American Academy of Matrimonial Lawyers Proposed Model Relocation Act

An Act relating to the relocation of the principal residence of a child.

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Introductory Comment

In recent times, disputes between divorced parents involving relocation of children and its impact on families, especially the children, have significantly increased in frequency and complexity. In recognition of the problem, the American Academy of Matrimonial Lawyers drafted a Model Act for consideration by state legislatures. The members of the Academy come from all regions of the United States and are highly experienced family law attorneys representative of the widely disparate views taken on this subject by court decisions and statutory formulations.

In preparing a proposed "act relating to the relocation of a child," the Academy researched the very substantial literature on relocation law, considered the relocation statutes of various states, and reviewed the case law from across the country. Additionally, because the welfare of the children involved in relocation disputes is the crucial issue, the Academy consulted with mental health professionals and reviewed the research regarding the effect of divorce and subsequent relocation on children. The Academy also considered the impact of the substantial increase in orders for joint physical or joint legal custody. The Academy found there is limited empirical data on any of these vital subjects.

The following suggested statute is not intended to be a uniform act; several significant issues are presented in the alternative in order to facilitate independent consideration of controversial issues by state legislators. Rather, the proposed act is meant to serve as a template for those jurisdictions desiring a statutory solution to the relocation quandary. Finally, the proposed act is definitely not

intended to be the basis for federal legislation. Family law issues are properly addressed by state law.

Article 1. General Provisions

§ 101. Definitions

As used in this [Act],[1] unless the context requires a different definition:

(1) "change of residence address" means a change in the primary residence of an adult;

(2) "child" means a minor as defined by [applicable state law];

(3) "person entitled to [custody of or visitation with][2] a child" means a person so entitled by virtue of a court order or by an express agreement that is subject to court enforcement;

(4) "principal residence of a child" means:

(A) the location designated by a court to be the primary residence of the child;

(B) in the absence of a court order, the location at which the parties have expressly agreed the child will primarily reside; or

(C) in the absence of a court order or an express agreement, the location, if any, at which the child, preceding the time involved, lived with the child's parents, a parent, or a person acting as parent for

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[1] The National Conference of Commissioners on Uniform State Laws has developed a legislative drafting convention for uniform and model acts, which places in brackets certain terms or phrases to indicate that state terminology should be employed if different from the common language contained in the bracket. *See* NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 1994-95 REFERENCE BOOK at 85, Drafting Rules for Uniform or Model Acts, Rule 21. Suggested time periods are treated identically.

[2] The terms "custody" and "visitation" are shown throughout the proposed statute in brackets, *see* footnote 1 supra, because in many states those terms have fallen into disfavor. Unfortunately, no single term has emerged to replace the identification of the custodial or noncustodial parent's rights of access to the child. States use a wide variety of alternative terms to express the concept, including "primary residential placement," "partial custody," "possession of and access to," and "joint legal custody." Similarly, a right of access to the child for a grandparent or other non-parent elicits a variety of terms.

at least six consecutive months and, in the case of a child less than six months old, the location at which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six-month or other period.

(5) "relocation" means a change in the principal residence of a child for a period of [60][3] days or more, but does not include a temporary absence from the principal residence.

Comment

Although relocation of the principal residence of a child is the primary focus of this proposed act, a change in the residence of any of the persons involved is subject to its notice requirements. Slightly different terminology (with basically the same meaning) is used to distinguish between the "change of the primary residence of an adult" and the "relocation of the principal residence of a child." Mandating that a change in the residence address of a concerned adult is subject to the notice requirements involves more than mere common courtesy. Although additional litigation will not be triggered by a change of the residence address of a noncustodian, such a change surely will have some effect on the relationships of the interested persons and the child. Perhaps the effect will be nothing more than a change in the location of the child during a period of visitation. But, in some circumstances a change of address of an adult will have greater consequences. For example, the custodian may decide to move without relocating the child, perhaps by leaving the child with a relative, e.g., grandmother. Note that unusual circumstances could even yield a relocation of the child without a change of residence of the custodian, e.g., child enrolled in a boarding school or sent to live with relatives by the custodian.

In the proposed act the term "relocation" is used only to refer to a proposed change of the principal residence of the child. The difficulties that may be engendered by a relocation are not limited to a move across state lines, or a move of an arbitrarily chosen

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[3] The sixty-day period was selected to provide the maximum reasonable notice of a proposed relocation.

distance within a state, e.g., 100 or 150 miles. A visitation schedule may be significantly affected any time that a move is made by either the custodial or noncustodial party, particularly in heavily urbanized areas. A move of even a relatively short distance may create other problems if it impedes access to the child or involves a change of school district. In sum, the proposed act is designed to provide a mechanism for adjusting the custodial schedule when either a noncustodian or the child moves.

§ 102. Applicability

(a) The provisions of this [Act] apply to an order regarding [custody of or visitation with] a child issued:

(1) after the effective date of this [Act]; and

(2) before the effective date of this [Act], if the existing [custody] order or enforceable agreement does not expressly govern the relocation of the child or there is a change in the primary residence address of an adult affected by the order.

(b) To the extent that a provision of this [Act] conflicts with an existing [custody] order or enforceable agreement, this [Act] does not apply to the terms of that order or agreement that govern relocation of the child or a change in the primary residence address of an adult.

Comment

The goal of the proposed act is to achieve a maximum impact on cases involving relocation issues and, at the same time, create minimum disruption with existing custodial relations. The proposed act is designed to apply to a custody or visitation order and to an enforceable agreement on custody issued both before and after its effective date, except if the pre-existing order or agreement purports to govern the relocation issue. If the proposed act were to apply only to future orders, its immediate impact would be greatly diminished and would take many years to become fully effective. However, if the terms of an existing order or agreement provide a procedure to resolve relocation disputes, the proposed act does not affect those orders or agreements. For example, giving notice of a proposed relocation of a child as required by the proposed act does not automatically force the parties back into court. Only if

the noncustodial parent objects to the proposal does litigation follow. But an existing order that states "the residence of the child shall be [a fixed location] until further order of the court" is controlling. Under the existing order, the party seeking to relocate must return to court for approval, despite the fact the procedure in the proposed act does not require that action.

Prospectively the proposed act will apply to everyone obtaining court-ordered or agreed custody of or visitation with a child, whether denominated as custody, visitation, grandparental access, etc. Thus, the statutory requirement of notice is far more effective because the act mandates the notice be incorporated in the final order.

Article 2. Notice of Relocation or Change of Residence Address

§ 201. Notice of Proposed Relocation of Child

Except as provided by Section 205, a person who has the right to establish the principal residence of the child shall notify every other person entitled to [visitation with] the child of a proposed relocation of the child's principal residence as required by Section 203.

Comment

The requirement to provide notice of a proposed relocation imposed on the custodian of the child deviates significantly from the statutes presently in force in most states. Typically the custodian is required to give notice only for a "major move," e.g., over a prescribed distance such as 100 or 150 miles or across a state border. The proposed act takes the position that any move of the child's principal residence is of significance to a person with custody or visitation rights, whether it be across town or within the same neighborhood. In part this notice is little more than common courtesy. But, important collateral issues may be implicated, e.g., a relatively short move may force a change of school or school district to the alleged detriment of the child. Further, the notice requirement facilitates the efficient delivery of child support in cases in which payments are mailed directly to the custodian.

§ 202. Notice of Intended Change of Residence Address of Adult

Except as provided by Section 205, an adult entitled to [visitation with] a child shall notify every other person entitled to [custody of or visitation with] the child of an intended change in the primary residence address of the adult as required by Section 203.

Comment

This section represents a relatively dramatic rethinking of the dynamics of a change of residence. Previously, legal focus has been almost exclusively on relocation of a child, with scant attention paid to the impact on existing relationships of a change of residence of a person with visitation rights. Notice of such a move will be required under the proposed act, notwithstanding the fact that legal action to interfere with an adult's constitutional right to travel is neither provided nor possible. More than common courtesy is involved, although that is a factor. At the very least, the child's custodian has an implicit right to know the whereabouts of the child during periods of visitation.

The requirement of notice of a change of residence of every person with a right to visitation with a child also takes into account the fact that someone other than a parent, such as grandparents, may have custody or visitation rights. Notice is required anytime a change in a residence is proposed by any of these adults for either the child or the adult. Although the legal implications of a change in residence of a noncustodial adult are much different than those triggered when relocation of a child is proposed, information about the details of a change of residence of a noncustodial party should enhance the relationships between the child and the adults involved. Not coincidentally, the correlative ease of facilitating enforcement of a child support order will be enhanced by the requirement.

§ 203. Mailing Notice of Proposed Relocation or Intended Change of Residence Address

(a) Except as provided by Section 205, notice of a proposed relocation of the principal residence of a child or notice of

an intended change of the primary residence address of an adult as provided in this article must be given by:

(1) [first class mail][4] to the last known address of the person to be notified;

(2) no later than:

(A) the [60th][5] day before the date of the intended move or proposed relocation; or

(B) the [10th][6] day after the date that the person knows the information required to be furnished by Subsection (b), if the person did not know and could not reasonably have known the information in sufficient time to comply with [60][7] day notice, and it is not reasonably possible to extend the time for relocation of the child.

(b) Except as provided by Section 205, the following information, if available, must be included with the notice of intended relocation of the child or change of primary residence of an adult:

(1) the intended new residence, including the specific address, if known;

(2) the mailing address, if not the same;

(3) the home telephone number, if known;

(4) the date of the intended move or proposed relocation;

(5) a brief statement of the specific reasons for the proposed relocation of a child, if applicable;

(6) a proposal for a revised schedule of [visitation with] the child, if any; and

(7) a warning to the non-relocating parent that an objection to the relocation must be made within [30] days or the relocation will be permitted.

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4 Notice by first class mail should be sufficient to provide reasonable notice of a proposed relocation. Some states may prefer to require this notice by registered or certified mail, return receipt requested.

5 A time period of sixty days was selected to provide the maximum reasonable notice of a proposed relocation.

6 A time period of ten days should provide the maximum reasonable notice under the circumstances described.

7 A time period of 60 days was used to provide the maximum reasonable notice of a proposed relocation.

(c) A person required to give notice of a proposed relocation or change of residence address under this section has a continuing duty to provide a change in or addition to the information required by this section as that information becomes known.

Comment

The details required in the notice of a proposed relocation of a child or a change of residence of an adult with custody or visitation rights are virtually identical.

§ 204. Standard Court Order Requiring Notice

After [the effective date of Act], an order issued by a court directed to a person entitled to [custody of or visitation with] a child shall include the following terms:

"You, as a party in this action, are ordered to notify every other party to this action of a proposed [relocation of the child][8] [change of your primary residence address], and the following information:

(1) the intended new residence, including the specific address, if known;

(2) the mailing address, if not the same;

(3) the home telephone number, if known;

(4) the date of the intended move or proposed relocation;

(5) a brief statement of the specific reasons for the proposed relocation of a child, if applicable; and

(6) a proposal for a revised schedule of [visitation with] the child, if any:"

"You are further ordered to give notice of the proposed [relocation] [change of residence address] on or before the [60th][9] day before a proposed change. If you do not know and could not have reasonably known of the change in suffi-

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8 This clause is to be inserted only in the order directed to the person who has the right to establish the principal residence of the child.

9 A time period of 60 days should be used to provide the maximum reasonable notice of a proposed relocation.

cient time to provide [60 day][10] notice, you are ordered to give notice of the change on or before the [10th][11] day after the date that you know of the change.";

"Your obligation to furnish this information to every other party continues as long as you, or any other person, by virtue of this order, are entitled to [custody of visitation with] a child covered by this order."

"Your failure to obey the order of this court to provide every other party with notice of information regarding the [proposed relocation change of residence address] may result in further litigation to enforce the order, including contempt of court, a finding of contempt may be punished by [state law regarding penalties for contempt]."

"In addition, your failure to notify of a relocation of the child may be taken into account in a modification of [custody of visitation with possession of/or access to] the child. Reasonable costs and attorney's fees also may be assessed against you if you fail to give the required notice."

["If you, as the non-relocating parent, do not file a proceeding seeking a temporary or permanent order to prevent the relocation within [**30**][12] days after receipt of notice of the intent of the other party to relocate the residence of the child, relocation is authorized."][13]

Comment

Mandating the court to order each person to give notice of a proposed relocation of the child or a change in residence of an adult introduces the issue of enforcement if the order is disobeyed. If state law requires, the notice should be given in the language of the recipient if that person does not read or speak English.

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10 The time period of 60 days should be used in order to provide the maximum reasonable notice of a proposed relocation.

11 The time period of ten days should be used to provide the maximum reasonable notice under the circumstances described.

12 A time period of 30 days was selected to provide a reasonable time for an action objecting to a proposed relocation.

13 This clause is to be inserted only in the order directed to a parent who has rights of visitation with the child, where that parent does not have the right to relocate the child.

§ 205. Nondisclosure of Relocation Information in Exceptional Circumstances

(a) On a finding by the court that the health, safety, or liberty of a person or a child would be unreasonably put at risk by the disclosure of the required identifying information in conjunction with a proposed relocation of the child or change of residence of an adult, the court may order that:

(1) the specific residence address and telephone number of the child or of the adult and other identifying information shall not be disclosed in the pleadings, other documents filed in the proceeding, or the final order, except for an in camera disclosure;

(2) the notice requirements provided by this article be waived to the extent necessary to protect confidentiality and the health, safety, or liberty of a person or child; and

(3) any other remedial action the court considers necessary to facilitate the legitimate needs of the parties and the best interest of the child.

(b) If appropriate, the court may conduct an ex parte hearing under this section.

Comment

This domestic violence provision is essential to take into account those cases in which disclosure of personal information would expose a party or the child to serious risk. The text follows the statutory scheme provided in the Uniform Interstate Family Support Act (UIFSA), § 312, which has been enacted in 35 U.S. jurisdictions as of September 1, 1996. The language should be familiar to a majority of the state legislatures because the federal welfare reform legislation of 1996 mandates enactment of UIFSA by all states by January 1998, as a condition for continued receipt of the federal subsidy for child support enforcement under the IV-D program, see P.L. 104-193, § 321, 110 Stat. 2221. Note that tracking the language of UIFSA is not sufficient in a relocation case because the scope of that uniform act is limited to child support. In a case involving of custody and visitation, the risk of harm to a custodial parent (or other custodian of the child) may not be a sufficient justification to prevent the child and the threatening non-

custodial parent from continuing their parent-child relationship. Subsection (a)(3) authorizes the court to fashion an order to shield the custodian from possible harm, while facilitating visitation between the noncustodial parent and the child. This may be a difficult order to draft, but the provision allows for the possibility.

§ 206. Failure to Give Notice of Relocation or Change of Residence Address Required by Statute

The court may consider a failure to provide notice of a proposed relocation of a child as provided by Sections 201 through 204 as:

(1) a factor in making its determination regarding the relocation of a child;

(2) a factor in determining whether [custody visitation should be modified;

(3) a basis for ordering the return of the child if the relocation has taken place without notice; and

(4) sufficient cause to order the person seeking to relocate the child to pay reasonable expenses and attorney's fees incurred by the person objecting to the relocation.

Comment

Disobedience of the statutory requirement to give notice of a proposed relocation of a child or change of residence of an adult yields a relatively minimal punishment. The absence of a prior court order precludes contempt as an option.

§ 207. Failure to Obey Court Order to Give Notice of Relocation

In addition to the sanctions provided by Section 206, the court may make a finding of contempt if a party violates the notice requirement provided by Section 204 and may impose the sanctions authorized for disobedience of a court order.

Comment

When a court issues the standard order specified in the proposed act, contempt of court is at least a theoretical possibility. If a finding of contempt of court is actually made, disobedience may yield a fine, jail time, equitable relief, or some combination of those sanctions.

Article 3. Objection to Relocation

§301. Failure to Object to Notice of Proposed Relocation

The person entitled to [custody] of a child may relocate the principal residence of a child after providing notice as provided by Article 2 unless a parent entitled to notice files a proceeding seeking a temporary or permanent order to prevent the relocation within [30][14] days after receipt of the notice.

Comment

Under the proposed act, failure to object to a proposed relocation is sufficient to allow the relocation to go forward. In many states the courts often issue orders at the time of an initial custody determination to prevent the custodian from relocating the child "until further order of the court." The proposed act rejects this procedure because:

(1) if relocation becomes an issue in the future, it should not be automatically prejudged without relevant and current evidence;

(2) in many instances parents have only recently left a nuclear family setting and begun living in a two-household context; the crucial evidence regarding relocation and the effect on the relationship between the child and the parties is not available at the time of initial hearing; and

(3) such an order forces many parties to return to court unnecessarily, with the concomitant expenditure of time and money. In many instances a relocation of the principal residence of a child

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[14] A time period of 30 days was used to provide a reasonable time to file an action objecting to a proposed relocation.

does not elicit an objection by the noncustodian. And, if a dispute does arise, often it may be resolved amicably by the parties without resort to a judicial proceeding.

§ 302. Objection to Relocation of Child

(a) A parent entitled by court order or written agreement to [visitation with] a child may file a proceeding objecting to a proposed relocation of the principal residence of a child and seek temporary or permanent order to prevent the relocation.

(b) If relocation of the child is proposed, a non-parent entitled by court order or written agreement to [visitation with] a child may file a proceeding to obtain a revised schedule of [visitation], but may not object to the proposed relocation or seek a temporary or permanent order to prevent the relocation.

(c) A proceeding filed under this section must be filed within [30] days[15] of receipt of notice of a proposed relocation.

(d) Except as otherwise specifically provided in this [Act], the [rules of civil procedure] applicable to the filing of an original lawsuit apply to a proceeding seeking to prevent a proposed relocation.

Comment

Whether an objection to the relocation of a child should be limited to parents of the child was the subject of considerable debate. It was ultimately decided to distinguish between the right to object to a proposed relocation and the remedy available to a parent and a nonparent. Only a parent may seek to prevent a proposed relocation. However, the proposed act recognizes that many persons besides parents may be awarded visitation rights with a child, e.g., grandparents, aunts and uncles, adult siblings, and even step-parents or non-relatives who served in loco parentis. These persons should receive notice of a proposed relocation so they may seek a new order to facilitate their post-relocation visita-

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15 A 30-day period provides reasonable time to file an action objecting to a proposed relocation.

tion rights. This section is intended to provide standing to a nonparent with access rights to a child to allow time to seek adjustment of the visitation schedule. It does not contemplate that a nonparent with visitation rights may seek to prevent the custodian from relocating the child.

Once an objection has been made to a proposed relocation by a noncustodial parent, requirements of due process come into effect. Because the litigation may have been dormant for a considerable period of time prior to the proposed relocation, Subsection (b) states the rules applicable to filing an original lawsuit apply to a relocation proceeding. Standard motion practice, which normally requires notice of a hearing to a party's attorney during the pendency of the original action, does not constitute adequate notice after a final custody order has been issued. Rather, service of process as required in an original civil lawsuit is necessary to provide proper notice of the litigation.

§ 303. Pleadings and Affidavits Regarding Relocation

(a) The [pleading] seeking an order to prevent the relocation of a child shall be accompanied by an affidavit setting forth the specific factual basis supporting a prohibition of the relocation.

(b) The party proposing to relocate the child may respond to an affidavit objecting to the proposed relocation by filing a counter-affidavit setting forth facts in support of the relocation.

Comment

A relocation dispute may lend itself to decision by something less than a full evidentiary hearing if permitted by state law, particularly at the temporary order stage of litigation. For example, the party objecting to a proposed relocation may provide an affidavit containing factual allegations that, even if proved, would not warrant an order preventing the child's relocation. Similarly, the party proposing relocation might present spurious reasons to justify the move or present an inadequate revised schedule for post-relocation visitation.

Article 4. Order Permitting or Restricting Relocation

§ 401. Temporary Orders

(a) The court may grant a temporary order restraining the relocation of a child, or ordering return of the child if a relocation has previously taken place, if the court finds:

(1) the required notice of a proposed relocation of a child as provided by Article 2 was not provided in a timely manner and the parties have not presented an agreed-upon revised schedule for [visitation with] the child for the court's approval;

(2) the child already has been relocated without notice, agreement of the parties, or court approval; or

(3) from an examination of the evidence presented at the temporary hearing there is a likelihood that on final hearing the court will not approve the relocation of the primary residence of the child.

(b) the court may grant a temporary order permitting the relocation of the child pending final hearing if the court:

(1) finds the required notice of a proposed relocation of a child as provided by Article 2 was provided in a timely manner and issues an order for a revised schedule for [temporary visitation with] the child; and

(2) finds from an examination of the evidence presented at the temporary hearing there is a likelihood that on final hearing the court will approve the relocation of the primary residence of the child.

Comment

The court has discretion to either delay or permit a proposed relocation pending final hearing.

§ 402. Priority for Hearing

A hearing on a pleading filed pursuant to this [Act] shall be accorded appropriate priority on the court's [calendar/docket].

Comment

Given the likelihood a proposed relocation will involve time-sensitive issues, e.g., a change of employment or a remarriage, authorizing priority on the trial docket for a relocation dispute is appropriate.

§ 403. Evidentiary Hearing

On the request of a party, the court shall hold a full evidentiary hearing on the relocation issue.

Comment

A full evidentiary hearing may be crucial to a relocation determination. Fears that an appropriate relocation will be unduly delayed by ill-conceived or frivolous objections are best dealt with by application of the sanctions provided in Section 409 or by traditional procedural remedies, such as a motion to dismiss or for summary judgment.

§ 404. Proposed Relocation as a Factor for Modification

A proposed relocation of a child [may] [may not] [shall] be a factor in considering a change of [custody].

Comment

A proceeding to prevent relocation of the child also may be accompanied by a request to modify custody. Currently, some jurisdictions by statutes or case law treat a relocation request as one which automatically triggers a full modification proceeding. Other jurisdictions limit the scope of a relocation request to a narrow "best interests" proceeding and do not treat the request to relocate as a change of circumstances sufficient to permit a full custody determination.

Given the variation in current treatment and the disparate views on whether a relocation request opens up a full custody modification proceeding, the alternative choices are presented in § 404. It is left for the states to debate and decide whether a cus-

tody proceeding should be tried in connection with the relocation request.

§ 405. Factors to Determine Contested Relocation

In reaching its decision regarding a proposed relocation, the court shall consider the following factors:

(1) the nature, quality, extent of involvement, and duration of the child's relationship with the person proposing to relocate and with the non-relocating person, siblings, and other significant persons in the child's life;
(2) the age, developmental stage, needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child;
(3) the feasibility of preserving the relationship between the non-relocating person and the child through suitable [visitation] arrangements, considering the logistics and financial circumstances of the parties;
(4) the child's preference, taking into consideration the age and maturity of the child;
(5) whether there is an established pattern of conduct of the person seeking the relocation, either to promote or thwart the relationship of the child and the non-relocating person;
(6) whether the relocation of the child will enhance the general quality of life for both the custodial party seeking the relocation and the child, including but not limited to, financial or emotional benefit or educational opportunity;
(7) the reasons of each person for seeking or opposing the relocation; and
(8) any other factor affecting the best interests of the child.

Comment

A wide variety of state statutes, reported decisions, and legal articles on the subject of relocation have been reviewed. The opin-

ions of some highly regarded mental health professionals, in the fields of child development also have been considered. We analyzed some recent court decisions. For example, during 1996 the highest courts of California, Colorado, Florida, New York, and Tennessee have issued significant decisions on the subject,[16] *and the leading legal journals devoted to family law all published major articles dealing with relocation.*[17] *From these diverse sources a manageable list of factors have been distilled to assist the trier of fact in its determination of whether a proposed relocation of a child should be permitted or restricted. Unfortunately, while the list of factors is comprehensive, it does little to resolve the dilemma so often presented in litigation. If the contestants are two competent, caring parents who have had a healthy post-divorce relationship with the child, the competing interests are properly labeled "compelling and irreconcilable." The child's custodian may have a compelling interest to move with the child; and the noncustodial person may have a compelling competing interest in maintaining the relationship with the child, which may be significantly undermined by the move. The child has a compelling interest in stability—both in the stability of remaining with the custodian and with maintaining frequent contact with the noncustodial parent. In sum, even a perfect list of factors, when applied to decide such a contest, will not resolve the dilemma, i.e., relocation often is a problem seemingly incapable of a satisfactory solution.*

§ 406. Factors Not to be Considered

(a) If the court has issued a temporary order authorizing a party seeking to relocate a child to move before final judg-

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[16] In re the Marriage of Burgess, 13 Cal. 4th 25, 913 P.2d 473, 51 Cal. Rptr. 2d 444 (1996); In re Marriage of Francis (Chobot), 919 P.2d 776 (Colo. 1996); Russenberger v. Russenberger, 669 So.2d 1044 (Fla. 1996); Tropea v. Tropea, 87 N.Y.2d 727, 665 N.E.2d 145, 624 N.Y.S.2d 575 (1996); Abby v. Strange, 924 S.W.2d 623 (Tenn. 1996).

[17] Carol S. Bruch & Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 FAM. L.Q. 245 (1996); 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); Nancy Zalusky Berg & Gary A. Debele, *Postdecree Custody Modification: Moving Out of State*, 10 AMERICAN J. FAM. L. 183 (1996); Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. LOUISVILLE J. FAM. L. 1 (1995-96)(158 PP.).

ment is issued, the court may not give undue weight to the temporary relocation as a factor in reaching its final decision.

(b) The court may not consider whether the person seeking relocation of the child has declared that he or she will not relocate if relocation of the child is denied.[18]

Comment

Subsection (a) recognizes the fact that the status quo resulting from the decision reached by a hearing on a temporary order often is treated as having a determinative effect on final hearing. Either permitting or denying relocation of the child on a temporary basis involves an aspect of prejudging the final resolution of the issue. Nonetheless, requirements of due process mandate the losing party at the temporary hearing may not be precluded from a fair final hearing, and is entitled to present the relevant evidence to reverse the outcome of the temporary decision.

§ 407. Burden of Proof

[Alternative A]

The relocating person has the burden of proof that the proposed relocation is made in good faith and in the best interest of the child.

[Alternative B]

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[18] The issue of propriety of the question of whether the person proposing to relocate the child will move regardless of whether the child is permitted to relocate has bedeviled litigation on this subject from the first time it was asked. A negative answer to the question, e.g., "No, I won't move," is likely to be prejudicial to the proposed relocation as to warrant exclusion from evidence despite the fact that logically that particular answer only tends to prove the proposition that the child is more important to the custodian than any other aspect of his or her life. It says nothing about whether a denial of the proposed relocation will cause the lives of the custodian and the child to be less advantageous. Similarly an affirmative answer, e.g., "Yes, I will move in any event," is also highly prejudicial to reaching a considered decision regarding the child's best interest. The psychology involved is very complex; allowing the question to be asked does not provide guidance as to how the possible answers are to be analyzed.

The non-relocating person has the burden of proof that the objection to the proposed relocation is made in good faith and that relocation is not in the best interest of the child.

[Alternative C]

The relocating person has the burden of proof that the proposed relocation is made in good faith. If that burden of proof is met, the burden shifts to the non-relocating person to show the proposed relocation is not in the best interest of the child.

Comment

After considerable analysis and discussion, there was significant approval for every section of this proposed act, except for this particular, intractable section. As is apparent from the three alternatives submitted, there was no agreement on the placement of the burden of proof in a relocation dispute. Some favored the custodian proposing relocation bearing the burden (Alternative A), while others favored placing the burden of proof on the party seeking to block the relocation (Alternative B). An obvious compromise proposal (Alternative C), suggested a shifting of the burden of proof; initially requiring the person proposing to relocate the child to show a good faith reason for the move. If that burden was met, the duty to go forward with evidence would shift to the objecting party, who would bear the burden of showing the relocation is not in the best interest of the child. This alternative also failed to elicit a consensus.

Rather than attempt to promulgate a proposal commanding an insignificant majority, it was determined the serious disagreement on this apparently crucial issue should be forthrightly stated and left for each legislature to determine for itself. The alternative of omitting this section entirely was rejected because the moving party would then automatically bear the burden under the usual rule of civil litigation. It was believed to be inappropriate to place the burden of proof on a petitioner-plaintiff, rather than allocate the burden to the status of either the party proposing or objecting to a relocation. The issues are sufficiently clear and the matter sufficiently sensitive to avoid allocating the burden of proof based upon who happens to first file a lawsuit.

Finally, some might argue the controversy over the burden of proof is more a hypothetical problem than a realistic hurdle, given

the fact that ultimately each alternative turns on an adjudication of the best interests of the child. Thus, the burden of proof in practice may be little more than a hypothetical legal concept. The trier of fact may first decide the relocation issue based on an evaluation of the best interest of the child and thereafter find whether the burden of proof has been met. In short, relocation is extraordinarily subject to result-oriented analysis by the trier of fact, thereby perhaps making the allocation of the burden of proof less relevant than it might first appear.

§ 408. Posting Security

If relocation of a child is permitted, the court may require the person relocating the child to provide reasonable security guaranteeing the court-ordered [visitation with] the child will not be interrupted or interfered with by the relocating party.

Comment

At its option, the court may retain continuing, exclusive jurisdiction over the case after relocation of a child as long as the nonrelocating person remains in the state, see *Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A. Although demanding security to guarantee return of the child may be unnecessary from a jurisdictional perspective, as a practical matter it may be crucial.*

§ 409. Sanctions for Unwarranted or Frivolous Proposal to or Objection to Relocation of Child

(a) After notice and a reasonable opportunity to respond, the court may impose a sanction on a person proposing a relocation of the child or objecting to a proposed relocation of a child if it determines that the proposal was made or the objection was filed:

(1) to harass a person or to cause unnecessary delay or needless increase in the cost of litigation;

(2) without being warranted by existing law or was based on frivolous argument; or

(3) based on allegations and other factual contentions which had no evidentiary support nor, if specifically so identified, could not have been reasonably believed to be likely to have evidentiary support after further investigation.

(b) A sanction imposed under this section shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. The sanction may include directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the other party of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

Comment

This section, based on Federal Rule of Civil Procedure 11, restates the general law of most states. Despite the possible redundancy, because relocation litigation is particularly vulnerable to abusive conduct, emphasis should be placed on dissuading a variety of unwarranted conduct. Likely scenarios which could well warrant sanctions being imposed on an objecting person include an objection to a relocation of a child that has little or no impact on the visitation, e.g., a move within the same neighborhood, or an objection by a noncustodial parent who has exercised a right of visitation very infrequently or never. Similarly, a court may decide that the child's custodian who seeks to relocate the child in order to thwart a noncustodial parent's relationship with the child may deserve a court sanction.

§ 410. Application of Factors at Initial Hearing

If the issue of relocation is presented at the initial hearing to determine [custody of and visitation with] a child, the court shall apply the factors set forth in this article in making its initial determination.

Comment

Except for this section, the proposed act is designed to apply when a prior order of custody and visitation has been entered

(before its effective date), or to a pending lawsuit that does not involve the issue of relocation at the time of the original final hearing after the effective date. There is a third possibility which may occur in a significant number of cases; the issue of a proposed relocation may be tried at the same time the custody litigation is to be finalized. In such instance, neither notice of a proposed relocation nor the statutory scheme to deal with a future proposed relocation are relevant. In this situation the court is required to determine whether a relocation should be authorized or prohibited at the same time a final order is issued on all other matters in dispute. In such a case, the proposed act directs that the list of factors, § 405 and § 406 are applicable.

If a legislature decides to enact this proposed act, the legislative drafters should consider whether to place this section with other statutes dealing with an initial custody determination and provide a cross reference to the appropriate sections in the proposed act.