Golden Gate University Law Review

Volume 28
Issue 3 *Notes and Comments*

Article 9

January 1998

California's Move-Away Law: Are Children Being Hurt by Judicial Presumptions that Sweep Too Broadly?

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COMMENT

CALIFORNIA'S MOVE-AWAY LAW: ARE CHILDREN BEING HURT BY JUDICIAL PRESUMPTIONS THAT SWEEP TOO BROADLY?

I. INTRODUCTION

Courts often modify child custody[1] orders when a parent with custody of the children desires to relocate with the children.[2] When and how to modify initial custody orders when one parent relocates is currently the most hotly debated issue in California's family law courts.[3] The growing number of these cases[4] is largely due to the continuing rise in the divorce rate coupled with an increasingly mobile society.[5] Further, economic needs often require that a parent change residence during the children's minority.[6] In its struggle to create a

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1. *See* BLACK'S LAW DICTIONARY 385 (6th ed. 1990). "Custody of children" refers to the "care, control and maintenance of a child which may be awarded by a court to one of the parents as in a divorce or separation proceeding." *Id.*

2. See Judith S. Wallerstein & Tony J. Tanke, To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce, 30 FAM. L.Q. 305 (1996).

3. Telephone Interview with Sharon Lazaneo and Jackie Karkazis, Family Law Mediation and Evaluation Specialists, in Oakland, Cal. (Aug. 24, 1997).

4. Interview with Lorie S. Nachlis, Family Lawyer, Nachlis & Fink, in San Francisco, Cal. (Jul. 8, 1997).

5. Interview with Roderic Duncan, Retired Judge of the Superior Court, in Berkeley, Cal. (Oct. 10, 1997). Judge Duncan points out that working parents are necessarily more mobile today, due in part to the rising frequency of corporate transfers. He has litigated several move-away cases involving this circumstance. *Id.*

6. *See In re* Marriage of Selzer, 34 Cal. Rptr. 2d 824, 829 (Ct. App. 1994). *See also* Lorie S. Nachlis, *Overview of Move-Away Law and Policy,* 19 FAMILY LAW NEWS 2,

standard for custody modifications in these "move-away" cases,[7] the California judiciary has established judicial presumptions to determine whether to modify the initial custody order.[8]

Critics of current "move-away" laws contend that these presumptions are overbroad and, therefore, exclude consideration of factors essential to a thorough analysis of what is best for the children involved.[9] These critics argue that move-away cases are too fact-specific and sensitive for a mechanical application of sweeping legal presumptions.[10] Factors such as children's ages, quality of the relationship with the non-moving parent, and attachment to the community vary widely among families.[11]

This Comment will summarize the various types of custody situations and their relevance in deciding move-away cases.[12] Next, this Comment will examine *In re Marriage of Burgess*,[13] a landmark California Supreme Court move-away case, and discuss its impact on family law courts, families, and attorneys

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1 (1996) [hereinafter "Nachlis"]. One American in five changes his or her residence each year, most often for economic reasons. Other reasons include remarriage, and closer proximity to extended family. *Id.*

7. *See, e.g., In re* Marriage of Whealon, 61 Cal. Rptr. 2d 559, 561 (Ct. App. 1997). Courts typically refer to cases involving a parent's desire to relocate with the children as "move-away" cases. *Id. See also* Michele A. Katz, *Tropea v. Tropea, Tropea and its Recent Aftermath: Relocation Cases Decided After Tropea,* 177 PLI/CRIM 59 (1997). In move-away cases, "the interests of a custodial parent who wishes to move away are pitted against those of a noncustodial parent who has a powerful desire to maintain frequent and regular contact with the children." *Id.* at 62. *See infra* notes 61-88 and accompanying text for a discussion of the standard used for deciding move-away cases.

8. *See In re* Marriage of Burgess, 913 P.2d 473 (Cal. 1996). The primary presumption from *Burgess* is that a custodial parent may move with the children absent a showing of detriment to the child caused by the move, because preserving the custodial relationship is paramount. *Id.* at 478.

9. Interview with Lorie S. Nachlis, *supra* note 4; Telephone Interview with Margaret Lee, Clinical Psychologist, in San Francisco, CA (Aug. 19, 1997).

10. Interview with Lorie S. Nachlis, *supra* note 4; Telephone Interview with Margaret Lee, *supra* note 9.

11. Interview with Lorie S. Nachlis, *supra* note 4.

12. *See infra* notes 25-31 and accompanying text for a discussion of the different custody situations.

13. *See In re* Marriage of Burgess, 913 P.2d 473 (Cal. 1996). *See infra* notes 54-88 and accompanying text for a summary of *Burgess*.

involved with move-away cases.[14] Included is an examination of certain factors that the *Burgess* court did not fully address in its analysis.[15] Finally, drawing upon public policy, social science research, legal commentary, and other jurisdictions' move-away laws,[16] this Comment will propose a more comprehensive approach to deciding move-away cases.[17] This approach limits the application of judicial presumptions, and allows for greater consideration of the specific facts of each case, especially through recharacterizing the types of parent-child relationships that develop after the parents separate.[18]

II. BACKGROUND

The "custodial parent" is the parent declared in the custody order to be the parent with whom the children primarily reside.[19] The "noncustodial parent" is the parent declared in the custody order as having a lesser amount of time with the children.[20] When a custodial parent gives notice to the noncustodial parent of a planned move with the children, the noncustodial parent may petition the court to prohibit the move, or to change the initial custody order if the custodial parent does move.[21] Whether a court will permit a parent to relocate with the children generally depends on the type of custody arrange-

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14. *See infra* notes 203-23 and accompanying text for a discussion of *Burgess's* impact.

15. *See infra* notes 89-223 and accompanying text for a discussion of the factors that the *Burgess* court did not fully address.

16. *See infra* notes 89-257 and accompanying text for a discussion of these sources and what they expound.

17. *See infra* notes 258-63 and accompanying text for a discussion of a proposed approach to deciding move-away cases that is broader than *Burgess's*.

18. *See infra* notes 264-85 and accompanying text for a discussion of proposed classifications of child custody.

19. *See* BLACK'S LAW DICTIONARY 385 (6th ed. 1990). Additionally, "custody" refers to the "care, control, and maintenance of a child which may be awarded by the court to one of the parents as in a divorce or separation proceeding." *Id. See infra* notes 25-31 and accompanying text for further discussion of custodial parents.

20. Interview with Roderic Duncan, Retired Judge of the Superior Court, in Berkeley, Cal. (Dec. 19, 1997).

21. *See, e.g., In re* Marriage of Rice, No. D94-00144 (Cal. Super. Ct. filed July 31, 1997).

ment currently in place.[22] Courts examine whether the parents share joint custody or a less balanced custody situation.[23] The type of custody the parents share generally determines the standard of review the courts will use to decide whether to permit a relocation.[24]

A. TYPES OF CUSTODY ARRANGEMENTS

California law recognizes two general classifications of physical custody: "joint physical custody" and "sole physical custody."[25] Under California Family Code section 3400, parents who share "joint physical custody" are each expected to spend substantial time with the children.[26] However, how equal the time share must be to be treated as joint physical custody remains unclear.[27] Many parents who co-parent under the label of "joint physical custody" actually carry out a somewhat unbalanced time share in which one parent has primary physical custody and the other has liberal visitation rights.[28] The parent with "primary physical custody" has more responsibility for the children, and is generally the parent who provides the children's main residence.[29]

California Family Code section 3007 states that a parent with "sole physical custody" has custody of the children; the

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22. *See infra* notes 61-64 and accompanying text for a discussion of how move-away cases should be evaluated based on the type of custody in place, as set forth by *In re* Marriage of Burgess, 913 P.2d 473 (Cal. 1996).

23. *See infra* notes 65-66 and accompanying text regarding how courts determine whether or not the parties have joint custody.

24. *See* Richard M. Bryan, *Beyond Burgess: One Year Later*, 20 FAM. ADVOC. 14, 15-16 (1997).

25. *See infra* notes 26-31 and accompanying text for definitions of "joint physical custody" and "sole physical custody."

26. *See* CAL. FAM. CODE § 3004 (West 1994). Section 3004 specifically defines joint physical custody as the situation in which "each of the parents [has] significant periods of physical custody." This section adds, "Joint physical custody shall be shared by the parents in such a way so as to assure a child of frequent and continuing contact with both parents." *Id.*

27. *See* M. SUE TALIA, HOW TO AVOID THE DIVORCE FROM HELL 257-258 (Nexus Publishing Company 1997) (1996).

28. *See id.*

29. *See infra* notes 39, 273-275, and accompanying text, for further discussion of "primary physical custody."

other parent has only visitation rights.[30] Thus, an order for "sole physical custody" assigns a more unbalanced time share than does a "joint physical custody" order.[31]

B. THE INITIAL CUSTODY DETERMINATION

1. The "Best Interest of the Child" Standard

If parents do not stipulate to an initial custody arrangement,[32] California courts apply the "best interest of the child" standard in making the initial custody determination.[33] Under this standard, divorce should minimally alter the environment in which children can grow into healthy, mature and educated adults.[34] California Family Code section 3011 specifically requires that the court strive to protect the contact the child has with both parents.[35]

2. The Judicial Preference for Maternal Custody Awards

California custody law has historically reflected the traditional societal view of mothers as the children's gender-appropriate domestic caretaker, and fathers as the working provider.[36] Although California statutes no longer explicitly

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30. *See* CAL. FAM. CODE § 3007 (West 1994). Section 3007 specifically states that "a child shall reside with and be under the supervision of one parent, subject to the power of the court to order visitation." *Id. See also* Martin F. Triano & Kristine Fowler Cirby, *Move Away Cases*, 1 FAM. L. NEWS (Law Offices of Martin F. Triano, San Francisco, Cal.), Oct. 1997, at 1.

31. *Compare* CAL. FAM. CODE § 3004 *with* CAL. FAM. CODE § 3007.

32. *See* Bourne v. Atchison, Topeka & Santa Fe Railway Co., 497 P.2d 110, 114 (Kan., 1972). A stipulation in this sense is an agreement made in a judicial proceeding by the parties or their attorneys. *See id.*

33. *See* CAL. FAM. CODE § 3011 (West 1994 & Supp. 1998).

34. *See* Robert Stephan Cohen & Pamela Sicher, *'Tropea' and 'Browner': The Missing Evidence,* 216 N.Y. L.J. 25, S5 (1996).

35. *See* CAL. FAM. CODE § 3011 (West 1994). Section 3011 states, "In making a determination of the best interest of the child in a [custody] proceeding . . . the court shall, among any other factors it finds relevant, consider . . . [t]he nature and amount of contact with both parents." *Id. See generally* Cohen & Sicher, *supra* note 34 (emphasizing the value of preserving the children's contact with both parents after divorce).

36. *See generally* Jennifer E. Horne, Note, *The Brady Bunch and Other Fictions: How Courts Decide Child Custody Disputes Involving Remarried Parents,* 45 STAN. L. REV. 2073 (July 1993) (examining judicial discretion used to resolve child custody disputes involving remarried parents, and in particular, detailing judges' gender stereotyping). *See also* Lynn Hecht Schafran, *Gender and Justice: Florida and the Nation,* 42

incorporate gender stereotypes,[37] actual custodial outcomes still reflect gender biases.[38] That is, courts subscribing to these stereotypes generally award sole or primary physical custody to the mother and visitation rights to the father.[39] This tendency is based largely on the status of the children's relationship with each parent.[40] Courts tend to award custody to the parent who spends the most time with the children, who is usually the mother.[41] Moreover, the mother is still frequently perceived by the courts as the parent who is better attuned to caring for children.[42] Meanwhile, since the father still tends to provide

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FLA. L. REV. 181 (1990). Ms. Schafran reviewed various task force reports on gender bias in the courts and found "widespread bias against fathers on the part of some judges who do not perceive men as being capable or appropriate primary caretakers." *Id.* at 191.

37. *See In re* Marriage of Carney, 598 P.2d 36, 38 (Cal. 1979). In the *Carney* opinion Justice Mosk wrote, "[S]ince it was amended in 1972 the [California Family C]ode no longer requires or permits the trial courts to favor the mother in determining proper custody of a child `of tender years.'" *Id.*

38. Interview with Kristi Cotton-Spence, Family Lawyer, Berra•Spence, in San Mateo, Cal. (Aug. 21, 1997). Ms. Cotten-Spence opines that in *In re* Marriage of Burgess, 913 P.2d 473 (Cal. 1996), the California Supreme Court saw the parents in stereotypical terms, casting the mother as the more domestic, caretaking parent and the father as appropriately less involved due to his work obligations. The *Burgess* court's perception is unrealistic in modern society where typically both parents have jobs outside the home. *See id. See also Amicus Curiae* Brief of Richard M. Bryan at 26, *In re* Marriage of Burgess, 913 P.2d 473 (Cal. 1996) (No. S046116). Richard Bryan wrote that in Nellis v. Renwick, No. A070565 (Cal. Ct. App. filed Aug. 9, 1996), "the trial court's decision reflects the judge's apparent view that mothers are more capable of providing day time child care than fathers." *Id.*

39. *See* ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 114 (Harvard University Press 1992). The findings of the authors' study revealed that:

> [W]hen children are residing with the mother at the time of separation, the father rarely succeeds in defeating her request for sole mother custody. When the children are living with the father, on the other hand, although the father's chances improve significantly, they are not as high. In those cases where there is dual residence at the time of separation, the father's chances of securing his requested custodial arrangement are not as high as the mother's, but are better than where there is mother residence.

Id. at 105.

40. *See id.* at 268.

41. *See id.* at 105-06.

42. *See* Ross A. Thompson, *The Role of the Father After Divorce,* 4 THE FUTURE OF CHILDREN 210 (1994). The author writes:

> If many judges believe . . . that children properly belong in maternal care—especially during their early years—the "best interests" standard provides the flexibility necessary to justify such a decision, regardless of the meaning to the child of the relationships she or he shares with each parent. Indeed, the preeminence of maternal custody awards could reflect, in part, the continuing influence of the "tender years doc-

more economic support to the children than the mother, he often spends less time with his children to meet work requirements.[43] Thus, the capacity of fathers for a meaningful post-divorce caregiving role is undermined by their pre-divorce economic support responsibility.[44]

Due to the judicial preference for maternal custody awards, fathers are often discouraged from pursuing custody arrangements which allow them a more vital role in their children's lives after divorce.[45] Consequently, divorce hurts children because of the loss of time, assistance, and affection provided by the noncustodial father.[46] Experts believe that children's compromised relationship with their noncustodial father results in lower levels of social and scholastic adjustment for these children as compared with children from families in which the parents remain together.[47] Children who lose closeness with their father in the aftermath of a divorce struggle more in their peer relationships and often suffer a loss of motivation in school.[48]

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trine" in the minds of many judges and their belief that mothers are better suited than fathers for the care of the children.

Id. at 216-17.

See also Horne, *supra* note 36. In the author's survey of cases, findings revealed that:

Many courts considered fathers favorably if they could point to a person - generally a woman - who was willing to help care for their children. In eight cases this person was the father's new wife; in seven others it was another female family member, usually his mother. Some courts also suggested that single fathers' efforts were nothing short of extraordinary, even when they had a female caretaker to assist them.

Id. at 2133.

43. *See* MACCOBY & MNOOKIN, *supra* note 39, at 268.

44. *See* Thompson, *supra* note 42, at 218-19.

45. *See id.* at 210, 217.

46. *See* Paul R. Amato, *Life-Span Adjustment of Children to Their Parents' Divorce*, 4 THE FUTURE OF CHILDREN 143, 150 (1994).

47. *See id.*

48. *See* Robert D. Hess & Kathleen A. Cameram, *Post-Divorce Family Relationships as Mediating Factors in the Consequences of Divorce for Children*, 35 J. SOC. ISSUES 79,92-95 (1979). The authors found that children who maintained close positive relationships with both parents demonstrated less stress and functioned more effectively in work and social relationships with their peers. *See id. See also* Michael Rutter, *Parent-Child Separation: Psychological Effects on the Children*, 12 J. CHILD PSYCHOL. AND PSYCHIATRY 233 (1971). Studies show that there is an increase in delinquency and antisocial behavior when the father is absent. The delinquency is much more pronounced when the father is absent due to separation or divorce rather than death. *See id.* at 241-42.

C. JUDICIAL DETERMINATIONS IN MOVE-AWAY CASES BASED ON THE PARENTS' CUSTODY ARRANGEMENT

In California's move-away cases involving parents with court-ordered "joint physical custody," the children's need for continuity and stability often leads to the judicial determination that preserving the custody status quo is in the children's best interest.[49] Consequently, a request to move with the children made by a parent with joint physical custody may be denied.[50] The parent can still relocate, but will risk losing custody by relocating.[51] By contrast, when one parent has "sole physical custody" and the noncustodial parent has visitation rights, California courts rely heavily on Family Code section 7501[52] and permit the sole custodial parent to relocate with the children unless the move would cause the children significant harm.[53]

D. *IN RE MARRIAGE OF BURGESS* REFINES CALIFORNIA'S MOVE-AWAY LAW

In 1996, the California Supreme Court addressed the issue of move-aways in deciding *In re Marriage of Burgess,*[54] and thereby established a precedent for subsequent California move-away cases.[55] In *Burgess,* the mother had sole physical custody of the children, and the father followed a detailed weekly visitation schedule, as well as an alternative schedule

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49. *See In re* Marriage of Whealon, 61 Cal. Rptr. 2d 559, 565 (Ct. App. 1997). *See also* Brody v. Kroll, 53 Cal. Rptr. 2d 280, 282 (Ct. App. 1996).

50. *See, e.g.,* Cassady v. Signorelli, 56 Cal. Rptr. 2d 545, 546 (Ct. App. 1996).

51. *See Brody,* 53 Cal. Rptr. 2d at 282.

52. *See* CAL. FAM. CODE § 7501(West 1994). Section 7501 states, "A parent entitled to the custody of a child 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." *Id.* Interview with Roderic Duncan, Retired Judge of the Superior Court, in Berkeley, Cal. (Dec. 19, 1997). Section 7501 was a relatively unknown section before the *Burgess* court used it in making its ruling. *Id. See infra* notes 54-88, 203-223, and accompanying text,regarding *In re Marriage of Burgess* and its impact.

53. See *infra* notes 77-87 and accompanying text regarding how California courts identify a move that would significantly harm the children.

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

55. *See, e.g.,* Ruisi v. Thieriot, 62 Cal. Rptr. 2d 766 (1997); *In re* Marriage of Whealon, 61 Cal. Rptr. 2d 559 (Ct. App. 1997); Cassady v. Signorelli, 56 Cal. Rptr. 2d 545 (Ct. App. 1996); Brody v. Kroll, 53 Cal. Rptr. 2d 280 (Ct. App. 1996).

for biweekly weekend visitation which was dependent on his work schedule.[56] The mother desired to move from Tehachapi, California to Lancaster, California, a distance of forty miles, for career advancement and greater access for the children to medical and school facilities.[57] The father petitioned the court to award him primary custody, testifying that the relocation would inhibit his ability to maintain his current visitation schedule.[58] The court permitted the mother to move with the children, reasoning that preserving the children's relationship with the mother outweighed preventing any resulting diminution of contact between the children and the noncustodial father.[59] A general rule emerged from *Burgess* that when the parents do not share joint physical custody, the custodial parent may move with the children unless the move is motivated by bad faith, such as to curtail the noncustodial parent's access to the children.[60]

Prior to *Burgess*, "joint physical custody" meant that each parent spent substantial time with the children.[61] The *Burgess* court narrowed the definition of "joint physical custody" to establish the standard of judicial review in move-away cases.[62] The court defined the term to mean sharing joint physical custody as mandated by court order *and* maintaining a roughly equal time share arrangement with the children.[63] Specifi-

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56. *See Burgess*, 913 P.2d at 477.

57. *See id.*

58. *See id.*

59. *See id.* See also *infra* notes 67, 93-99, and accompanying text for further discussion of the weight the *Burgess* court placed on preserving the custodial relationship.

60. *See infra* notes 67-88 and accompanying text for further discussion of *Burgess's* general rule.

61. *See supra* note 26 and accompanying text for a statutory definition of "joint physical custody." *See also In re* Marriage of Hoover, 46 Cal. Rptr. 2d 737 (Ct. App. 1995). In *Hoover*, the court stated, "[W]hat is before us is a joint physical custody situation where both parents have been actively involved since birth in rearing and caring for their child. True, mother has had more custodial time, but this is a matter of degree only." *Id.* at 742.

62. *See Burgess*, 913 P.2d at 483 n. 12.

63. *See id. See, e.g.*, Ruisi v. Thieriot, 62 Cal. Rptr. 2d 766 n. 2 (Ct. App. 1997). In *Ruisi*, the parents shared physical custody both by court order and as a factual matter. The father was awarded care of the child on Sunday, Monday and Tuesday; the mother took care of the child on Wednesday, Thursday and Friday; and the parents alternated care on Saturday, holidays and vacations. Thus, the parents had "joint physical custody" as defined by *Burgess*. *See id.*

cally, in footnote twelve of Justice Stanley Mosk's majority opinion, he stated:

> 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.' The trial court must determine de novo what arrangement for primary custody is in the best interest of the minor children.[64]

By implication, *Burgess* holds that joint physical custody does not exist where the actual arrangement between the parents approximates equal time with the children despite a court order for an unequal time share.[65] Similarly, joint physical custody does not exist under *Burgess* where the parents share joint physical custody by court order but not as a factual matter.[66]

E. THE REBUTTABLE *BURGESS* PRESUMPTION

In ruling that a parent with sole physical custody has a right to move with the children, the *Burgess* court relied on the rebuttable presumption that protecting the children's relationship with the custodial parent serves the children's best interest.[67] A noncustodial parent may rebut that presumption and

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64. *See Burgess*, 913 P.2d at 483 n. 12 (second emphasis added) (citation omitted). *See also* BLACK'S LAW DICTIONARY, 721 (6th ed. 1990). "A de novo review involves trying a matter anew the same as if it had not be heard before and as if no decision had been previously rendered." *Id.*

65 *See Burgess*, 913 P.2d at 483 n. 12.

66. *See id.*

67. *See In re* Marriage of Burgess, 913 P.2d 473 (Cal. 1996). Justice Mosk stated: "As we have repeatedly emphasized, the paramount need for continuity and stability in custody arrangements—and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker—weigh heavily in favor of maintaining ongoing custody arrangements." *Id.* at 478-479 (citing *In re* Marriage of Carney, 598 P.2d 36, 38 (Cal. 1979); Burchard v. Garay, 724 P.2d 486, 493 (Cal. 1986)).

prevent the move only by demonstrating a change of circumstances that warrants an expedient or imperative custody change to the noncustodial parent.[68] A "change of circumstances" is a change relevant to the capacity of the moving party or custodial parent to properly care for the child.[69] The "change" must not have been contemplated at the time of the original custody order.[70] In addition, the change must enhance or adversely impact the welfare of the child.[71] To demonstrate the requisite changed circumstances, the noncustodial parent must present evidence of significant changes since the initial custody order.[72]

Prior to *Burgess*, California courts traditionally did not apply the term "detriment" to custody proceedings between two

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68. *See* Burchard v. Garay, 724 P.2d 486 (Cal. 1986). In this case, the California Supreme Court explained the change of circumstances requirement in the following manner:

> In deciding between competing parental claims to custody, the court must make an award `according to the best interests of the child' . . . The changed circumstances rule is not a different test, devised to supplant the statutory test, but an adjunct to the best-interest test. It provides, in essence, that once it has been established that a particular custodial arrangement is in the best interests of the child, the court . . . should preserve the established mode of custody unless some significant change in circumstances indicates that a different arrangement would be in the child's best interest. The rule thus fosters the dual goals of judicial economy and protecting stable custody arrangements.
> *Id.* at 488 (citations omitted).

See also Carney, 598 P.2d at 38. Justice Mosk wrote in the dictum of the *Carney* opinion:

> It is settled that to justify ordering a change in custody there must generally be a persuasive showing of changed circumstances affecting the child . . . . The reasons for the rule are clear: `It is well established that the courts are reluctant to order a change of custody and will not do so except for imperative reasons; that it is desirable that there be an end of litigation and undesirable to change the child's established mode of living' (citation omitted).
> *Id.*

69. *See* BLACK'S LAW DICTIONARY 231 (6th ed. 1990).

70. *See id.*

71. *See id.*

72. *See Buchard,* 724 P.2d at 490 n. 5. Justice Broussard held that:

> [T]he duration between a prior custody determination and a later trial is immaterial to the application of the changed-circumstances rule. Once it has been determined that a particular custody serves the child's best interests, a party seeking to change custody must show a change in circumstances, whether he brings his action two weeks after the determination or ten years later.
> *Id.*

parents.[73] Rather, the courts generally invoked the detriment standard in custody litigation involving a child and a non-parent third party, such as a grandparent.[74] Pre-*Burgess* courts defined "detriment" as an expected net harm to the child, after weighing all relevant factors.[75] Such harm may result from the loss of a parent-child relationship.[76]

The *Burgess* court attached a somewhat different meaning to "detriment" when applied to a move-away situation.[77] In determining what constitutes "detriment" in a move-away, the court referred to California Family Code section 7501 which prohibits "prejudice to the rights or welfare of the child."[78] The detriment must render it "essential or expedient for the welfare of the child that there be a change [of custody]."[79] Under *Burgess*, a "change of circumstances" results in "detriment" to the child.[80] A proposed move in itself is not sufficient to demon-

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73. Interview with Bernard N. Wolf, Family Lawyer, Law Offices of Bernard N. Wolf, in San Francisco, Cal. (Jul. 21, 1997).

74. *See, e.g., In re* B.G., 523 P.2d 244 (Cal. 1974).

75. *See, e.g., In re* Marquis D., 46 Cal. Rptr. 2d 198 (Ct. App. 1995); Armando L. v. Super. Ct. of L.A. County, 42 Cal. Rptr. 2d 222 (Ct. App. 1995); *In re* Monica C., 36 Cal. Rptr. 2d 910 (Ct. App. 1995); Cody W. v. Jill V., 36 Cal. Rptr. 2d 848, 852 (Ct. App. 1994).

76. *See, e.g., Guardianship of* Phillip B., 188 Cal. Rptr. 781 (Ct. App. 1983). The court in *Phillip B.* stated, "Our law recognizes that children generally will sustain serious emotional harm when deprived of the emotional benefits flowing from a true parent-child relationship." *Id.* at 791.

77. *See In re* Marriage of Burgess, 913 P.2d 473, 482 (Cal. 1996). The court held that the custodial parent may move with the children unless the move would infringe upon the rights or welfare of the children. *See id.* at 476. It further held that the reduction in the father's visitation time that would necessarily follow from the move did not constitute such an infringement. *See id.* at 484. *See supra* notes 59-66 and accompanying text for a more detailed discussion of the *Burgess* holding.

78. *See* CAL. FAM. CODE § 7501 (West 1994). See *supra* note 52 for the complete text of section 7501.

79. *See Burgess*, 913 P.2d at 482, citing *In re* Marriage of Carney, 598 P.2d 36, 38 (Cal. 1979).

80. *See In re* Marriage of Burgess, 913 P.2d 473 (Cal. 1996). Justice Mosk stated that the court should:

> preserve the established mode of custody unless some significant change in circumstances indicates that a different arrangement would be in the child's best interests . . . 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.'

Id. at 482.

strate the change in circumstances necessary to rebut the presumption favoring preservation of the custodial relationship.[81]

Since *Burgess*, the legal use of the term "detriment" remains problematically vague in the context of move-aways.[82] Legal experts suggest that detriment refers to a long-term adverse effect that transcends the normal adjustment period of a move.[83] Because this effect is difficult to predict, courts exercise wide discretion in determining the existence of a change of circumstances that constitutes detriment.[84]

If the noncustodial parent proves that the motive for the move is to intentionally disrupt visitation between that parent and the child,[85] a court may recognize detriment and modify custody, despite the *Burgess* presumption favoring preservation of the custodial relationship.[86] Absent such a showing, however, a move's mere adverse impact on visitation rights generally is not a change in circumstances sufficient to defeat the *Burgess* presumption, because it is not expected to result in detriment to the children.[87] The move may result in a modifi-

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

82. Interview with Tony J. Tanke, Partner, Tanke & Willemsen, LLP, in Palo Alto, Cal. (Aug. 24, 1997).

83. *See* Carolyn Wilkes Kaas, *Breaking Up a Family or Putting It Back Together Again: Refining the Preference in Favor of the Parent in Third-Party Custody Cases,* 37 WM. & MARY L. REV. 1045, 1123 (1996).

84. Interview with Tony J. Tanke, *supra* note 82.

85. *See* Gruber v. Gruber, 583 A.2d 434 (Pa. 1990). The *Gruber* court held that a motive of vindictiveness may constitute detriment. It stated:

> The court must assure itself that the move is not motivated by a desire to frustrate the visitation rights of the non-custodial parent or to impede the development of a healthy, loving relationship between the child and the non-custodial parent. An aspect of this determination is the degree to which the court can be confident that the custodial spouse will comply cooperatively with alternate visitation arrangements which the move may necessitate.

Id. at 439.

86. *See, e.g.,* Cassady v. Signorelli, 56 Cal. Rptr. 2d 545, 547 (Ct. App. 1996).

87. *See* Reporter's Transcript of Proceedings at 13-14, 17, *In re* Marriage of Rice, No. D94-00144 (Cal. Super. Ct. filed July 31, 1997). Simons, J. stated in his decision:

> [T]here is certainly language in *Burgess* that would suggest that once I designated the mother as custodial parent, then I am to say father must prove positive detriment or necessity in order to get me to deny mother's motion . . . . And if there is no significant change in circumstances . . . there is no need to show positive detriment . . . . I don't believe there has been a showing of a significant change of circumstances

cation of the noncustodial parent's visitation rights, but generally not a shift in custody from one parent to the other.[88]

III. DISCUSSION

The *Burgess* decision is tailored to the specific facts of that case.[89] Additionally, the *Burgess* court relied heavily on certain expert opinion without fully considering contrary opinion.[90] As a result, the *Burgess* rules have been inappropriately applied to cases with widely different custody situations and relocation circumstances.[91] Such a mechanical application of

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. . . . [F]rom a legal standpoint the reduction in [the father's] involvement is not significant.

Id.

See also In Aaby v. Strange, 924 S.W.2d 623 (Tenn. 1996). Tennessee's move-away law resembles that of California. In Aaby, the leading move-away case in Tennessee, the noncustodial father presented expert mental health testimony that a move-away would be detrimental to the child. Nevertheless, the court held that the move-away did not establish an injury that was specific and serious enough to justify the drastic measure of changing custody, because preservation of the nature of the relationship between the child and custodial parent was paramount. *See id.* at 630.

88. *See In re* Marriage of Burgess, 913 P.2d 473 (Cal. 1996). Justice Mosk wrote:

Even if 'prejudice' is not established and a change in custody is not `essential for the welfare of the child,' however, the trial court has broad discretion to modify orders concerning contact and visitation to minimize the minor children's loss of contact and visitation with the noncustodial parent in the event of a move . . . .

Id. at 484 (citation omitted).

See also MACCOBY & MNOOKIN, *supra* note 39, at 295. The authors call attention to the consideration that:

it becomes important to know how much contact with non-residential parents is needed for those parents to sustain a close, committed relationship with their children. Is a month in the summer, plus a Christmas holiday, enough? If so, long-distance moves are not as threatening to a non-custodial parent as they otherwise would be. We do not yet know the answer to the question of how much difference the frequency of contact makes . . . .

Id.

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

90. Interview with Lorie S. Nachlis, Family Lawyer, Nachlis & Fink, in San Francisco, Cal. (Jul. 8, 1997).

91. Telephone Interview with Susan Talia, Family Lawyer, Law Offices of Susan Talia, in San Francisco, Cal. (Sept. 18, 1997). *See* Richard M. Bryan, *Beyond Burgess: One Year Later*, 20 FAM. ADVOC. 14, 15-16 (1997) [hereinafter "Bryan"]. Mr. Bryan noted, "The distance involved in *Burgess* was only 40 miles, which can be traveled in less than one hour and is not unusual for California automobile commuters. None of the heart-wrenching issues of a cross-country `move-away' were present in *Burgess*." *Id.* at 15.

Burgess precludes full consideration of other factors that may be the strongest indicators of the children's best interest.[92]

A. RESEARCH UPON WHICH THE PRESUMPTION IN *BURGESS* IS BASED

The *Burgess* court appeared to rely substantially on two of the four submitted *amicus* briefs.[93] Both *amicus* briefs argued that stability and continuity in the custodial relationship are determinative factors in the children's post-dissolution psychological adjustment.[94] The briefs cited studies indicating that children's best interests are served by maintaining the continuity of established parent-child relationships.[95] As such, the briefs asserted that children generally suffer greater harm when a custody modification results in reduced contact with the custodial parent than with the noncustodial parent.[96] The briefs also emphasized supporting a divorced parent's desire to

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92. In *Tropea v. Tropea*, 665 N.E.2d 145 (N.Y. 1996), Justice Titone wrote:
> In reality, cases in which a custodial parent's desire to relocate conflicts with the desire of a noncustodial parent to maximize visitation opportunity are simply too complex to be satisfactorily handled with any mechanical, tiered analysis that prevents or interferes with a simultaneous weighing and comparative analysis of all of the relevant facts and circumstances.

Id. at 150.

93. *See Burgess*, 913 P.2d at 483. One of the *amicus* briefs upon which the *Burgess* court heavily relied was the *Amica Curiae* Brief of Judith S. Wallerstein. The other was the *Amica Curiae* Brief of Scott Altman, Janet Bowermaster, Carol S. Bruch, Jan C. Costello, Joan Heifetz Hollinger, Lisa C. Ikemoto, Janice E. Kosel, Frances Olsen, and Kelly Weisburg. The latter brief was submitted by Carol S. Bruch and Janet Bowermaster on behalf of a group of nine law professors. The briefs the *Burgess* court did not appear to rely upon were the *Amici Curiae* Brief of Roberta M. Ikemi and Joan Zorza in support of respondent Wendy Burgess, and the *Amica Curiae* Brief of Richard M. Bryan in support of appellant Paul D. Burgess. *See id.*

94. *See Amica Curiae* Brief of Judith S. Wallerstein at 17, *In re* Marriage of Burgess, 913 P.2d 473 (Cal. 1996) (No. S046116). The Wallerstein argument also states that frequency and continuity of contact with the noncustodial parent is not nearly as significant a factor in the child's psychological development as the preservation of the custodial relationship. *See id.*

95. *See Amica Curiae* Brief of Judith S. Wallerstein at 13, 17, *In re* Marriage of Burgess, 913 P.2d 473 (Cal. 1996) (No. S046116), citing Joan B. Kelly & Judith S. Wallerstein, *The Effects of Parental Divorce: Experiences of the Child in Early Latency*, 46 AM. J. OF ORTHOPSYCHIATRY 20, 23 (1976).

96. *See Amica Curiae* Brief of Scott Altman, Janet Bowermaster, Carol S. Bruch, Jan C. Costello, Joan Heifetz Hollinger, Lisa C. Ikemoto, Janice E. Kosel, Frances Olsen, and Kelly Weisburg at 23-25, *In re* Marriage of Burgess, 913 P.2d 473 (Cal. 1996) (No. S046116).

build a new and separate life, which may involve a move to remarry, to pursue career opportunities, or to live near other family members.[97] They argued that when relocation is likely to result in a substantially enhanced quality of life for a custodial parent, often the children's best interests are indirectly but genuinely served.[98] By following the recommendations in these *amicus* briefs, the *Burgess* court "[elevated] a parent's right to relocate above the children's need for frequent and continuing contact with both parents."[99]

B. RESEARCH THAT THE *BURGESS* COURT DID NOT CONSIDER

Practitioners have criticized the *Burgess* court for not considering contrary expert opinion.[100] By giving primary weight to preserving the relationship between the children and the moving custodial parent, *Burgess* allows only a remote possibility that in some divided families, other factors may outweigh the importance of preserving the children's relationship with

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97. *See id.*

98. *See id. See also* Gruber v. Gruber, 583 A.2d 434 (Pa. 1990). Other state courts also associate the custodial parent's desire to relocate with the children's best interests. In this recent Pennsylvania case, the custodial mother wished to relocate to another state for various reasons which included the absence of close friends and family where she was, and frequent heated arguments with her ex-husband in front of her three children. Also, her financial problems threatened her ability to support her children. The contemplated move from Pennsylvania to Illinois offered the mother an opportunity to raise the children surrounded and supported by family and friends. *See id.* at 435-36. The court emphasized that the well-being of children was more closely allied with the interests and quality of life of the custodial parent and therefore could not be determined without reference to those interests. *See id.* at 440-41. The court therefore permitted the mother to relocate with the children over the father's objections. Justice Beck wrote in his majority opinion:

> We think it is undisputable, under the circumstances of this case, that appellant's ability to be an effective parent to her children is seriously undermined by the difficulty and unhappiness of her life in Pennsylvania. Conversely, there is no question that the move to Illinois is likely substantially to promote the well-being of the mother and, consequently make her a more effective, superior parent. We think it is fundamental that the best interests of the children cannot, in this case, be severed from the interests of the mother with whom they live and upon whose mental well-being they primarily depend.

Id. at 441.

99. *See* Bryan, *supra* note 91, at 15.

100. Interview with Lorie S. Nachlis, *supra* note 90. *E.g.,* Interview with Richard M. Bryan, Principal, Bryan, Hinshaw, Cohen & Barnet, in San Francisco, Cal. (Mar. 4, 1998) (pointing out that the *Burgess* court did not follow his recommendations in the *amicus* brief he submitted.)

the custodial parent.[101] The factors that the *Burgess* court neglected to thoroughly evaluate include, among others: the nature of the relationship that the children have with the noncustodial parent;[102] the age of the children;[103] the severity of conflict between the parents;[104] and the distance and economic burden of the move.[105] These factors could serve to compel a court to prohibit the relocation.[106] Despite the reliance by California courts on *Burgess's* reasoning,[107] critics argue that judicial decisions should not be based on a single threshold issue such as preserving the custodial relationship.[108] Without a more flexible analysis, they argue, children's best interests may be sacrificed for judicial uniformity.[109] Following is an examination of the factors that *Burgess* did not fully evaluate.[110]

1. The Value of the Children's Relationships with Both Parents

In California, two conflicting policies exist regarding the children's relationship with their divorced parents.[111] These policies simultaneously emphasize the importance of the non-

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101. *See Burgess*, 913 P.2d at 478-79. *See supra* note 67 for Justice Mosk's statement regarding continuity and stability in custody arrangements.

102. *See* Tropea v. Tropea, 665 N.E.2d 145, 151 (N.Y. 1996).

103. *See* Dorene Marcus & Jeffrey I. Garfinkel, *The Trial: Opposing Relocation*, 20 FAM. ADVOC. 41, 43 (1997).

104. *See Tropea*, 665 N.E.2d at 151.

105. *See* Marcus & Garfinkel, *supra* note 103, at 43.

106. *See Burgess*, 913 P.2d at 483. The *Burgess* court conceded:

> Although the interests of a minor child in the continuity and permanency of custodial placement with the primary caretaker will most often prevail, the trial court, in assessing "prejudice" to the child's welfare as a result of relocating . . . *may* take into consideration the nature of the child's existing contact with both parents . . . and the child's age, community ties, and health and educational needs.
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> *Id.* (emphasis added).

The *Burgess* court, however, stopped short of making consideration of these factors mandatory and of analyzing how much weight courts may assign to these factors. *See id.*

107. *See, e.g., In re* Marriage of Whealon, 61 Cal. Rptr. 2d 559, 561 (Ct. App. 1997).

108. Telephone Interview with Sharon Lazaneo and Jackie Karkazis, Family Law Mediation and Evaluation Specialists, in Oakland, Cal. (Oct. 10, 1997).

109. Jeremy D. Dolnick, Article, 24 PEPP. L. REV. 1113, 1117-1118 (1997).

110. *See infra* notes 111-202 and accompanying text for a discussion of those factors not fully evaluated by the *Burgess* court.

111. *See infra* notes 114-17 and accompanying text for identification of these two conflicting policies.

custodial relationship while supporting the custodial parent's decision to move with the children.[112] The *Burgess* court neglected to fully acknowledge the importance of the noncustodial relationship.[113]

Public policy inherent in California Family Code section 3020 highly values the noncustodial relationship and emphasizes the quantity of time with the noncustodial parent as critical to the preservation of that relationship.[114] Specifically, section 3020 states 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 . . . ."[115]

At the same time, in cases in which a custodial parent is moving to remarry, public policy discourages forcing a parent to choose between her children and her new spouse, and therefore supports a custodial parent's move with the children.[116] This public policy is reflected in California Family Code section 7501 which states that "[a] parent entitled to the custody of a child has a right to change the residence of the child . . . ."[117]

California's conflicting public policies send mixed messages to family courts that struggle with the move-away issue.[118] However, the *Burgess* presumption, by valuing quality of time over quantity of time with the noncustodial parent, favors pre-

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112. See *infra* notes 118-20 and accompanying text for a discussion of how these two public policies simultaneously influence move-away adjudications.

113. *See In re* Marriage of Burgess, 913 P.2d 473 (Cal. 1996). In his dissent, Justice Baxter recognized this shortcoming by stating, "As our statutory law makes clear, California's public policy strongly favors the maximum contact between a minor child and `both' of his separated parents." *Id.* at 486 (citation omitted).

114. *See* CAL. FAM. CODE § 3020 (West Supp. 1998).

115. CAL. FAM. CODE § 3020(b).

116. *See Amica Curiae* Brief of Scott Altman, Janet Bowermaster, Carol S. Bruch, Jan C. Costello, Joan Heifetz Hollinger, Lisa C. Ikemoto, Janice E. Kosel, Frances Olsen, and Kelly Weisburg at 17-23, *In re* Marriage of Burgess, 913 P.2d 473 (Cal. 1996) (No. S046116).

117. *See* CAL. FAM. CODE § 7501 (West 1994).

118. Telephone Interview with Richard M. Bryan, Principal, Bryan, Hinshaw, Cohen & Barnet, in San Francisco, Cal. (Mar. 4, 1998).

serving the custodial relationship at the cost of weakening the noncustodial relationship.[119] Unfortunately, this preference exists even when the noncustodial parent is as significant in the children's lives as the custodial parent by serving as a role model or providing abundant emotional support and nurturance.[120]

As post-*Burgess* courts favor a move by the custodial mother over insuring continuity of contact with the noncustodial father,[121] the resulting loss of contact with the noncustodial father adversely affects the children.[122] In many cases, reduced visitation after a move-away results in the foregone opportunity for future contact with a parent who may have been capable of providing love, support, and a link to the children's heritage.[123] That parent becomes a visitor in the children's lives, thereby weakening the parent-child bond that existed before the relocation.[124]

Recently, child psychologists have emphasized the importance of both parents to the children's well-being,[125] and legal experts have advocated strongly for the noncustodial father.[126]

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119. *See* Lorie S. Nachlis, *Overview of Move-Away Law and Policy,* 19 FAMILY LAW NEWS 2, 3 (1996). *Burgess* regards the relationship between the noncustodial parent and the child as relatively unimportant. *See id.*

120. Telephone Interview with Sharon Lazaneo and Jackie Karkazis, Family Law Mediation and Evaluation Specialists, in Oakland, Cal. (Oct. 10, 1997).

121. *See, e.g., In re* Marriage of Whealon, 61 Cal. Rptr. 2d 559, 563-64 (Ct. App. 1997).

122. *See* Paul R. Amato, *Life-Span Adjustment of Children to Their Parents' Divorce,* 4 THE FUTURE OF CHILDREN 143, 150 (1994) (discussing the repercussions of parental absence).

123. *See id.*

124. *See* Robert Stephan Cohen & Pamela Sicher, *`Tropea' and `Browner': The Missing Evidence,* 216 N.Y. L.J. 25, S5 (1996).

125. *See* Amato, *supra* note 122, at 153.

126. Telephone Interview with Sharon Lazaneo and Jackie Karkazis, Family Law Mediation and Evaluation Specialists, in Oakland, Cal. (Oct. 10, 1997). *See* ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 286 (Harvard University Press 1992). The authors stress that:

> children who primarily reside with their mother can nevertheless receive a variety of benefits—psychological, social, and economic—from a continuing relationship with their father . . . . [T]he relationship with the father . . . can provide emotional support in times of crisis and possible guidance for the child over the years. A father who has remained in contact is also more likely to provide substitute care should some-

Such an emphasis has resulted in an increased interest by fathers in joint custody; fathers appear to be more satisfied with an approximately equal time share than with a visitation schedule.[127]

Moreover, recent case law reflects this emphasis on the importance of both parents.[128] For example, in *Cassady v. Signorelli*,[129] although the parents had a court order for joint physical custody, the daughter primarily resided with the mother, and the father enjoyed regular and frequent visitations with the daughter.[130] When the mother proposed to move from California to Florida with the daughter, the father protested.[131] The court denied the mother's request to relocate with the child, holding that it was not in the child's best interest to move away from her father with whom she shared a close relationship.[132]

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thing happen to the custodial mother or to the child's relationship with the mother.

Id.

127. *See* Amato, *supra* note 122, at 153.

128. *See infra* notes 129-32 and accompanying text for a discussion of a case that exemplifies the recent judicial emphasis on the importance of both parents in the children's lives.

129. *See* Cassady v. Signorelli, 56 Cal. Rptr. 2d 545 (Ct. App. 1996). The *Cassady* court's ruling appears to misapply *Burgess's* reasoning. It focused on whether, according to *Burgess*, the trial court abused its discretion in concluding that the parties' custody arrangement was in the daughter's best interest. *Id.* at 546-47. The *Cassady* court prohibited the mother's relocation with the daughter primarily because it found that her job prospects in Florida were not realistic, and therefore not a strong enough reason to deny the daughter the continued close proximity to her father with whom she shared a good relationship. *Id.* at 547-49. The *Cassady* holding is not wholly consistent with *Burgess's* primary holding — that a custodial parent is free to relocate with the child barring a vindictive motive. Specifically, in *Cassady*, Justice Peterson wrote:

> Contrary to mother's contentions, the trial court did not err by failing to give proper weight to the presumption that mother, as the primary physical caretaker, should be permitted to relocate unless relocation was not in Grace's best interests. (See *Burgess, supra,* 13 Cal.4th at p. 32, 51 Cal.Rptr.2d 444, 913 P.2d 473.) Rather, the trial court properly exercised its great discretion to determine the best interests of Grace, and decided a relocation of her residence based only upon mother's somewhat whimsical plans and very uncertain prospects in Florida was not in Grace's best interests. (Ibid)

Id. at 548.

130. *See id.* at 547.

131. *See id.*

132. *See id.* at 545, 546.

2. The Children's Ages

Just as the age of a child is an important consideration in determining the initial custody order, age should also be considered in custody modifications that result from the custodial parent's relocation.[133] Although the *Burgess* court noted the significance of age in a footnote and in a brief acknowledgment of California Family Code section 3042, which mandates that courts consider the children's age in custody determinations,[134] it stopped short of qualifying it as a necessary factor to be considered in a move-away adjudication.[135]

Typically, children under two years of age are more dependent on the custodial parent, who is generally the mother.[136] As children mature, however, their psychological growth and their diversified needs demand far broader parental roles and responsibilities from both parents.[137] As both parents assume meaningful but different roles and relationships with their maturing children, each parent may become a "primary parent" in separate ways.[138] Often, children gradually regard each parent as a gender role model, and later, as a friend and advisor.[139] Therefore, when custody modifications involve children past infancy, more weight should be given to the value of main-

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133. Interview with Lorie S. Nachlis, *supra* note 90.

134. *See In re* Marriage of Burgess, 913 P.2d 473, 483 (Cal. 1996). Justice Mosk cited California Family Code section 3042(a) which states that "[i]f a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to the wishes of the child in making an order granting or modifying custody." *Id.* He also noted "that amica curiae Professor Judith S. Wallerstein . . . observes that `reasonably mature adolescents . . . should be given the choice . . . as to whether they wish to move with the moving parent.'" *Id.* at 483 n.11.

135. *See id.* at 483.

136. *See* Sandy W. Barnet & Richard M. Bryan, *A Blueprint for a Move-Away Case Part II: The Non-Move-Away Parent,* 18 FAM. L. NEWS 4, 5 (1996) [hereinafter "Barnet & Bryan"]. Young children's dependency on the mother is especially strong if a mother is still nursing. *See id.*

137. *See* Ross A. Thompson, *The Role of the Father After Divorce,* 4 THE FUTURE OF CHILDREN 210, 217 (1994).

138. *See id.* The "primary" parent is the parent who plays a more central caretaking role in the children's lives. *See id.*

139. Telephone Interview with Kimberly B. Hogan, Clinical Psychologist, in Berkeley, Cal. (Mar. 8, 1998); *see* Thompson, *supra* note 137, at 219.

taining relationships with both parents rather than just the custodial parent.[140]

Additionally, for older children, the importance of school, established friendships, and a familiar neighborhood, argue against a move-away.[141] For example, in a 1986 California case, *In re Marriage of Rosson,*[142] the custodial mother wished to relocate with the children.[143] The children, ages ten and thirteen, did not want to leave their familiar surroundings and expressed a clear wish to reside with their father who lived locally rather than move long-distance with their mother.[144] Despite the mother's status as the children's "psychological" parent,[145] the court gave deference to the children's wishes and denied the mother's request to relocate with the children.[146] Thus, as *Rosson* demonstrates, a move away from a parent may have a more powerful adverse impact on children at one age or developmental stage than another.[147]

Had this case been decided after *Burgess*,[148] however, the court may not have exercised the flexibility to consider these important factors, because of the *Burgess* court's emphasis on preserving the custodial relationship.[149] Under a *Burgess*

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140. *See* Thompson, *supra* note 137, at 221.

141. *See* Barnet & Bryan, *supra* note 136, at 6.

142. *See In re* Marriage of Rosson, 224 Cal. Rptr. 250 (Ct. App. 1986).

143. *See id.* at 254.

144. *See id.* at 254-55.

145. *See* Jennifer Klein Mangnall, *Stepparent Custody Rights After Divorce*, 26 SW. U. L. REV. 399 (1997). A 'psychological parent' is "one who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological need for a parent, as well as the child's physical needs." *Id.* at 416 (*quoting* JOSEPH GOLDSTEIN, ET AL., BEYOND THE BEST INTEREST OF THE CHILD 98 (The Free Press 1979) (1973)). *See also* Jennifer E. Horne, Note, *The Brady Bunch and Other Fictions: How Courts Decide Child Custody Disputes Involving Remarried Parents,* 45 STAN. L. REV. 2073 (July 1993). The author recognizes that the psychological parent is the person to whom the children are most bonded. This parent "may or may not be their primary caretaker, and . . . judges should conduct psychological evaluations to determine how children feel about each parent." *Id.* at 2087. *See also Guardianship of* Phillip B., 188 Cal. Rptr. 781, 789 (Ct. App. 1983) (considering the role of a "psychological parent" in a custody dispute between the child's biological parent and grandparents).

146. *See Rosson*, 224 Cal. Rptr. at 259-260.

147. *See* Marcus & Garfinkel, *supra* note 103, at 43.

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

149. *See id.* at 478-79.

analysis, the *Rosson* court probably would have permitted the mother's relocation with the children, subordinating the children's best interests to the overriding concern with maintaining the custodial relationship.[150]

3. The Severity of Parental Conflict

Another factor the *Burgess* court neglected to thoroughly account for is how the parents relate to each other.[151] Joint physical custody or sole physical custody with liberal visitation are generally beneficial arrangements for children where divorced parents cooperate with each other.[152] Their cooperative interaction contributes to the children's healthy development and peace of mind.[153] Despite the growing frequency of fairly balanced custody arrangements, however, many parents do not cooperate with each other in sharing parenting responsibilities.[154] Courts need to consider the type of custody that is best for children when parents maintain an antagonistic relationship with each other.[155]

Legal experts proffer conflicting ideas about what type of custody arrangements are better for children in situations involving combative parents.[156] Where parents with joint physi-

150. *Compare Rosson*, 224 Cal. Rptr. at 256 (holding that, given the children's ages and maturity, their preference to remain in the community had to be given serious consideration by the court where the issue was whether the children should be moved from the place where they have lived for most of their lives, and where a devoted parent remaining in the community wished to have the children reside with him), *with Burgess*, 913 P.2d at 478 (holding that the paramount need for continuity and stability in custody arrangements, and harm that may result from disrupting established patterns of care and emotional bonds with the primary caretaker, weigh heavily in favor of permitting the custodial mother to relocate with the children).

151. Interview with Lorie S. Nachlis, *supra* note 90.

152. *See* Amato, *supra* note 122, at 154.

153. *See* Judith S. Wallerstein & Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L.Q. 305, 311 (1996) [hereinafter "Wallerstein & Tanke"]. The authors add that without harmonic relations between the parents, the children's sense of security is threatened, and they may "view the world as an armed camp in which the child can trust no one." *Id.*

154. *See* Frank F. Furstenberg, Jr., *History and Current Status of Divorce in the United States*, 4 THE FUTURE OF CHILDREN 29, 36 (1994).

155. Interview with Lorie S. Nachlis, *supra* note 90.

156. *See infra* notes 157-85 and accompanying text for discussion of desirable custody arrangements when parents do not cooperate with each other.

cal custody maintain a state of severe parental discord, one pool of legal experts discourage co-parenting plans that require careful coordination between the parents of the children's social, academic, and extracurricular schedules.[157] Similarly, where parents in conflict have an arrangement of sole physical custody with noncustodial parent visitation, these experts advise against frequent visits with the noncustodial parent.[158] They reason that children do not benefit from being tossed into the tumultuous sea of resentment, anger, and discontent that flows too frequently from their parents' divorce.[159]

Specifically, these legal experts argue that although a generous time share between hostile parents may preserve contact between the children and each parent, it may also exacerbate conflict between the parents.[160] Such exacerbated conflict often leads to parental alienation which is harmful to the children's psychological well-being.[161] Parental alienation results when one parent, usually the custodial parent, deliberately attempts to turn the children against the other parent, often by making disparaging comments about the other parent to the children.[162] Children may become emotionally troubled and

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157. Interview with Lorie S. Nachlis, *supra* note 90. *See* Amato, *supra* note 122, at 154. *See also* Wallerstein & Tanke, *supra* note 153, at 311. High conflict between divorced parents with shared custody "can severely threaten the child's sense of security, confirming a view of the world as an armed camp in which the child can trust no one." *Id.*

158. *See* Amato, *supra* note 122, at 150. *See also* Janet R. Johnston, *High-Conflict Divorce,* 4 THE FUTURE OF CHILDREN 165, 176 (1994) [hereinafter "Johnston"].

159. *See* Sondra Miller, *Whatever Happened to the `Best Interests' Analysis in New York Relocation Cases?,* 15 PACE L. REV. 339, 388 (1995).

160. *See* Riva Nelson, *Parental Hostility, Conflict, and Communication in Joint and Sole Custody Families,* 13 JOURNAL OF DIVORCE 145, 155-57 (1989).

161. *See* Amato, *supra* note 122, at 154. *See also* Janet R. Johnston, Marsha Kline & Jeanne M. Tschann, *Ongoing Post-Divorce Conflict: Effects on Children of Joint Custody and Frequent Access,* 59 AM. J. OF ORTHOPSHYCHIATRY 576, 578 (1989) [hereinafter "Johnston, Kline & Tschann"]. For example, the authors conducted a study involving 100 children (ages 1 to 12) of high conflict divorce. The parents in the study spoke disparagingly about the other parent to their children. Findings of the study revealed that young children who had more alternating time with these discordant parents were more emotionally and behaviorally disturbed. *See id.* Specifically, they were more depressed, withdrawn, and/or uncommunicative, had more somatic symptoms, and tended to be more aggressive. *See id.* at 581-88.

162. *See* M. SUE TALIA, HOW TO AVOID THE DIVORCE FROM HELL 111-13 (Nexus Publishing Company) (1996) [hereinafter "TALIA"]. *But see* MACCOBY & MNOOKIN,

exhibit behavioral problems.[163] Therefore, when parents are unable to cooperate, or when one parent is violent or abusive to the other parent, many experts recommend a sole custody arrangement with minimal visitation.[164]

However, such a custody arrangement is not entirely beneficial to children.[165] The adverse effects of the judicial tendency to award sole physical custody in situations where parents conflict sharply include: reducing the custodial parent's motivation to cooperate with the noncustodial parent, further threatening the children's bond with the noncustodial parent, and increasing litigation.[166] To begin, where courts tend to award sole physical custody in situations of extreme parental conflict, parents may use this judicial tendency to their advantage.[167] Parents recognize that once they have sole physical custody, courts generally will rely on the *Burgess* presumption favoring preservation of the custodial relationship and permit a move with the children.[168] As a result, a primary parent may choose not to work through conflict with the other parent since doing so could reduce the chances of being awarded sole physical custody.[169] Courts, therefore, should be wary of the potential for

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supra note 126, at 275. "A mother's conviction that it is good for the children to sustain their relationship with their father is strongly associated with sustaining contact." *Id.*

163. *See* Leslie Milk, *Studies Say Relaxed Divorce Laws Have Hit Hardest at Kids,* STAR-TRIB. OF MINNEAPOLIS-ST. PAUL, Jan. 2, 1996, at 01E, citing Joan B. Kelly, Executive Director of the Northern California Mediation Center, Corte Madera, CA. Additionally, research on adolescents shows that when they feel caught between parents, they too are more likely to exhibit depression and anxiety, and they often engage in "deviant behaviors" even years after their parents separate. *See id. See also* Johnston, Kline & Tschann, *supra* note 161, at 576.

164. *See* Amato, *supra* note 122, at 154. An arrangement that involves minimal coordination between intensely hostile parents protects the child from parental friction. *See id.*

165. Interview with Tony J. Tanke, Partner, Tanke & Willemsen, LLP, in Palo Alto, Cal. (Aug. 24, 1997).

166. *See infra* notes 167-76 and accompanying text for further discussion of these adverse effects.

167. Interview with Tony J. Tanke, *supra* note 165.

168. *Id.*

169. *Id.*

the *Burgess* presumption to discourage parents in a custody dispute from trying to cooperate.[170]

Courts should also consider that a hostile custodial parent often does little to facilitate the noncustodial relationship.[171] If a move-away under such circumstances is permitted, the added distance increases the risk that the children will lose their relationship with the noncustodial parent entirely.[172] For example, the moving parent may be so blinded by ill feelings toward the other parent that she fails to support the children in working through their feelings of loss with regard to the noncustodial parent.[173] If left to manage such feelings of loss on their own, young children may reason the nonmoving parent must not be a good person.[174] Additionally, this unsupportive behavior by the custodial parent can in turn motivate a resentful noncustodial parent to appeal a custody modification.[175] Perpetual hostility and litigation between parents battling for custody in the face of a move can ultimately hurt the children, who are often used as pawns in their parents' power struggle.[176]

A separate school of legal experts encourages joint physical custody even when divorced parents are locked in conflict with each other.[177] These experts reason that parents who refuse to cooperate often have difficult personalities which may include traits of distrustfulness and a reduced ability to communicate.[178] Despite the conflict between the divorced parents, the children may benefit from a balanced time share because one parent's strengths can balance out the other's weaknesses.[179]

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170. Telephone Interview with Margaret Lee, Clinical Psychologist, in San Francisco, CA (Aug. 19, 1997).

171. *See id.*

172. *See id.*

173. *See id.* When the moving parent neglects to help the children through their separation from the nonmoving parent, the impact of the loss is thus greater. *Id.*

174. *See id.*

175. Telephone Interview with Susan Talia, *supra* note 91.

176. Telephone Interview with Margaret Lee, *supra* note 170.

177. *See id. See generally* Johnston, Kline & Tschann, *supra* note 161, at 579 (describing personality shortcomings in parents who cannot settle their differences).

178. Telephone Interview with Margaret Lee, *supra* note 170.

179. *Id.*

Additionally, the balanced time share may be especially valuable for very young children, because they "have difficulty remembering an absent parent unless access occurs at more frequent intervals."[180]

These legal experts further contend that where hostile parents do not share joint physical custody, the children's need for a stable community environment is heightened.[181] Thus, where hostile parents fail to protect the children from their own disturbed attitudes and behavior toward each other, the children's best interests may not be served by permitting the custodial parent to move with the children.[182] A move increases the disruption in the children's lives.[183] It therefore may be appropriate to give greater weight in these custody decisions to providing the child with continuity in relationships and a stable environment.[184] Prohibiting the children's move enables them to continue receiving the support of teachers and peers, and to remain in their own neighborhood and school environments.[185]

4. The Distance of the Move-Away

A move-away is not formally defined by California's Family Code.[186] Further, courts have not established formal guidelines to manage the variability of distance in move-away cases.[187] The *Burgess* court in particular did not specifically address the distance factor, thereby failing to distinguish a short-distance move from a long-distance move.[188]

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180. Janet R. Johnston, *supra* note 158, at 179.

181. Interview with Bernard N. Wolf, Family Lawyer, Law Offices of Bernard N. Wolf, in San Francisco, Cal. (Jul. 21, 1997).

182. *Id.*

183. *Id.*

184. *See* Johnston, *supra* note 158, at 179.

185. *See id.*

186. *See* CAL. FAM. CODE §§ 1 - 20043 (West 1994 & Supp. 1998).

187. *See* Barnet & Bryan, *supra* note 136, at 3.

188. *See In re* Marriage of Burgess, 913 P.2d 473 (Cal. 1996). Interview with Richard M. Bryan, Principal, Bryan, Hinshaw, Cohen & Barnet, in San Francisco, Cal. (Mar. 4, 1998).

a. Long-Distance Move-Aways

Some legal experts emphasize the negative effects on the children of visitation schedules that change after a long-distance move from frequent visits to occasional but longer visits, such as summers and holidays.[189] The farther away the move, the higher the degree of necessity for the move should be shown by the custodial parent to outweigh the reduction in contact between the children and the noncustodial parent.[190] For example, in a long-distance move, the custodial parent may "be required to show that the move is not merely preferable or convenient, but rather . . . essential and imperative."[191]

Experts also assert that the noncustodial parent's financial ability to make regular long-distance visitation trips is another factor the court should weigh in determining whether to permit a relocation.[192] When the moving parent is in a better financial position than the nonmoving parent, the court may permit the relocation and assign visitation costs to the moving parent.[193] Commonly, however, neither parent has the financial means to afford regular airline travel.[194] Consequently, the high cost of

189. Interview with Lorie S. Nachlis, *supra* note 90.

190. *See, e.g.,* Barnet & Bryan, *supra* note 136, at 3.

191. *Id. See also In re* Marriage of Carlson, 280 Cal. Rptr. 840 (Ct. App. 1991). In fact, California's earlier case law held that "in an appropriate situation, an increase in the distance between the child and the noncustodial parent will authorize an alteration in the terms of custody or visitation." *Id.* at 844.

192. *See* Barnet & Bryan, *supra* note 136, at 6. Interview with Richard M. Bryan, Principal, Bryan, Hinshaw, Cohen & Barnet, in San Francisco, Cal. (Mar. 4, 1998). The appellate court in *Ruisi v. Thieriot*, 62 Cal. Rptr. 2d 766 (Ct. App. 1997), remanded the case for reconsideration of the mother's request to relocate with the child to Rhode Island. Mr. Bryan is currently representing the mother at retrial. In arguing in favor of granting the mother's request, he intends to emphasize that the father, who has extreme wealth and no job, could conceivably purchase a second home for himself wherever the child moves. *See id.*

193. *See Burgess*, 913 P.2d at 484. The *Burgess* court ruled that the trial court has broad discretion to modify orders concerning contact and visitation with the noncustodial parent in the event of a move, "e.g., by . . . allocating transportation expenses to the custodial parent, or requiring the custodial parent to provide transportation of the children to the noncustodial parent's home." *Id. See also, e.g., In re* Marriage of Rice, No. D94-00144 (Cal. Super. Ct. filed July 31, 1997). One additional measure to mitigate the harm to the child is court-ordered long-distance communication mechanisms to maintain contact, such as a specially dedicated facsimile machine, video conferencing system, or email account. *See id.*

194. *See* Barnet & Bryan, *supra* note 136, at 6.

long-distance travel often inhibits frequent visitation, generally resulting in an eroded relationship between the noncustodial parent and the children.[195] Arguably, prohibitive transportation costs could be used to establish detriment to the children if they preclude regular visits with the noncustodial parent, and thus justify denying a long-distance relocation.[196]

b. Short-Distance Move-Aways

In a short-distance move, however, such as that in *Burgess,* frequent and continuing contact may be maintained.[197] Thus, a mere preference to move might be sufficient if no significant reduction of the other parent's time share would result.[198] For example, in *In re Marriage of Selzer,*[199] the custodial mother requested to move the short distance within California from Ukiah to Santa Rosa to substantially reduce her one-hour commute to work.[200] Although the court granted the mother's request to relocate with the daughter, it also increased the nonmoving father's visitation.[201] Thus, frequent and continuing contact was maintained despite the move.[202]

C. CUSTODY ORDERS AFTER *BURGESS*

When one parent attempts to prevent the children's relocation with the other parent, *Burgess* requires that there be a initial court order for joint physical custody and a balanced time share between the parents before the court may grant a de novo review of custody to determine anew what outcome

195. *See id.*

196. Interview with Roderic Duncan, Retired Judge of the Superior Court, in Berkeley, Cal. (Dec. 19, 1997). Some family law judges, including Judge Duncun, view the loss of contact with a father over a long-distance barrier as a detriment warranting denial of a move-away. However, not all judges agree on this point. *See id.*

197. *See Burgess,* 913 P.2d at 479. The court determined that "[a]lthough it would be more convenient for the father to maintain a daily visitation routine with the children if they remained in Tehachapi, he would still . . . be able to visit them regularly and often." *Id.*

198. *See* Barnet & Bryan, *supra* note 136, at 3.

199. *See In re* Marriage of Selzer, 34 Cal. Rptr. 2d 824 (Ct. App. 1994).

200. *See id.* at 824.

201. *See id.* at 825. *See also* Barnet & Bryan, *supra* note 136, at 3.

202. *See Selzer,* 34 Cal. Rptr. 2d at 825.

meets the children's best interests.[203] As a result, courts since *Burgess* give heightened deference to the language of the initial court order and the daily calendars of each parent.[204] Aware of this heightened deference, parents attach great significance to the custodial labeling process in the early stages of separation.[205]

Since *Burgess*, more fathers campaign harder at the initial custody hearing for an award of court-ordered joint physical custody, hoping to avoid the risk of losing their children in a later move-away adjudication.[206] Without a court-ordered label of "joint physical custody," *Burgess* dictates that the court may not grant a de novo review of custody.[207] The noncustodial father then carries the burden of demonstrating the change of circumstances required to modify custody or prevent a relocation.[208] He must show that the move would result in detriment to the children.[209] If the noncustodial father fails to meet this burden, the *Burgess* presumption favoring preservation of the custodial relationship typically prevails, inclining courts to grant the custodial mother's request to relocate with the children.[210]

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203. *See supra* notes 64-66 and accompanying text for a discussion of the requirements for a de novo custody review in move-away cases.

204. Interview with Tony J. Tanke, *supra* note 165.

205. *See* Bryan, *supra* note 91, at 16-17.

206. Interview with Tony J. Tanke, *supra* note 165. *See also* Nancy Z. Berg & Gary A. Debele, *Postdecree Custody Modification: Moving Out of State and Changes to the Parenting Relationship*, 10 AM. J. OF FAM. L. 183, 191 (1996). Recent research also indicates that joint custody appears to be becoming more common. *See id.*

207. Telephone Interview with Sharon Lazaneo and Jackie Karkazis, Family Law Mediation and Evaluation Specialists, in Oakland, Cal. (Oct. 10, 1997). Ms. Karkazis observes through her mediation and evaluation work that parents are well aware of the *Burgess* decision, and they are rightly concerned about the impact of that decision on their own custody modification litigation. *See id.*

208. *See id.*

209. *See supra* notes 77-88 and accompanying text for a discussion of what constitutes detriment.

210. Telephone interview with Mary McNeal, Family Lawyer, Law Offices of Mary McNeal, in Berkeley, Cal. (July 14, 1997). Ms. McNeal criticizes the *Burgess* decision for its overly heavy reliance on court-issued custody labels. She opines that these labels result in unfairness to noncustodial fathers who play an important role in their children's lives regardless of the label, and who do not want to lose their children to a long-distance move with the mother. *See id. See infra* notes 264-85 and accompanying text for further discussion of custody labels.

Parents' struggle to fit *Burgess's* joint physical custody definition[211] creates problems that are particularly detrimental to children, such as increasing litigation and hostility between the parents.[212] Often, attorneys and mediators spend considerable time counseling clients about how to draft the initial custodial agreement so that it meets the definitional requirements established by *Burgess* for a de novo review in move-aways.[213] In the process, attorneys can easily lose sight of the ultimate issue of children's best interests by focusing on the labels more than the custody arrangement that best meets the children's needs.[214] Additionally, these legal procedures are costly, and

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211. *See In re* Marriage of Burgess, 913 P.2d 473, 483 n.12 (Cal. 1996). The *Burgess* court defined "joint physical custody" to mean sharing physical custody as mandated by court order *and* maintaining a roughly equal time share arrangement with the children. *See id. See supra* notes 62-66 and accompanying text for a complete discussion of *Burgess's* "joint physical custody."

212. *See infra* notes 213-23 and accompanying text for further discussion of the detrimental effects to children of parents' struggle to fit *Burgess's* "joint physical custody" definition.

213. Telephone Interview with Sharon Lazaneo and Jackie Karkazis, Family Law Mediation and Evaluation Specialists, in Oakland, Cal. (Oct. 10, 1997). *See also* Linwood R. Slayton, Jr., *Custody, Visitation, Divorce: Factors to Consider When Representing the Father*, NAT'L BAR ASS'N MAGAZINE, July/Aug. 1996, at 16. Mr. Slayton reminds that "[a]ttorneys have an affirmative duty to zealously advocate on behalf of the client but they also have a duty to ensure that the children . . . suffer as little as possible as the process unfolds and ultimately comes to a conclusion." *Id.*

214. *See generally* Richard Updegrove, Jr. & Roberta L. Thompson, *The Double-Edged Sword of Child Relocations: Successful Representation of the Parents*, 45 R.I. B.J. 11, 13 (1997) (outlining how the *Tropea* and *Burgess* decisions might effect client representation in Rhode Island). *See also* JANET R. JOHNSTON & VIVIENNE ROSEBY, IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF CONFLICTED AND VIOLENT DIVORCE 224 (The Free Press 1997). The authors urge that:

> family law attorneys' primary role is not to strategically maneuver the presentation of evidence and evoke statutes and case law to win their client's case—as if their clients were indifferent to the effects of a legal victory on the lives of their children and as if the need for an ongoing working relationship with the other spouse/parent were irrelevant . . . . [T]he family attorney's role includes counseling clients fully on their rights and responsibilities as *parents and co-parents*, and exploring deeply the ramifications of all the clients' actions not only on the clients' welfare but on the welfare of the children as well. The attorney can then responsibly and ethically advocate for their clients' more clearly defined interests.
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> *Id.*

often generate ill-will between the parents, which ultimately hurts the children.[215]

Focusing chiefly on the labels can cause further problems when one parent petitions to modify custody in a move-away adjudication.[216] Court-issued labels often do not accurately describe the custody arrangement that the parents actually share.[217] Specifically, while parents may have a court order for joint physical custody, the time share that the parents exercise and the relationships between the children and their parents may reflect a more unbalanced custodial arrangement.[218] Nevertheless, in a move-away case, post-*Burgess* courts generally determine the standard of review based on the language of the initial custody order.[219] Thus, *Burgess* has the unfortunate effect of shifting the emphasis away from consideration of the actual relationships the children have with each parent in favor of the custody label.[220]

Another significant problem with relying on the joint physical custody label is that as parents amplify their concern about the percentage of time the children are with them, their interest in timekeeping begins to loom larger than their interest in the children's needs.[221] The children's lives often are seriously disrupted by their constant shuttle between their parents' separate homes.[222] Consequently, the benefits to children of joint physical custody can easily be clouded by the ongoing

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215. *See generally* Bryan, *supra* note 91 (discussing the implications of the *Burgess* decision).

216. *See infra* notes 264-69 and accompanying text for further discussion of the problems labels cause in move-away adjudications.

217. Interview with Roderic Duncan, Retired Judge of the Superior Court, in Berkeley, Cal. (Oct. 10, 1997).

218. *See supra* notes 26-29 and accompanying text for a distinction between court-ordered joint physical custody and the actual custodial arrangement.

219. Interview with Roderic Duncan, Retired Judge of the Superior Court, in Berkeley, Cal. (Oct. 10, 1997).

220. *See id.*; Interview with Kristi Cotton-Spence, Family Lawyer, Berra•Spence, in San Mateo, Cal. (Aug. 21, 1997). Noncustodial fathers who attempt to prove that a move will result in detriment to the children will often hire a psychological evaluator to scrutinize the children's relationships with each parent and then testify in court about those relationships. Placing the children under intense observation can be especially unsettling for children. *See id.*

221. *See* TALIA, *supra* note 162, at 104.

222. *See id.*

hardship of bouncing between parents who insist on maintaining an inflexible timeshare schedule.[223]

IV. CRITIQUE AND PROPOSAL

Since *Burgess*, the presumption favoring continuity of the custodial relationship induces courts to strive to keep the custodial relationship intact, thereby helping custodial parents gain judicial permission to relocate with their children.[224] Without the relative ease of gaining judicial permission, these parents, who are generally the mothers, would face a greater risk of being forced to choose between relocating and keeping their children.[225] An unfortunate effect of the *Burgess* decision is the noncustodial father's increased risk of becoming the long-distance parent who seldom sees his children.[226] As a result, a tension has developed between "the effect of changing the child's contact with the non-custodial parent and the often positive reasons for the custodial parent's desire to relocate."[227] Mounting concern about the effect of *Burgess* on fathers' loss of contact with their children suggests that California should modify its move-away law.[228] Specifically, California should

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223. Interview with Kristi Cotton-Spence, *supra* note 220.

224. *See* Richard M. Bryan, *Beyond Burgess: One Year Later*, 20 FAM. ADVOC. 14 (1997) [hereinafter "Bryan"]. "Burgess eases the ability of a custodial parent to move freely." *Id.*

225. *See, e.g., In re* Marriage of Roe, 23 Cal. Rptr. 2d 295 (Ct. App. 1993). In this pre-*Burgess* case, the mother had to show that the move was in the children's best interests before the court would allow her to relocate with them. *See id.*

226. *See* Jeff Woods, *Singer Joins Dads Fighting Custody Laws,* NASHVILLE BANNER, Apr. 7, 1997, at A1. The *Burgess* decision parallels the Tennessee Supreme Court's holding in *Aaby v. Strange*, 924 S.W.2d 623 (Tenn. 1996), discussed *infra*. Tennessee singer Radney Foster laments the effect of Tennessee's move-away law in the words of his song, *5,000 Miles*: "Cause it don't matter how much you love them, or if you've acted faithfully. They can take away your precious children. Five thousand miles from Tennessee." *Id.*

227. *See* Richard Updegrove, Jr. & Roberta L. Thompson, *The Double-Edged Sword of Child Relocations: Successful Representation of the Parents,* 45 R.I. B.J. 11 (1997).

228. Interview with Roderic Duncan, Retired Judge of the Superior Court, in Berkeley, Cal. (Dec. 19, 1997). Judge Duncun describes the "fathers' movement" as organized groups comprised primarily of fathers who voice criticism of California's current move-away law and advocate for statutory modifications. One group, the Coalition of Parent Support, publishes a widely circulating newsletter and has chapters throughout the state. *See id. See also* Monroe L. Inker & Charles P. Kindregan, Jr., *Can Custodial Parents Dictate a Child's Home?*, MASS. L. WKLY, Feb. 24, 1997, at 11.

discard its presumptions and instead apply a "best interest of the child" analysis, as employed in other jurisdictions.[229] California should also develop additional child custody labels that more accurately describe the custody arrangements that parents maintain.[230]

A. GUIDANCE FROM OTHER JURISDICTIONS' MOVE-AWAY LAWS

Throughout the United States and internationally, applicable standards to determine when a custodial parent may relocate over the objection of the noncustodial parent remain disparate.[231] Several jurisdictions' move-away laws may offer guidance to the California legislature.[232]

Despite the prevalence of presumptions favoring custodial parent relocation in the 1990s, some jurisdictions are indicating a renewed preference for the "best interest" analysis over the "change of circumstances" test.[233] California should also re-adopt the "best interest" analysis in move-aways to insure the best possible outcome for the children.[234]

Jurisdictions using a "best interest" standard reject deciding relocation cases by using presumptions that skew the analysis.[235] They reason that such a mechanical application of legal

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The belief that children benefit from regular contact with both parents continues to run strong in our society and parental rights continue to find many supporters. *Id.*

229. *See infra* notes 235-57 and accompanying text for a discussion of the "best interest" standard used by other jurisdictions.

230. *See infra* notes 270-85 and accompanying text for a discussion of proposed custody labels.

231. *See* Gruber v. Gruber, 583 A.2d 434, 437 (Pa. 1990).

232. Interview with Roderic Duncan, Retired Judge of the Superior Court, in Berkeley, Cal. (Dec. 19, 1997).

233. *See* Nancy Z. Berg & Gary A. Debele, *Postdecree Custody Modification: Moving Out of State and Changes to the Parenting Relationship*, 10 AM. J. OF FAM. L. 183, 189 (1996). *See supra* notes 32-35 and accompanying text for a description of the "best interest" analysis. *See supra* notes 67-88 and accompanying text for a description of the "change of circumstances" test.

234. *See, e.g., In re* Marriage of Roe, 23 Cal. Rptr. 2d 295 (Ct. App. 1993) (applying the "best interest" standard more freely before the *Burgess* decision).

235. *See, e.g.,* Tropea v. Tropea, 665 N.E.2d 145, 151 (N.Y. 1996). In the *Tropea* opinion, Justice Titone wrote, "[I]t serves neither the interests of the children nor the ends of justice to view relocation cases through the prisms of presumptions and threshold tests that artificially skew the analysis in favor of one outcome or another." *Id.*

doctrine is not in the best interest of children or the pursuit of justice.[236] Instead, these jurisdictions weigh a wider range of factors, such as the quality of the children's relationship with the noncustodial parent and the children's ages.[237]

A recent New York case, *Tropea v. Tropea*,[238] exemplifies this broader analysis in its application of the "best interest" analysis.[239] In *Tropea*, the custodial mother desired to move long-distance to join her fiancé and raise her sons in the new family unit, thereby effectively eliminating the noncustodial father's regular midweek visits.[240] The New York Court of Appeal found no single factor dispositive on the issue of whether to permit the relocation.[241] Instead, the court considered many factors such as the psychological impact on the children if the custodial mother's goals were thwarted, the impact on the relationship between the children and the noncustodial parent, and both parties' economic circumstances.[242] The court ultimately affirmed the district court's decision to permit the relocation, finding that the move was in the children's best interest.[243]

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236. *See id.*

237. *See id.* Justice Titone wrote:

> These factors include, but are certainly not limited to each parent's reasons for seeking or opposing the move, the quality of the relationship between the child and the custodial and the noncustodial parents, the impact of the move on the quality and quantity of the child's future contact with the noncustodial parent, the degree to which the custodial parent's and child's life may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the noncustodial parent and child through suitable visitation arrangements.

Id.

238. *See* Tropea v. Tropea, 665 N.E.2d 145 (N.Y. 1996).

239. *See id.* Justice Titone wrote, "In the end, it is for the court to determine, based on all of the proof, whether it has been established by a preponderance of the evidence that a proposed relocation would serve the child's best interests." *Id.* at 151-52.

240. *See id.* at 146.

241. *See id.* at 150-51 (discussing the various factors weighed in the decision of whether or not to permit the relocation, but not concluding that a particular single factor was ultimately determinative).

242. *See id.*

243. *See Tropea*, 665 N.E.2d at 152. *See also* Robert Stephan Cohen & Pamela Sicher, *'Tropea' and 'Browner': The Missing Evidence,* 216 N.Y. L.J. 25, S5 (1996). Nevertheless, the Tropea court is criticized for denying the father "the opportunity to establish, with psychological evidence and expert testimony from a forensic mental health professional, whether the proposed relocation was proper under the new 'best interest' standard." *Id.*

Further, in *Aaby v. Strange*,[244] the custodial mother requested the court's permission to move out-of-state with her minor son, against the father's wishes.[245] As in *Burgess*, the Tennessee Supreme Court recognized a presumptive right of the custodial parent to relocate with the child wherever she wishes to move.[246] The court held that the custodial mother was allowed to remove the minor child to Kentucky notwithstanding the father's objection that the move interfered with the noncustodial parent's access to the child.[247] It further held that the relocation was impermissible only if the noncustodial parent proved the motive for moving was vindictiveness towards that parent.[248]

Justice White's dissent criticized the majority for placing a high degree of importance on the custodial parent's unrestricted freedom to relocate.[249] He stated that the law should require a custodial parent who desires to relocate to first demonstrate that the move would not harm "the child's social, educational, psychological and health needs."[250] Presently, a bill before the Tennessee legislature addresses the issues raised in White's dissent.[251] The bill proposes returning to the "best in-

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244. *See* Aaby v. Strange, 924 S.W.2d 623 (Tenn. 1996).

245. *See id.* at 624.

246. *See id.* at 629. *See also* Inker & Kindregan, *supra* note 228, at 11.

247. *See Aaby*, 924 S.W.2d at 629. *See also* Inker & Kindregan, *supra* note 228, at 11.

248. *See Aaby*, 924 S.W.2d at 629.

249. *See id.* at 631 (White, J., dissenting).

250. *Id.*

251. *See* Woods, *supra* note 226, at A1; S. 1235, 100th Gen. Assembly, 2d Sess., § 1 (Tenn. 1998). The bill states, in pertinent part:

> (c) If the non-custodial parent does petition the court for a hearing, the court shall conduct one as soon as possible after notifying the parties. The court, in its discretion, may appoint a guardian ad litem to represent the interests of the child or children if the court does not believe they will be adequately represented by the parties. The sole issue at the hearing shall be whether the proposed move of the child or children out-of-state is in the best interests of such child or children. The custodial parent, the non-custodial parent and the guardian ad litem, if one is appointed, may offer proof on the issue.
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> (d) If the court determines that moving the child or children out-of-state is in their best interest, it shall issue an order authorizing the move. If the court determines that it is not in their best interest, it may issue an order prohibiting the move or it may modify or change its original award of custody.
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> *Id.*

terest" standard in move-away cases involving an out-of-state relocation,[252] and requiring the moving parent to prove that the move is in the children's best interest.[253] California should enact a similar bill because it already has provided for wide discretion in the code and case law has supported placing a certain burden on the moving parent.[254]

Moreover, a recent decision in the Court of Appeal of the United Kingdom ruled that a mother who had temporary custody should not normally be allowed to remove a child from Colorado to England without the father's consent.[255] In dictum, the court discussed the rights of noncustodial parent in relocation cases.[256] Specifically, the court stated that because both parents have the right of custody, one mother's unilateral removal of the child is wrong because it precludes the father's exercise of his right.[257]

In taking guidance from the move-away laws of other jurisdictions, California should abandon its presumptions in favor of

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252. *See* S. 1235, 100th Gen. Assembly, 2d Sess., § 1 (Tenn. 1998). This bill not only changes the burden of proof in Tennessee's move-away cases, but also establishes that the minimum distance requirement is a move out of the state. *See id.* California has not yet formally defined the distance required for qualification as a move-away. *See supra* notes 186-88 and accompanying text for further discussion of the absence of distance perimeters in California's move-away law.

253. *See* Woods, *supra* note 226, at A1. The bill is recommended by a special legislative committee that studied child custody issues at length. *See id.*

254. *See* CAL. FAM. CODE § 3040(b) (West 1994) (giving the court the "widest discretion" in choosing a parenting plan that is in the child's best interest). *See also In re* Marriage of Roe, 23 Cal. Rptr. 2d 295 (Ct. App. 1993). In *Roe*, a pre-Burgess case, the court held that the moving parent does in fact bear a burden of proof, but it is the burden to show that the move is not only necessary to the custodial parent but also is in the best interest of the child. *See id. See also In re* Marriage of Selzer, 34 Cal. Rptr. 2d 824 (Ct. App. 1994). Subsequently, the court in *Selzer* cited to *Roe* and observed that "this standard, derived from the present language of § 3040(b) . . . properly harmonizes and strikes a balance between the rights of the custodial parent, the noncustodial parent, and the child." *Id.* at 828.

255. *See In re* F (A Minor), [1995] 3 W.L.R. 339.

256. *See* Inker & Kindregan, *supra* note 228, at 11.

257. *See In re* F (A Minor), [1995] 3 W.L.R. 339. Judge Butler-Sloss wrote:

> I am satisfied that the mother and father both enjoyed equal and separate rights of custody by Colorado law . . . . The removal of the child by the mother [therefore] interfered with the rights of the father in that he was prevented from actually exercising them in the U.S.A. . . . In so doing, she was in my judgment in breach of the father's rights . . . and the removal was wrongful.

Id. at 344.

a proposed move by a custodial parent.[258] Courts could then exercise greater discretion and flexibility to decide cases where the noncustodial parent is genuinely opposed to the move.[259] A move will be allowed, or disallowed, because one of the parties has demonstrated that it is, or is not, in the children's best interest.[260] As Justice Baxter noted in his *Burgess* dissent,[261] when the California legislature adopted the Family Law Act in 1969, it specified that custody disputes must be decided solely on the basis of the children's best interests.[262] California case law must not contravene that mandate.[263]

B. THE NEED FOR MORE ACCURATE CUSTODY LABELS

The *Burgess* opinion recognizes only two formal classifications of physical custody: "joint physical custody" and "sole physical custody with visitation rights."[264] To noncustodial fathers who are significantly involved in parenting despite not having joint physical custody, the "sole physical custody" label is offensive.[265] Noncustodial fathers understand that when a mother is granted "sole physical custody," post-*Burgess* courts may regard the mother has having full custodial responsibility

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258. *Cf.* Sondra Miller, *Whatever Happened to the `Best Interests' Analysis in New York Relocation Cases?*, 15 PACE L. REV. 339, 385 (1995) (proposing that New York should abandon an "exceptional circumstances" test and adopt a "best interest" test, with the burden on the custodial parent to show that the move satisfies the "best interest" test criteria).

259. *Cf. id.* at 385-86 (proposing a four-part analysis that would require the court to consider all relevant factors before a move is permitted).

260. *See id.* at 386 (urging abandonment of presumptions against relocation and the required showing of threshold exceptional circumstances, and instead permitting a move only if the children's best interests will be served).

261. *See In re* Marriage of Burgess, 913 P.2d 473, 484-86 (Cal. 1996) (Baxter, J. dissenting).

262. *See id.* at 485.

263. *Cf.* Judge Donald R. Ash, *Bridge Over Troubled Water: Changing the Custody Law in Tennessee*, 27 U. MEM L. REV. 769 (1997) (emphasizing that Tennessee's mandate cannot be contravened). Judge Ash cautions that the "best interest" standard can allow too much judicial discretion. He states that "the lawyer's victory may very much depend on the accurate perception and manipulation of the court's leanings, or upon creating them. The court must do a better job in its application of [the best interest] standard." *Id.* at 804.

264. Interview with Roderic Duncan, Retired Judge of the Superior Court, in Berkeley, Cal. (Oct. 10, 1997).

265. Interview with Roderic Duncan, Retired Judge of the Superior Court, in Berkeley, Cal. (Dec. 19, 1997). Courts can quite casually assign the designation of "sole physical custody" without realizing its possible implications. *See id.*

for the children, and attach minimal custodial value to the father's parenting involvement, regardless of the frequency and quality of his visitations.[266] The court may then simply rely on the *Burgess* presumption favoring preservation of the custodial relationship and permit the mother's move.[267] The term "sole physical custody" also disparages the significance of the role of the father in the child's emotional or psychological development[268] by relegating him to the outside parent with "visitation rights" only.[269]

The California legislature should institute "primary physical custody" and "secondary physical custody" labels to more appropriately identify many parenting plans and to offer fathers without joint physical custody greater recognition of their parenting roles.[270] The "primary custodial parent" designates that parent in whose physical custody the children remain most of the time, and who, therefore, has more responsibility over the children.[271] The "secondary custodial parent" has the children for less than half time but still plays a vital role in the children's lives.[272] Although some courts currently assign joint physical custody with "primary physical custody" to one parent to assure that parent that she will have more custodial time with the children,[273] the "primary physical custody" designa-

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266. Interview with Lorie S. Nachlis, Family Lawyer, Nachlis & Fink, in San Francisco, Cal. (Jul. 8, 1997).

267. *See In re* Marriage of Burgess, 913 P.2d 473 (Cal. 1996). See *supra* note 67 and accompanying text for a description of the *Burgess* presumption.

268. *See* Miller, *supra* note 258, at 387.

269. Interview with Kristi Cotton-Spence, Family Lawyer, Berra•Spence, in San Mateo, Cal. (Aug. 21, 1997). *See also Amica Curiae* Brief of Richard M. Bryan, *In re* Marriage of Burgess, 913 P.2d 473 (Cal. 1996) (No. S046116). Mr. Bryan writes that "[t]imesharing percentages and loose terminology have no place in weighing real life considerations to children going through a move-away experience. What is really important is the quality, intensity, and bonding of the child's relationship with each of its parents." *Id.* at 24.

270. Interview with Kristi Cotton-Spence, *supra* note 269.

271. *See* Brody v. Kroll, 53 Cal. Rptr. 2d 280, 282 (Ct. App. 1996). *See also* Ruisi v. Thieriot, 62 Cal. Rptr. 2d 766, 770 (Ct. App. 1997) (demonstrating that the "primary caretaker" is not necessarily the parent in whose custody the children remain *all* of the time, but rather, in whose custody and care the children remain *most* of the time).

272. Interview with Bernard N. Wolf, Family Lawyer, Law Offices of Bernard N. Wolf, in San Francisco, Cal. (Aug. 20, 1997).

273. Interview with Roderic Duncan, Retired Judge of the Superior Court, in Berkeley, Cal. (Oct. 10, 1997). *See also Ruisi*, 62 Cal. Rptr. 2d at 770.

tion is merely "window dressing," and cannot be enforced because it is not defined in the California Family Code or formally recognized by the courts.[274] Moreover, it does not constitute an official custody designation for the purpose of triggering a standard of review in move-away cases.[275]

The "primary" and "secondary" physical custody designations are beneficial to parents and children in several ways.[276] First, they are more honest descriptors than "sole custodial parent" and "noncustodial parent with visitation rights" in many situations where the father assumes significant parenting responsibilities.[277] A "secondary custodial parent" label validates the parenting role and describes dedicated parental involvement, whereas "visiting rights" suggests that the noncustodial parent is merely a visitor in the children's lives.[278] This nomenclature also emphasizes to parents that custody orders are not "joint or nothing" propositions.[279] This understanding encourages a cooperative attitude between the parents, and helps them recognize the children's need to maintain a close, continuing relationship with each parent.[280] Greater

274. Interview with Roderic Duncan, Retired Judge of the Superior Court, in Berkeley, Cal. (Oct. 10, 1997).

275. *See Brody*, 53 Cal. Rptr. 2d at 282.

276. *See infra* notes 277-85 and accompanying text for a discussion of the positive effects of the "primary" and "secondary" custody designations.

277. Interview with Kristi Cotton-Spence, *supra* note 269.

278. *Cf.* Ash, *supra* note 263, at 801 (advocating replacing terms such as "custody" and "visitation" with terms that do not convey ownership of the child or only a peripheral involvement by the noncustodial parent).

279. Interview with Kristi Cotton-Spence, *supra* note 269. Ms. Cotton-Spence notes that the words "sole" and "visitation" sound threatening to many parents and therefore tend to produce litigation. *See id.* *See* ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 279 (Harvard University Press 1992). The authors suggest that the labels courts use in the custody order influence co-parental relations and patterns of parenting. They write, "We suspect . . . that the reforms enacted by California divorce law, explicitly authorizing joint custody and encouraging frequent and continuing contact with both parents, have had something to do with our finding of relatively high frequencies of joint physical custody awards and sustained visitation." *Id.*

280. *Cf.* Ash, *supra* note 263, at 806 (proposing goals for establishing parenting agreements that include removal of legal jargon, and recognizing the benefit of maintaining a close relationship with both parents).

cooperation between parents thereby reduces custody modification litigation.[281]

Additionally, loose definitions of "primary" and "secondary" physical custody afford parents the opportunity to settle into their own best pattern of shared custody.[282] In contrast, if ordered by the court to follow the rigid custody schedules associated with "joint physical custody" or "sole physical custody with visitation rights," parents may exercise a co-parenting routine that is uncomfortable for them and the children.[283] Perhaps most importantly, the new labels may incline courts to regard co-parenting plans differently.[284] The labels may signal courts to attach greater weight in the custody evaluation to the father's role and give courts more flexibility to consider the importance to the children of the father's role in their lives.[285]

V. CONCLUSION

In re Marriage of Burgess and subsequent California courts emphasize the distinction between joint physical custody and sole custody with noncustodial parent visitation in move-away cases.[286] Although largely ignored by the courts, abundant social science research and expert legal opinion discourage joint and sole physical custody designations because they preclude a thorough evaluation of the actual relationships between the

281. *See* Miller, *supra* note 258, at 388.

282. Interview with Kristi Cotton-Spence, *supra* note 269.

283. *Id.*

284. Interview with Richard M. Bryan, Principal, Bryan, Hinshaw, Cohen & Barnet, in San Francisco, Cal. (Mar. 11, 1998).

285. Interview with Judith H. B. Cohen, Family Lawyer, Law Offices of Judith H. B. Cohen, in Corte Madera, Cal. (Mar. 13, 1998). Ms. Cohen notes, however, that certain jurisdictions in California rely more on existing labels than others to interpret the relationships between the children and each parent. In particular, several courts in the San Francisco Bay Area have demonstrated a reluctance to rigidly follow *Burgess's* "joint" and "sole" custody distinction, looking beneath the labels to understand the child-parent relationships. *See id.*

286. *See, e.g.*, Ruisi v. Thieriot, 62 Cal. Rptr. 2d 766 (1997); *In re* Marriage of Whealon, 61 Cal. Rptr. 2d 559 (Ct. App. 1997); *In re* Marriage of Burgess, 913 P.2d 473 (Cal. 1996).

children and each parent.[287] Studies show and various cases illustrate that the quality of the noncustodial parent's relationship with the children is not necessarily a function of the duration or frequency of visits[288] or of the court-ordered label for that relationship.[289] Many legal professionals and psychologists point out that the substance and character of the parent-child relationship, and not the particular form, is often most critical in deciding a custody modification proceeding.[290]

Furthermore, *Burgess* provides little guidance for the majority of move-away cases.[291] This is due to the relatively simple facts and short-distance move contemplated in that case.[292] For these reasons, the *Burgess* presumptions should not be mechanically applied to cases with significantly different facts and varying shared custody arrangements.[293] Presumptions only simplify the complicated inquiries inherent in move-away cases.[294] The courts must not lose sight of the child's best interests in an effort to promote judicial economy and uniformity.[295]

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287. *See, e.g.,* Richard M. Bryan, *Beyond Burgess: One Year Later*, 20 FAM. ADVOC. 14, 16 (1997). California's statutory definitions of "joint" and "sole" physical custody are imprecise and deceptive. *See id.*

288. *See* Michele A. Katz, *Tropea v. Tropea, Tropea and its Recent Aftermath: Relocation Cases Decided After Tropea,* 177 PLI/CRIM 59, 63 (1997). *See also* Sondra Miller, *Whatever Happened to the 'Best Interests' Analysis in New York Relocation Cases?,* 15 PACE L. REV. 339, 366 (1995).

289. Interview with Roderic Duncan, Retired Judge of the Superior Court, in Berkeley, Cal. (Oct. 10, 1997).

290. *See, e.g.,* Janet R. Johnston, *Children's Adjustment in Sole Compared to Joint Custody Families and Principles for Custody Decision Making*, 33 FAM. & CONCILIATION CTS. REV. 415, 419 (1995).

291. Interview with Roderic Duncan, Retired Judge of the Superior Court, in Berkeley, Cal. (Dec. 19, 1997).

292. *Id. Burgess* involved a move of only 40 miles, but most move-aways involve a moving of a distance of far greater than 40 miles. *See id.* Telephone Interview with Sharon Lazaneo and Jackie Karkazis, Family Law Mediation and Evaluation Specialists, in Oakland, Cal. (Oct. 10, 1997). Of the many move-away cases that Sharon Lazaneo and Jackie Karkazis have mediated, no two cases have been factually alike. *See id.*

293. Interview with Tony J. Tanke, Partner, Tanke & Willemsen, LLP, in Palo Alto, Cal. (Aug. 24, 1997).

294. *See* Katz, *supra* note 288, at 63.

295. *See* Richard Updegrove, Jr. & Roberta L. Thompson, *The Double-Edged Sword of Child Relocations: Successful Representation of the Parents,* 45 R.I. B.J. 11 (1997). *See also* Tropea v. Tropea, 665 N.E.2d 145 (N.Y. 1996). Justice Titone wrote, ". . . given

Instead of a mechanical *Burgess* approach, California courts should use a more flexible definition of a change of circumstances in a move-away situation.[296] Insofar as a change of circumstances must result in detriment to the children, this definition must be broadened to encompass consideration of the loss of proximity to the noncustodial parent who is significant in the children's lives.[297] In protecting the custodial parent's freedom to make decisions about her own future and the future of the children, courts should not permit the imposition of an excessive handicap on the relationship between the children and the noncustodial parent.[298]

The resolution of move-away cases involves imperfect and often painful solutions,[299] and applicable standards vary across jurisdictions.[300] In addressing the shortcomings of the *Burgess* decision, California courts should look for guidance in the holdings in other jurisdictions[301] that consider a wider range of factors which affect the well-being of children in divided families.[302] Additionally, California lawmakers should codify custody designations that more fairly characterize actual divided parenting situations instead of relying on narrow statutory

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the variety of possible permutations, it is counterproductive to rely on presumptions whose only real value is to simplify what are necessarily extremely complicated inquiries." *Id.* at 150.

296. Interview with Bernard N. Wolf, Family Lawyer, Law Offices of Bernard N. Wolf, in San Francisco, Cal. (Jul. 21, 1997).

297. *Id.*

298. *See* Gruber v. Gruber, 583 A.2d 434, 441 (Pa. 1990).

299. Telephone Interview with Susan Talia, Family Lawyer, Law Offices of Susan Talia, in San Francisco, Cal. (Sept. 18, 1997).

300. *See* Nancy Z. Berg & Gary A. Debele, *Postdecree Custody Modification: Moving Out of State and Changes to the Parenting Relationship*, 10 AM. J. OF FAM. L. 183, 184-185 (1996). *Compare In re* Marriage of Burgess, 913 P.2d 473 (Cal. 1996) (establishing a California presumption that the custodial parent may relocate with the child because preserving the custodial relationship is paramount), *with* Tropea v. Tropea, 665 N.E.2d 145 (N.Y. 1996) (applying New York's 'best interest of the child' test that weighs multiple factors without any presumptions favoring the moving parent).

301. *See, e.g.*, Tropea v. Tropea, 665 N.E.2d 145 (N.Y. 1996). The *Tropea* court held that ". . . in all cases, the courts should be free to consider and give appropriate weight to all of the factors that may be relevant to the determination." *Id.* at 151.

302. *See* Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 643 (1992).

definitions that fail to capture the nature of the relationships that parents share with their children.[303]

It is impossible to devise a judicial formula for a divided custody arrangement that perfectly suits all, or even most, families.[304] However, the more equipped California courts are to understand the ties that children have to each parent in move-away cases, the better the judicial outcomes will be for children.[305] After all, children are innocent victims in divorce and are ill prepared to handle a changing family situation.[306] Therefore, the rights and needs of the children must be accorded the greatest weight.

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303. Interview with Roderic Duncan, Retired Judge of the Superior Court, in Berkeley, Cal. (Dec. 19, 1997). By relying on old statutes that identify physical custody as either "joint" or "sole," the *Burgess* court made a decision that was legalistic in nature, not socialistic. *See id.*

304. *See* ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 296. (Harvard University Press 1992).

305. Interview with Roderic Duncan, Retired Judge of the Superior Court, in Berkeley, Cal. (Dec. 19, 1997). Judge Duncan cautions that attempting to actually characterize the actual shared custody arrangement could result in an evidentiary battle between the parents. *See id.*

306. *See* Katz, *supra* note 288, at 63.

* Golden Gate University School of Law, Class of 1998. Sincere thanks to my editors Karleen Murphy and Kara Buchner for their invaluable comments and guidance, and to the many others who encouraged and assisted with the writing of this article.