodial arrangement.<sup>126</sup>

### *C. The Supreme Court of California’s Dissenting Opinion*

Justice Kennard dissented from the majority’s decision and framed

119. *Id.* at 97.

120. *Id.* (quoting *In re Marriage of Burgess*, 913 P.2d 473, 482 (1996)).

121. *Id.* at 98.

122. *Id.* at 99.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 100.

the case as follows:

A mother who had been the primary caretaker of her two children since their birth, and who had never violated the trial court's visitation orders, wanted to provide a better life for her children by moving with them to another state where she had relatives and where her new husband had accepted a better paying job.<sup>127</sup>

Justice Kennard argued that the lower court abused its discretion in its ruling. While the lower court considered the impact of the relocation on the children's relationship with their father, it never discussed the "potential harm to the children from losing their mother as their primary caretaker, despite undisputed evidence that this harm would be significant."<sup>128</sup> The majority opinion acknowledged that the lower court must consider "the *paramount* need" for stability and continuity in custody arrangements, but as Justice Kennard argued, the majority merely assumed that the lower court took this factor into account.<sup>129</sup> According to Justice Kennard, a reviewing court cannot assume that a lower court has made the adequate considerations and therefore, the order of the superior court should have been reversed.<sup>130</sup>

Justice Kennard also argued that the lower court was required to weigh the detriment to the children's relationship with the father against the detriment resulting from transferring the children's custody away from the mother.<sup>131</sup> "Only if the child's interests are better served by changing custody than by relocating with the custodial parent may a court order custody transferred to the other parent."<sup>132</sup> Justice Kennard objected to the lower court's framing of the issue,<sup>133</sup> which stated that the "issue is the effect on these children of relocating, and the effect of the relationship with their father if they are permitted to relocate,"<sup>134</sup> and instead, argued that the impact on the children's relationship was just one factor that the lower court was required to consider.<sup>135</sup>

The dissent also criticized the lower court's lack of emphasis on the continuity and stability in custodial relationships.<sup>136</sup> Although the majority found the record devoid of consideration of the children's

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127. *Id.* (Kennard, J., dissenting).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 102 (Kennard, J., dissenting).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

interest in continuity and stability, the majority held that this oversight did not constitute an abuse of discretion because it did not indicate that the lower court “failed to properly discharge its duties.”<sup>137</sup> Justice Kennard objected to this finding and instead argued that “[i]n the absence of such a statement . . . showing that the trial court affirmatively considered and weighed the required factors, I cannot conclude that the trial court properly exercised its discretion.”<sup>138</sup> Therefore, the lower court failed to evaluate the case under the “best interest” standard because it failed to take into account the presumption favoring continuity and stability in custodial arrangements.<sup>139</sup> In so finding, the dissent argued that the Supreme Court of California should have affirmed the judgment of the court of appeal and remanded the case back to the superior court.<sup>140</sup>

#### IV. DISCUSSION

##### *A. Best Interests of the Child and the Burden of Proof*

The Supreme Court of California ordered the transfer of physical custody in the event of Susan’s relocation, without requiring Gary to establish that the custodial change was essential to prevent detriment or considering the impact of the custodial change on the children. The court erred in its finding that the superior court did not abuse its discretion in ordering that physical custody be transferred to Gary if Susan relocated to a different state. The superior court’s analysis, which assigned primary importance to the reinforcement of the children’s relationship with their father, failed to account for the best interests of the children. Given that California presumes that the custodial parent has a right to move, the superior court’s decision suggests that the court was emphasizing the noncustodial parent’s relationship with the children, rather than considering that relationship as one factor in determining the children’s best interests. Therefore, the Supreme Court of California should have held that the superior court misapplied California’s standard, which takes many factors into account and does not make the children’s relationship with one parent the determinative factor.

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137. *Id.* at 103 (Kennard, J., dissenting).

138. *Id.*

139. *Id.*

140. *Id.*



In *LaMusga*,<sup>141</sup> the Supreme Court of California sought to define more precisely the standard applicable to noncustodial parents who object to the relocation of the custodial parent. This debate over the burden of proof required in relocation cases illustrates what the Supreme Court of New Mexico in *Jaramillo v. Jaramillo*<sup>142</sup> sought to avoid. In *Jaramillo*, the court declined to assign a burden of proof so that the child's best interests remain in the forefront of the court's inquiry.<sup>143</sup> In its search for a standard, the Supreme Court of California lost sight of the ultimate determination: what is in the best interests of the children.

The Supreme Court of California failed to address the lower court's application of the factors used when determining what is in the best interests of the children. The court of appeal found that the lower court did not address how a change in custody would impact the children; instead, the lower court focused its findings on how the relocation would impact the children. The court of appeal also criticized the lower court's analysis because it did not give weight to the custodial parent's presumptive right to relocate.<sup>144</sup> The Supreme Court of California, however, found that the trial court must be allowed to exercise its discretion in the determination of the best interests of the children.<sup>145</sup> As the court of appeal's decision indicates, it is difficult to consider the best interests of the children when only one option, the relocation of the custodial parent, is found to harm the children, and the alternative, the transfer of custody from the mother to the father, is not examined in light of the best interests of the children. The Supreme Court of California emphasized the burden of proof on the noncustodial parent, while assuming that the lower court examined all of the factors relevant to the children's best interests.

By the court's reasoning, the noncustodial parent is implicitly favored, despite California's legislatively stated policy favoring continuity and stability in custody arrangements and the custodial parent's presumptive right to relocate. In deciding that relocation would cause detriment to the children without considering the detriment to the children if custody was transferred to the noncustodial parent, the court effectively announced a standard that on its face favors the custodial parent, but applies the standard in a way that favors the noncustodial parent.

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141. *Id.*

142. 823 P.2d 299 (N.M. 1991).

143. *Id.* at 305.

144. *In re Marriage of LaMusga*, No. A096012, 2002 WL 968837, at \*6 (Cal. Ct. App. Apr. 10, 2002).

145. *LaMusga*, 88 P.3d at 100.

Justice Kennard argued that the standard should involve a balancing test between the relocation with the custodial parent and the transfer of custody to the noncustodial parent.<sup>146</sup> Instead of balancing the impact on the children in either of those scenarios, the lower court focused on the detriment that the relocation could cause to the noncustodial parent's relationship with the children.<sup>147</sup> By failing to consider the impact of the children in the event that custody is transferred to the noncustodial parent, the Supreme Court of California incorrectly affirmed the lower court's holding.

California's public policy emphasis on the "paramount need for continuity and stability in custody arrangements" did not factor into the lower court's reasoning when it focused primarily on the custodial parent's relationship with the children.<sup>148</sup> The issue of stability can be used to support both the arguments for relocating with the custodial parent and staying in the same area as the noncustodial parent.<sup>149</sup> If a child remains in the custody of the relocating parent, the child must acclimate to new surroundings, potentially without the network of extended family and friends.<sup>150</sup> Although the child may experience major adjustments to the new surroundings, the child will continue to enjoy the stability involved in staying in the care of the custodial parent. On the other hand, if custody of the child is transferred to the noncustodial parent who remains in the same area, the child must adjust to living with a caretaker different from his or her previous caretaker. This adjustment, however, is likely to be cushioned by the continuing presence of extended family and friends. Therefore, California's preference for continuity and stability in custody arrangements may be undercut by these divergent views of what constitutes continuity and stability.

The conditional nature of the order changing the custodial arrangement upon the mother's relocation is also problematic. A conditional order essentially compels the mother to choose between the custody of her children and relocating with her new husband and child for better job opportunities. In its concern for the noncustodial parent's relationship with the children, the court overlooks the impact of such a ruling on the custodial parent. In its focus on the interests of the children solely in regards to their relationship with their father, the court implicitly places extra emphasis on the noncustodial parent's interests.

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146. *Id.* at 102 (Kennard, J., dissenting).

147. *Id.*

148. *See In re Marriage of Burgess*, 913 P.2d 473, 478 (Cal. 1996).

149. Kindregan, *supra* note 68, at 51.

150. *Id.*

By implicitly favoring the noncustodial parent and objecting to the court of appeal's placement of "too great a burden on the noncustodial parent,"<sup>151</sup> the Supreme Court of California placed too great a practical burden on the custodial parent in offering the difficult choice between relocation and custody. In its search for a standard, the court lost sight of its ultimate goal: to determine what is in the children's best interests.

In determining whether to allow a custodial parent to relocate, a balancing approach, as suggested by Justice Kennard in her dissenting opinion, would more fairly consider the rights of both parents and the best interests of the child. By examining the detriment to the child in the event of relocation with the custodial parent and the detriment to the child in the event of a transfer of custody to the noncustodial parent, the court would be able to keep the best interests of the child in the forefront of the consideration. At the same time, the court could avoid the difficult task of weighing the custodial parent's right to relocate and the noncustodial parent's right to frequent visitation with the child. By keeping the focus on the detriment caused to the child in both alternative situations, the court may adhere to what should be the primary concern, the best interests of the child.

Because the determination of what is in the best interests of the child necessarily relies on the facts, proceeding on presumptions regarding one parent or the other parent clouds the court's inquiry. The approach used by the Supreme Court of New Mexico, in *Jaramillo*,<sup>152</sup> is the better approach: by refusing to assign burdens and presumptions, the court may focus on the facts of each case and determine what is in the best interests of the child.<sup>153</sup> The Supreme Court of California was too engrossed in detailing the specific burden of proof that must be satisfied by the noncustodial parent, as evidenced by its complacency with the lower court's failure to examine the detriment to the children that would be caused by a transfer of custody. Thus, the Supreme Court of California's decision fell precisely into what *Jaramillo* feared: it substituted "procedural formalism" for the real issue at hand, which was to determine whether relocation would be in the children's best interests.<sup>154</sup>

Determining whether relocation with the custodial parent is in the best interests of the children is a difficult task. This difficulty can be seen in the wide variations of the issue as framed by the superior court and by

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151. *In re LaMusga*, 88 P.3d at 97.

152. *Jaramillo v. Jaramillo*, 823 P.2d 299, 305 (N.M. 1991).

153. *Id.*

154. *Id.*

Justice Kennard's dissenting opinion. Both ways of framing the issue fail to fully consider the overarching goal in deciding relocation disputes: serving the best interests of the child. Although the lower court framed the issue as whether the best interests of the children would be served by relocating with the custodial parent or by a change of physical custody if the mother was to relocate, its reasoning focused on the detriment to the children in relocation and failed to consider any detriment to the children in a change of custody. Thus, the lower court viewed the issue solely as whether the relocation would cause detriment to the children and implicitly favored the noncustodial parent by not weighing any detriment resulting from a custodial change. Justice Kennard's framing of the issue focused solely on the custodial parent's perspective: the custodial parent as the primary caretaker, who had never violated visitation orders, who sought relocation for the purpose of a better life with relatives and her new husband. The lower court implicitly favored the noncustodial parent, while the dissenting opinion favored the custodial parent. However, in both opinions, the best interests of the children were not placed in the forefront. If the lower court wished to effectuate what was in the best interests of the children, it would have considered the potential detriment of changing custody. If the dissenting opinion wished to examine the best interests of the children, it would have considered the children's perspective of the potential custodial arrangements, rather than the custodial parent's perspective alone.

## V. CONCLUSION

There is no easy solution in relocation disputes. Regardless of what a trial court decides, at least one family member will be disappointed: the custodial parent may be denied permission to relocate or else give up primary physical custody of the child; the noncustodial parent may have to witness his or her child move to a distant location; the child, meanwhile, is stuck in the middle. Regardless of what standard or test a court uses, the decision will be difficult to reach.

The primary concern in resolving these relocation disputes is to discern what is in the best interests of the child. By differing on the burdens of proof and presumptions used in determining relocation issues, and consequently favoring one parent over the other, courts can lose this focus on the child. As debates regarding the rights of custodial and noncustodial parents continue, courts will not be able to justify favoring one parent's rights over the other parent's rights. Consequently, the best approach towards resolving relocation disputes

must necessarily center on the specific facts of each case, in order to ensure that the court makes the child's best interests the centerpiece of its decision. While some argue that a fact-intensive approach will create time-consuming and expensive litigation, the import of the *LaMusga* case shows that presumptions have certainly not decreased the amount of litigation necessary. Therefore, in order to make a relocation decision based on the best interests of the child, with no preference geared towards one parent, courts should adopt a fact-intensive approach that allows the court to consider the totality of the circumstances.