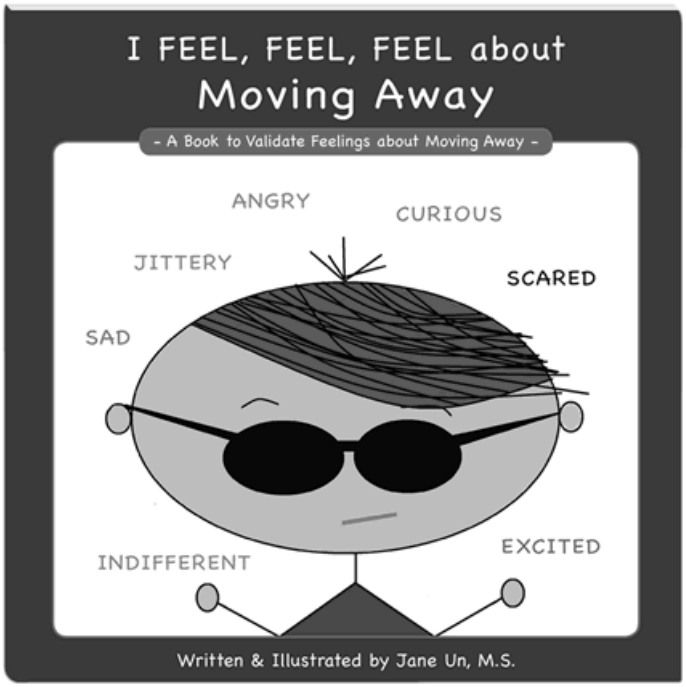
WHAT ABOUT ME?

STATE STATUTES & CASELAW

Change of Legal Residence—State-Specific Framework for Deciding Relocation Cases
American Bar Association 2014 Spring Conference



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I Feel, Feel, Feel about Moving Away Book
Written & Illustrated by Jane Un, M.S. http://www.childswork.com/I-Feel-Feel-Feel-about-Moving-Away-Book/

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I. CONSTITUTIONAL ISSUES

There is the potential for relocation decisions to infringe on certain constitutional rights of the parties involved. While the right to travel is not explicitly stated in the Constitution, it is firmly established in U.S. law and precedent. In *U.S. v Guest*, 383 U.S. 745 (1966), the Court noted, "It is a right that has been firmly established and repeatedly recognized."

Interesting legal questions were presented in *In re Sara Ashton McK. v Samuel Bode M*, Docket No. 11057, Appellate Division of the Supreme Court of the State of New York (Nov. 14, 2013). In a scathing reversal, the court scolded the trial court for ruling that a pregnant woman could not relocate from California to New York. After dismissing Ms. McK's custody petition filed two days after her child's birth, the New York trial court had declined jurisdiction in favor of a California court having jurisdiction over a pre-birth paternity action.

The appellate court held that New York was the child's home state under the UCCJEA. California did not have subject matter jurisdiction under the UCCJEA because the father's pre-birth paternity petition, did not initiate a proper custody proceeding where, as here, the child had not yet been born. Under the UCCJEA, courts cannot exercise subject matter jurisdiction over custody proceedings filed prior to the birth of a child. *In re McK v Bode*, ___ NY ___ (Nov. 14, 2013) [Slip Op. at pp 1-2] http://www.nycourts.gov/reporter/3dseries/2013/2013_07554.htm Last accessed on January 4, 2014.

2 PRESUMPTIONS FOR/AGAINST RELOCATION

In 2006, a review of state statutes and case law showed eight states with a presumption in favor of allowing the custodial parent to determine the child(ren)'s residence and to relocate. "*States Differ on Relocation*" by Linda D. Elrod, 28 Fam. Adv. 4, 10-11 (2006). "*State Statutes on Relocation"* - American Bar Association,

family_advocate_2804RelocationChart.authcheckdam.pdf, last accessed on January 4, 2014

An exemplar of relocation litigation strategy in states in which there is a presumption in favor of permitting the custodial parent to relocate is *In re Marriage of Burgess*, 913 P2d 473 (Cal. 1996) The *Burgess* court established a presumption in favor of maintaining a custody arrangement by permitting relocation of the custodial parent. The court emphasized the best interests of a child and his/her need for continuity and stability, i.e., to relocate with the custodial parent. *Burgess* placed the burden of proof upon the non-custodial parent to show why the move was made or proposed in bad faith and how the move would be detrimental to the child in light of the circumstances.

A SEA CHANGE IN FAVOR OF CHILDREN? Again in California, a shift in policy was seen in *In re Marriage of LaMusga*, 88 P.3d 81 (2004). There the court held that the policy of *Burgess*, *supra*, authorizing the custodial parent's right to determine the principal residence of the minor child unless the noncustodial parent failed to carry the heavy burden of proof should be moderated. The *LaMusga* court advocated "wide discretion" be given to the trial courts. The *LaMusga* majority held that the presumptive rights of the custodial parent to move was not to be the focus of a move-away analysis. Instead, a court faced with a relocation motion should focus on the needs and concerns of the child.

3. FRAMEWORK FOR RELOCATIONS UNDER LAMUSGA

The *LaMusga* opinion provided an eight-part test for move-away cases. The majority stated: "Among the factors that the court should ordinarily consider when deciding whether to modify a custody order in light of the custodial parent's proposal to change the residence of the child are the following:

1) the children's interest in stability and continuity in the custodial arrangement;

2) the distance of the move;

3) the age of the children;

4) the children's relationship with both parents;

5) the relationship between the parents including, but not limited to, their ability to communicate and cooperate effectively and their willingness to put the interests of the children above their individual interests;

6) the wishes of the children if they are mature enough for such an inquiry to be appropriate;

7) the reasons for the proposed move; and

8) the extent to which the parents currently are sharing custody."

4. STATES WITHOUT A PRESUMPTION IN FAVOR OF A CUSTODIAL PARENT RELOCATING:

Michigan is one of many states without a presumption in favor of a custodial parent relocating at will—states that have required something more. Prior to 2001, a custodial parent who wanted to relocate within Michigan was only required to notify the Friend of the Court of the child's new address. By contrast, an interstate move required court approval. There were no restrictions on relocation for a noncustodial parent, other than to provide an address change so

that child support orders could be enforced. There was, however, case law that was applied to changes in residence.

A four-prong test for change of residence was adopted from *D'Onofrio v D'Onofrio*, 144 NJ Super 200, 206–207, 365 A2d 27, *aff'd*, 144 NJ Super 352, 265 A2d 716 (1976):

1. [The court] should consider the prospective advantages of the move in terms of its likely capacity for improving the general quality of life for both the custodial parent and the children.
2. It must evaluate the integrity of the motives of the custodial parent in seeking the move in order to determine whether the removal is inspired primarily by the desire to defeat or frustrate visitation by the noncustodial parent, and whether the custodial parent is likely to comply with substitute visitation orders when she [or he] is no longer subject to the jurisdiction of the courts of this State.
3. It must likewise take into account the integrity of the noncustodial parent's motives in resisting the removal and consider the extent to which, if at all, the opposition is intended to secure a financial advantage in respect of continuing support obligations.
4. Finally, the court must be satisfied that there will be a realistic opportunity for visitation in lieu of the weekly pattern which may provide an adequate basis for preserving and fostering the parental relationship with the noncustodial parent if removal is allowed.

Watters v Watters, 112 Mich App 1, 12–13, 314 NW2d 778 (1981).

CODIFICATION OF THE *D'ONOFRIO* TEST:

Subsequently, in 2001 the *D'Onofrio* test was codified in MCL 722.31 and a fifth factor was added by the legislature.

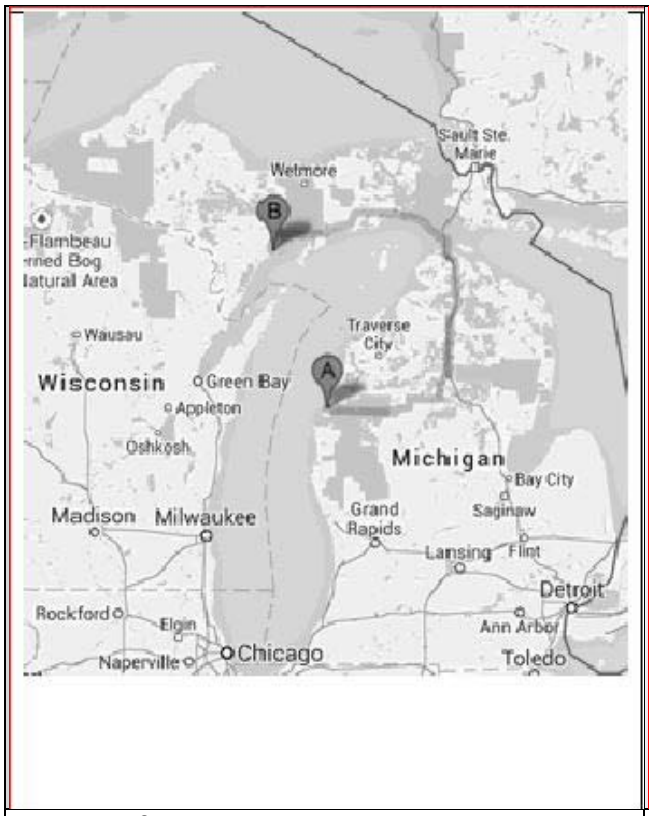
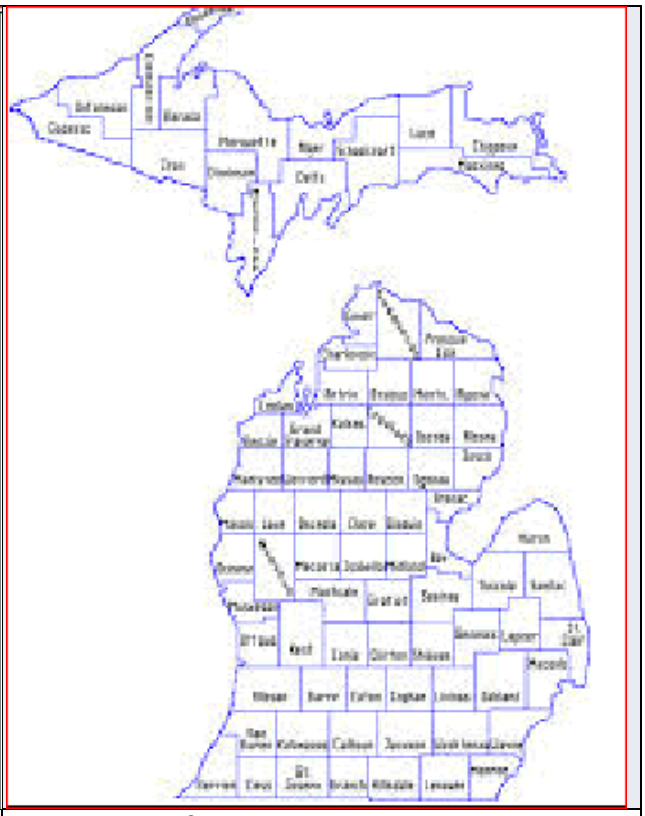
MCL 722.31 provides that:

(1) A child whose parental custody is governed by court order has, for purposes of this section, a legal residence with each parent. Except as otherwise provided in this section, a parent of a child whose custody is governed by court order shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued.

This is commonly known in Michigan as the “100-mile rule.” The statute applies to cases in which the parents live within 100 miles of each other at the time of filing but only if the parents have joint legal custody.

Michigan also has a court rule that provides that “a judgment or order awarding custody of a minor must provide that ... the domicile or residence of the minor child may not be moved from Michigan without the approval of the judge who awarded custody or the judge’s successor.” MCR 3.211(C)

Parents are prohibited from moving without court permission more than 100 miles from the residence or residences at the time the case was filed. The absurdity of that is illustrated in the map above. The court of appeal has decided that the 100 miles is to be measured not by actual road miles, but by radial miles, i.e., on a straight line or “as the crow flies,”. *Bowers v Vandermeulen-Bowers*, 278 Mich App 287, 750 NW2d 597 (2008).

	
A move from Manistee, MI to Escanaba, Michigan equals 341 mi, 5 hours 42 minutes in road miles.	As the crow flies between Manistee, MI to Escanaba, Michigan equals 99 miles, thus would meet the statutory requirement.

5. SIGNIFICANT RECENT MICHIGAN CASES:

BIOC APPLIED: Relocation of 93 Miles Leads to Change in Custody:

In *Powery v Wells*, 278 Mich App 526, 752 NW2d 47 (2008), the custodial parent (mother) moved 89 miles from the other custodial parent. The father filed a motion to change custody. The mother filed a motion for a modification of parenting time. The evidence presented at the motion hearing showed that if the mother moved to Traverse City, either she or the father would be relegated to the role of a "weekend" parent. Both parents were equally active in their daughter's life. Because any change in parenting time would amount to a change in the child's

established custodial environment, the court did a best interest factor analysis and held that in the event that the mother chose to remain in Traverse City custody would be changed to the father.

Shifting of the burden of proof: Significantly, in *Powery*, because the mother made the move to Traverse City, necessitating a modification of parenting time, she had the burden of establishing that the existing custody arrangement should be disrupted. Because there was an established custodial environment with both parents, *neither parent's custody* may be disrupted absent clear and convincing evidence.

6. MICHIGAN'S FRAMEWORK FOR DECIDING RELOCATION CASES—A BIOC ANALYSIS:

See Rains v Rains, 301 Mich App 313, ___NW2d ___ (2013), included in your materials. In Rains, the parents shared joint legal and joint physical custody. However, the mother had significantly more overnights with the parties' minor child than did the father. (He had 156 overnights per years). This was a high conflict case like *LaMusga* and there were parenting coordinators and counselors involved with the family.

The mother filed a motion to relocate about three hours away alleging that the move would be beneficial to the minor child because her fiancé had obtained a much better and a higher paying job. She alleged that she would be able to be a stay-at-home mother. She also alleged that the social status she and her fiancé (who became her husband during the appellate process) would enjoy and schools available in Traverse City would all benefit the child.

But what the mother could not counter was this: the child enjoyed access to many friends and a host of family members in the community where he lived. The father had arranged his

residential situation so that he was very actively involved in the minor child's life. Although the trial court employed an inappropriate procedural approach to the case, it eventually got to the best interests of the child analysis. It was obvious that there was an established custodial environment with both parents. Of the twelve best interest factors in the Michigan statute, the trial court credited the father on three of the factors. These were related to the child's stability and permanency in his present custodial environment and his significant ties to access to extended family that would be lost or hindered because of a relocation. The parents fared equally regarding most of the other factors with neither being favored on the factors related to domestic violence and the willingness and ability to facilitate a parent-child relationship with the other parent. [In fact, this case sounds very similar to the *LaMusga* case in which co-presenter Dr. Stahl was the expert witness and whose testimony was heavily relied upon by the appellate court.]

THE ROADMAP FOR STATES WHERE THE BIOC IS THE CONTROLLING FACTOR IN A RELOCATION CASE

The Rains panel clarified the following as the manner in which a court should proceed in a relocation case.

The relocation statute discussed above is to be used. These statutory factors are similar to those in many states. MCL 722.31(4) sets forth the factors the court will consider before permitting a legal residence change restricted by subsection (1) of the statute.

(4) Before permitting a legal residence change otherwise restricted by subsection (1), the court shall consider each of the following factors, with the child as the primary focus in the court's deliberations:

(a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.

(b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.

(c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.

(d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.

(e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

THE TRIAL COURT'S DECISION-MAKING PROCESS:

The trial court must follow a precise roadmap for making a child-centered decision, according to *Rains*:

1) A parent requesting a change of legal residence has the burden of proof by a preponderance of the evidence that the change is warranted based on MCL 722.31(4).

2) If the relocating parent meets this burden, the trial court must decide if an established custodial environment exists.

3) If the court finds that there is an established custodial environment, the court must next decide whether the change of residence would alter that environment. [Note that where the court finds that the ECE exists with both parents, then as in *Powery, supra, a fortiori* that ECE would be changed by the move].

4) If the residence change will alter the established custodial environment, the burden of proof is upon the relocating parent to show by clear and convincing evidence that the move "is in the child's best interest."

CONCLUSION

All family law cases have facts that are unique unto themselves. The cases are gut-wrenching and fact intensive. Certain scenarios, however recur. Often the court is faced with balancing the child's established custodial environment with his/her primary caretaker against the importance *from the child's perspective* of separation from the noncustodial parent. Although a substitute visitation / parenting time plan may be fashioned, in many, if not most cases, that plan will not provide substantially equal time and/or substantially similar quality of time when compared with that previously shared by the child and the non-custodial parent.

Many will argue that Skype, Facetime and other social media resources will make up for what the child is missing. But really—from the child's perspective . . . does any one of us really believe that?

Other Resources:

Elrod, Linda D., "National and International Momentum Builds for More Child Focus in Relocation Disputes." Family Law Quarterly, American Bar Association Family Law Section, vol. 44, no. 3 (Fall 2010)