The Absence of a National Standard

This brief article is intended to analyze several legal standards governing relocation with a child by a custodial parent following a divorce or paternity judgment. In the absence of any national consensus or uniform law each state has developed its own set of standards for resolving such cases. It is
thought by comparing the law of three states with distinct standards the reader may develop a better understanding of this controversial area of family law. The three states selected represent three distinction geographical areas. They are California, Georgia and Massachusetts.

The issues discussed here relate to situations where one parent has sole legal custody and the other is a noncustodial parent. (While recognizing that various states employ different terminology, traditional terminology of “custodial” and “noncustodial” parent is used here to avoid unnecessary confusion).

For much of the past decades states around the country have been influenced by vastly different decisions on relocation of children after a divorce or paternity case. See Charles Kindregan, Family Interests in Competition: Relocation and Visitation, XXXVI Suffolk Univ. Law Rev. 31 (2002) (noting somewhat liberalized treatment of requests by custodial parents to relocate with the children some distance from the noncustodial parent even if this impacts negatively on visitation rights). This trend was heightened by the much-noted Supreme Court of California decision in
Marriage of Burgess, 913 P.2d 473, 13 Cal.4th 25 (1996), which created a presumption of a right to relocate by ruling that the relocating parent does not have to show the move is necessary as a condition of continuing custody.

Over the past decade some courts liberalized their rules on allowing relocation by separating the request to move from the issue of whether there should be a modification of custody. This was based in part on the concept that a child’s welfare is intimately bound up with the welfare of the new post-divorce custodial family. This model of analysis is based on the identity of interest of the custodial parent and child. Baures v. Lewis, 770 A.2d 214 (N.J. 2001). However, it has not achieved any kind of national acceptance in the courts.

The older analysis was that the child’s best interest lies in having continued and regular contact with both parents. The older analysis continued to be employed in resolving relocation cases in most states, but it was at first believed that the Burgess approach would find advocates. See Carol S. Bruch & Janet M. Bowermater, The Relocation of Children and Custodial Parents: Policy Past and Present, 30 Fam. L. Q. 245 (1996); Judith S. Wallerstein & Tony J. Tanke, To Move or Not to Move? 30 Fam. L. Q.

Some states were apparently influenced by the Burgess philosophy. See, e.g., Blivin v. Weber, 126 S.W.2d 351 (Ark. 2003) (rebuttable presumption to allow relocation). However, most states have no presumption either for or against relocation and decide the issue based on the circumstances of each case based on the best interests of the child. See, e.g., Ireland v. Ireland, 717 A.2d 676 (Conn. 1998); Roberts v. Roberts, 64 P.3d 327 (Idaho 2003); In re Tropea, 665 N.E.2d 145 (1996). A few states apply the traditional best interests of the child rule, but do not require a showing of compelling reasons to support removal. See, e.g., Dupre v. Dupre, 857 A.2d 242 (R.I. 2004) (mother allowed to relocate out of the country).

There is widespread division over the question of whether relocation is itself a change of circumstances which opens up the question of modification

A number of other states have statutes either requiring notice prior to the move and/or otherwise stating requirements to be met before court approval of relocation. See, e.g., Colo. Rev. Stat. § 14-10-129 (2006). Some states have statutes simply providing the need for court approval prior to an out of state move after a divorce, but without specific standards set out in the statute. See, e.g., Mass. Gen. L. c. 208, § 30 (2006).

Shared Physical Custody:

The theories discussed in this article do not cleanly apply to shared physical custody. Most states have a statute encouraging shared custody, although placing primary care custody in one divorced parent continues to be quite common.
That shared custody cases present a very different kind of relocation issue than one confronting a court when the parent who seeks to move away is in law and fact the true primary caretaker parent. The American Law Institute *Principles of the Law of Family Dissolution*, §§ 2.17(1) & 4(c) can be read to require that the court determine if the relocation of a parent will significantly impair the other parent’s ability to exercise parental responsibilities when the parents have previously had actual shared custody and if modification of a prior custody order will after consideration of all the relevant factors impact or promote the child’s best interests.

The difficulty with resolving a relocation case when the court has decreed shared physical custody is that such an arrangement will simply not work when one parent relocates a considerable distance. Courts have recognized this incompatibility. In order to justify a relocation order in favor of a move involving a substantial distance it would seem necessary to first modify the original joint custody order, which in turn would require proof of a substantial change in circumstance. *Maynard v. McNett*, (Maynard) No. 20050090 (N.D., Feb. 8, 2006) (after a joint physical custody order relocation cannot be authorized unless the court first determines that sole physical custody is required based on the best interests of the child);

A California Appeals Court decision reflects the practical consideration that when there is a true shared custody arrangement in place using the changed circumstances test employed in modification actions will not work. The is because where the parents share custody of a child in law and in fact “and one of the parents wants to move away, the changed circumstances analysis is not appropriate since the existing order becomes a practical impossibility.” Ragghanti v. Reyes, 123 Cal.App.4th 989, 997 (Cal.App., 6th Dist. 2005) [initial order of shared custody after a long period of practical shared custody, court awarded father primary care custody during the school year; mother cannot move away with the child]. If the court cannot apply the changed circumstances test for modification in such a shared custody case then of necessity it will have to rely on the best interests of child test used to determine an initial custody order. Id. [based on best interested of child father will have full physical custody if mother decides to move away].
The case law (or statute) governing modification is likely to be well-developed, and from a burden of proof viewpoint may be a practical obstacle to the desires of the relocating parent to move. On the other hand, the parent who objects to the relocation may not be willing to assume greater childcare responsibilities if the other chooses to relocate anyway. The modification of visitation schedules may satisfy some parents and children in such cases but not all. The use of what has been called virtual visitation when parents live far apart may work in some cases, but the emotional and financial costs involving computers and telephone charges are not likely to ever be a substitute for human contact. Given these realities it would be desirable for the law to develop a better body of law to deal with the shared custody cases in relocation claims.

Georgia Law Reflects the Traditional Approach

Although some states were at least to some extent influenced by the Burgess reasoning, Georgia appears not to have been affected in its analysis of relocation cases. The decision in Bodne v. Bodne, 588 S.E.2d 728 (Ga. 2003) ruled that a relocation by a parent out of state with the child can
constitute a material fact which affects the welfare of the child and might justify the modification of the prior custody order. In reaching this decision the Georgia court in Bodne recognized that the trial court considering a relocation case must weigh the best interests of the child; the trial court cannot apply a rule or presumption that is based on an assumption that relocation is in the best interests of the child even if it would substantially improve the life of the custodial parent. Id. at 729.

In Bodne the Georgia court considered the counterclaim of the noncustodial mother for custody when the custodial father proposed to move to Alabama. Id. at 728. The court ruled out all bright line rules, i.e. that there was neither a presumption in favor of relocation or one against relocation. Id. at 729. The Georgia court also ruled that in a relocation case the original custody order will not control, in effect allowing the reopening of custody in the light of new circumstances involved in the relocation matter. Id.

In Bodne the Georgia court had the opportunity to adopt a Burgess approach to relocation requests. The dissenting judge cited decisions from other states which adopted an identity of child and custodial parent interest
analysis. Id. at 732. One such decision was the Oklahoma decision in *Kaiser v. Kaiser*, 23 P.2d 278 (Okla. 2001), in which an Oklahoma court cited *Wallerstein & Tanke*, supra, 305, arguing the proposition propounded by a so-called Wallerstein brief which had influenced the California court which decided *Burgess*. (This refers to an amicus brief by Professor Judith S. Wallerstein in the *Burgess* case, which argued that the best interests of the child was best promoted by a presumption in favor of allowing the primary-care custodial family to locate even if the effect was to mean the child spending less time with the other parent).

The dissenting Georgia judge in *Bodne* also quoted an older Massachusetts decision in *Yannas v. Frondistou-Yannas*, 481 N.E.2d 1153 (1985), which noted that in relocation cases the court must consider the interwoven interests of the child with those of the custodial parent (although Massachusetts did not explicitly adopt a *Burgess*-type rule). *Bodne*, 588 S.E.2d at 732-733 (Benham, dissenting). However, the majority of the Georgia court declined to take the bait of following other courts which liberalized their approach to allowing relocation based on a presumption or bright line rule. Id. at 729.
So Georgia, like most other states, staked out a middle position between the California in Burgess and the attitude of some state court judges who apply a de facto (even if not legal) presumption against relocation. This middle ground favored by the Georgia court views relocation through the prism of traditional custody issues rather than as based on a distinct set of values, which means the application of the best interests of the child standard.

Georgia does have a statute which while not a relocation law in the full sense of the word can have an impact on relocation. Ga. Code Ann. § 30-3-37 (2006) authorizes the court to insert in a judgment a provision requiring the custodial parent to give notice to the other parent as to a change of residence. While failure to comply with such an order is not of itself a change in circumstance the court may give consideration to a suddenly announced relocation without the notice as a factor which could affect the welfare of the child. See In re R.R., 474 S.E.2d 12, 16 (Ga. 1996).

*California Reformulates the Burgess Rule:*

A more recent significant national development is that the Supreme Court of California has modified its Burgess views in Marriage of LaMusga, 88
P.3d 81, 32 Cal.4\textsuperscript{th} 1072 (Cal. 2004). The result of the later California decision brings its influential views into a closer alignment with states such as Georgia. In \textit{LaMusga} the custodial mother wanted to relocate with the children from California to Cleveland, Ohio, for various reasons including being near relatives and a job opportunity for her new husband; during the appeal she obtained a temporary order allowing her to relocate with the children to Arizona but the court treated the case as involving a proposed move to Ohio. \textit{Id.}

Prior to \textit{LaMusga} the California decision in \textit{Marriage of Burgess}, 913 P.2d 473, 13 Cal.4\textsuperscript{th} 25 (1996) was widely cited around the country for the proposition that the law was evolving toward recognizing that a custodial parent may relocate without the need to show that the move is “necessary.” The \textit{Burgess} ruling would allow the custodial parent to change the residence of the child subject only to the power of the court to restrain the move if it is shown that the move would prejudice the rights or welfare of the child. \textit{Burgess}, 13 Cal. 4th at 29. Without formally overruling \textit{Burgess} the California Court qualified this approach in \textit{LaMusga}. 
In LaMusga the court reaffirmed the basic concept of Burgess that a custodial parent does not have to establish that a planned move is necessary to relocate, but added that neither does an objecting noncustodial parent have to establish that a change of custody is essential to prevent a detriment to the children if the move were to take place. 32 Cal.4th at 1078. The essence of this ruling is that “the noncustodial parent bears the initial burden of showing that the proposed relocation of the children’s residence would cause detriment to the children, requiring a reevaluation of the children’s custody.” Id. This constitutes some backtracking from how the Burgess ruling was originally perceived since the burden on the objecting party is now merely to make a preliminary showing of detriment to the children, after which the case could be converted into what is effectively a modification of custody case.

While this reformulation of the rule by the California court had the effect of questioning the original widespread interpretation of Burgess as a practical green light in favor of relocation, the court stressed that there is still a “paramount need for continuity and stability in custody arrangements.” Id. at 1093. This suggests adherence to the single family model for dealing with relocation issues which lie at the heart of a suggested trend in some
American courts of giving deference to reasonable requests in favor of relocation. See Kindregan, supra, 43-44. In LaMusga the court finally affirmed the trial court order affirming a transfer of custody to the father if the mother moved to Ohio, based in part on the court-appointed custody evaluator that while the mother had several good reasons for the move she also wanted to move to take the children away from day-to-day interactions with the father: “The court may still consider whether one reason for the move is to lessen the child’s contact with the noncustodial parent and whether that indicates when considered in the light of all the relevant factors, that a change in custody would be in the child’s best interest.” LaMusga, 32 Cal.4th at 1100.

Thus, the California court which seemed to pioneer the concept of a presumptive right to relocate, has now qualified it by allowing the objecting party to make a preliminary showing that a change of custody would be in the child’s best interests if the custodial parent relocates. If such a showing is made the court must then weigh all the factors to determine if the custody order should be modified, including “the children’s interest in stability and continuity in the custodial arrangement; the distance of the move; the age of the children; the children’s relationship to both parents; the relationship
between the parents including, but not limited to, their ability to communicate and cooperate to the put the interests of the children above their individual interests; the wishes of the children if they are mature enough for such an inquiry to be appropriate; the reasons for the proposed move; and the extent to which the parents are currently are sharing custody.”

LaMusga, 32 Cal.4th at 1101.

An objecting noncustodial parent does not have an automatic right to an evidentiary hearing on the question of modification of custody alleged to be triggered by an expressed intent of the other parent to move away from the area. The Supreme Court of California has ruled that the test for allowing such an evidentiary hearing is necessity. When one parent has primary care physical custody with a right to make decisions relating to the health, education and welfare of a child under Cal. Fam. Code § 3006 and proposes to relocate, the objecting noncustodial parent has the burden of making a prima facie showing of detriment to the child. If that showing “is insubstantial in the light of all the circumstances presented in the case, or is otherwise legally insufficient to warrant relief” then an application for an evidentiary hearing will be denied. Brown v. Yana, 127 P.3d 128, (Cal. 2006).
Massachusetts and the Real Advantage Standard:

Massachusetts has an ancient statute governing relocation of a custodial parent after a divorce. Mass. Gen. L. c. 208 (2006), while amended from time-to-time, dates to 1842. The consent of both parents is needed to relocate a child of divorce outside the Commonwealth, or the consent of the child if he or she is “of suitable age.” If neither of these situations apply the approval of the court “upon cause” is needed to the child out of the state. The statute appears to have been enacted in order to protect “the custody, support and modification jurisdiction of the Massachusetts courts.” Charles Kindregan & Monroe Inker, Massachusetts Domestic Relations Rules and Statutes Annotated, 285 (West/Thomson 2006).

A statute which leaves to the courts a determination of what constitutes “cause” is obviously an open invitation to develop new standards as the needs of society change. The standard which has evolved in Massachusetts is based on a formulation called a “real advantage” standard. As announced by the Supreme Judicial Court in Yannas v. Frondistou-Yannas, 481 N.E.2d 1153 (Mass. 1986), this standard requires the judge to most importantly consider the effect of a removal on the child. But also too considered are whether the child’s quality of life will be improved and any improvement to
the child flowing from the improvement of the quality of the custodial parent’s life.  Id. at 710. Any potential harm to the curtailment of the child’s contact with the noncustodial parent must also be considered.  Id. at 711. The Massachusetts court admitted that such a formulation means that relocation issues have to “be resolved on a case by case basis.”  Id. at 1158.

The Massachusetts court borrowed the “real advantage” test from the New Jersey decisions.  See Cooper v. Cooper, 491 A.2d 606 (N.J. 1984). Paradoxically, New Jersey later abandoned this standard in favor of an even more liberalized rule which allows relocation based on any sincere, good faith reason and no longer requiring the custodial parent to show a real advantage.  See Holder v. Polanski, 544 A.2d 852 (N.J. 1988) (mother allowed to relocate children to Connecticut based on several good faith reasons).

A number of Massachusetts appellate decisions illustrate the application of the real advantage test.  In Rosenthal v. Maney, 745 N.E.2d 350 (Mass. App. Ct. 2001), the court reversed a judgment which denied a mother’s request to relocate to Rhode Island where her new husband lived and where she was employed as violinist in a philharmonic orchestra. The trial judge
had awarded the father primary care custody, but this was also reversed. Id. at 362. The court ruled that “a request for modification of custody is distinct from a request to be relocated and must be based on material and substantial changes of circumstances other than the move.” Id. at 354. The fact that the mother had remarried and had relocated to another state was not shown to have a detrimental effect on the child and was not change of circumstance. Id. at 355.

The real advantage standard requires consideration of the effect relocation would have on all the parties, and in Rosenthal the father argued that it would have an adverse effect on his time with his child. Id. at 353. But the Massachusetts court ruled that the “fact that visitation by the noncustodial parent will be changed to his or her disadvantage cannot be controlling.” Id. at 361 (quoting Yannas, supra). Given the fact that the distance between the mother’s new home and the father’s is only 55 miles, the court noted that modification of the visitation schedule could minimize any adverse consequences on the father’s time with the child. Id. at 360.

Other Massachusetts appellate decisions deal with various aspects of the relocation issue. In Williams v. Pitney, 567 N.E.2d 894 (Mass. 1991) the
court stressed that the “cause” which had to be shown under the statute and real advantage standard essentially is that the move has to be in the best interests of the child. In this case the state supreme court affirmed a judgment allowing the mother to relocate the children to California on the theory that her increased economic opportunities there and the presence of supportive friends and relatives would be a real advantage to the children and would have an uplifting effect on the mother, which would offset the decreased time the father would have with the children. *Id.* at 899. The reasoning in this case does suggest the weakness of the real advantage test. Even if it benefits the children by improving the quality of the mother’s life, of necessity a move of thousands of miles will adversely effect the relationship of the children to the father, unless substantial changes to the visitation schedule can be made and the family is wealthy enough to afford extensive travel. *Id.* at 898-899. In *Williams* the Supreme Judicial Court also ruled that a prior agreement between the parents that neither would remove the children from the state without the consent of the other, even if it survives the divorce as a contract having independent significance, would not be binding on the court regarding post-divorce issues relating to the welfare of the children. *Id.* at 898.
The issue of whether to allow a temporary removal pending a final hearing also arises from time-to-time. Opinions on such orders are likely to vary greatly. In Gouin v. Gouin, 755 N.E.2d 1221 (Rescript opinion, Mass. 2001), the state supreme court denied a writ of mandamus to quash an order allowing the wife to temporarily relocate the children to Maine while her complaint to relocate was pending. The case might be understood as in accordance with the usual policy of not reviewing interlocutory orders, although in one sense once a relocation has been allowed even on a temporary basis it changes the circumstances which exist “on the ground” once the children settle into a new neighborhood, enroll in new schools and arrange for new medical providers.

A different situation is created when a parent removes a child in violation of a court order or contrary to the governing law. In Hernandez v. Branciforte, 770 N.E.2d 41 (Mass.App.Ct. 2002) the mother removed the children to Italy for a limited time pursuant to a stipulation and later a judge allowed her a temporary removal. However, it later became apparent that the mother did not intend to return the children to Massachusetts and the court granted the father temporary custody. Id. at 44. The mother defied court orders that she return the child. Id. at 45. The mother attempted to
have an Italian court assume jurisdiction on grounds that Italy was now the child’s home state, but while the Italian judge allowed the child to remain in that country it did not assert jurisdiction over the merits. *Id.* at 44. While the removal was not of itself grounds for modification of custody, the court considered evidence that the mother had disrupted the child’s paternal and familial relationships in Massachusetts by her conduct, the father’s good parenting skills, the breakdown in communications caused by the mother’s conduct and her failure to seek legal approval for the relocation. *Id.* at 48-49. The court found that the mother was not being punished for her conduct by the change in custody, but that her inability to act for her child’s welfare in these circumstances justified the modification. *Id.*

Another issue in Massachusetts courts stems from the fact that the statute (Mass. Gen. L. c. 208, § 30) applies only to post-divorce relocations out of state and only when the child has lived in the state for five years. How should the court address issues relating to either a non-divorce situation such as a paternity case or an in-state relocation? This type of problem can arise in any state when a legislature has defined the circumstances in which court approval must be sought before a non-consented relocation can occur. Presumably at a very minimum cases which do not technically come under
the statute could be entertained by a court on an equitable basis, and for reasons of equal treatment decided on the same standards used in cases heard under a statute.

In D.C. v. J.S., 700 N.E.2d 686 (Mass. App. Ct. 2003) the mother proposed to move from eastern Massachusetts where the father lived to the western part of the state. Even though the statute did not apply to an in-state move, they applied the real advantage standard on the theory that “custodial conditions for the child that would result from relocation to a distant part of the State will resemble those applied to removal beyond the State boundaries.” Id. at 690. Citing and quoting Charles Kindregan & Monroe Inker, Family Law and Practice, (2d ed. 2002), the Appeals Court noted favorably that the trial judge concluded that it is likely in a case involving a substantial in-state move the court would apply the real advantage test employed in cases decided under the statute. Id. at 690, FN6. There is no reason to doubt that the same standard would be used in deciding a post-parentage non-marital case involving a relocation issue even though the statute would not apply.
Finally it should be noted that as this was written the case of *Mason v. Coleman*, SJC # 09625, is pending before the Massachusetts Supreme Judicial Court. This case raises the question of the proper standard for determining removal cases when the parents have had shared physical and legal custody and one of them wishes to relocate with the child. Should the court in such a case try to apply the “real advantage” test or is some other standard appropriate. The decision in this case may clarify an issue which has been less than clear until now.

*Conclusion:*

The widespread different approaches to relocation as reflected in the three states analyzed here reflect a national problem. The growing number of relocation cases brought to the family courts, and the radically different methods of resolving them, calls out for a proposed uniform law. Many issues, including the use of guardian ad litem, mediation, the proper standard for modification of prior orders, the burden of proof and who has it, the use of presumptions, the treatment of a parent who defies court orders, etc. need clarification. But above all, the problem of how to apply the best interests of child rule while still considering the interests of all parties cries
out for clarification. No rule can cover every situation, and to some extent the litigation of these cases will continue to be resolved on a fact-intensive case-by-case basis. But the development of a national standard will help reduce the disparity which exists between the states and help to make the resolution of relocation disputes a little more uniform and predictable.