IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

In re the Marriage of Navarro & LaMusga

SUSAN POSTON NAVARRO (LaMUSGA)

Appellant

and

GARY LaMUSGA,

Respondent

_____/

Supreme Court
Case No.: S107355

Court of Appeal
Case No.: A096012
Contra Costa County
Superior Court
Case No.: D95-01136

RESPONDENT'S OPENING BRIEF ON THE MERITS

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TO THE HONORABLE CHIEF JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Respondent, Gary LaMusga, respectfully submits this Opening Brief, following this Court's Order, filed August 28, 2002, granting review of the decision of the Court of Appeal, First District, Division Five, Case No. A096012, filed May 10, 2002, hereinafter referred to as "the Opinion."

ISSUE PRESENTED

When this Court decided *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 51 Cal.Rptr.2d 444, 913 P.2d 473, it established straightforward rules to guide trial courts on when a custodial parent's request to "move-away" with the children could be restricted:

> "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."' [Citation.] This construction is consistent with the presumptive 'right' of a parent entitled to custody to change the residence of his or her minor children, unless such removal would result in 'prejudice' to their 'rights or welfare.'" (Id. at p. 38.)

Burgess merely restated this Court's "long established" "'general rule [...that] a parent having child custody is entitled to change residence unless the move is detrimental to the child.'" (Id. at p. 35.)

Among the lessons in *Burgess* that have been forgotten are that that trial courts must consider whether a parent's planned move will be detrimental to the welfare of the child and "that bright-line rules in this area are inappropriate: each case must be evaluated on its own unique facts." (Id. at p. 39.) Instead, the perceived right of a custodial parent to move-away with a child has become a bright-line rule and the portion of the test that the trial court should consider actual prejudice to the children has been lost. Trial courts are being given the message that once they determine that the requested move is not being made for

an improper motive, they are powerless to inquire further into the children's best interests. When they make any order other than one permitting a move-away, they are reversed.[1]

Although quoting the *Burgess* test, Courts of Appeal and many trial courts have forgotten that children's welfare must be considered. If the trial court finds on the basis of substantial evidence that the planned move will be harmful (or prejudicial, or detrimental) to the welfare of the children, then it should have the right to restrain it. The Court of Appeal's Opinion ignores this principle.

Justice Yegan raised this very issue in his dissent in *In re Marriage of Bryant* (2001) 91 Cal.App.4th 789, 110 Cal.Rptr.2d 791, asking whether a proposed move must be automatically approved when the evidence is that such a move would be detrimental to the welfare of the children? He complained of courts having to rubber-stamp move-away requests that were not the best alternative for the children. He quoted the trial judge's thinking on the subject:

> "There are two realistically possible scenarios in this case. The court could conditionally grant physical custody of the children to the father (with liberal visitation to the mother) if the mother moves away, with joint physical custody if the mother remains in Santa Barbara. In all likelihood, the court could force the joint-physical-custody scenario, since it is unlikely that mother will move-away if it means she thereby becomes the non-custodial parent. This would be the optimum scenario for the best interests of the children, since it would preserve their lifelong social structure in the Santa Barbara area with very successful schooling, church, sports, paternal extended family and maternal aunt and would maximize the children's frequent and continuing contact with both parents." (Id. at p. 797.)

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[1] The only published opinion affirming the denial of a move-away request is *Cassady v. Signorelli* (1996) 49 Cal.App.4th 55, 56 Cal.Rptr.2d 545, which was the first published opinion interpreting *Burgess* and had a highly unusual fact pattern. Every subsequent opinion since has held in favor of the custodial parent's right to move, even when the trial court felt that the move was not in the child's best interests. (See, e.g., *In re Marriage of Bryant* (2001) 91 Cal.App.4th 789, 110 Cal.Rptr.2d 791, discussed *infra* at page 43 et seq.)

Nevertheless, Justice Yegan noted, the trial court opted for what can and must be characterized as a custody arrangement that was not the optimum scenario for the children. It expressly said that it was "compelled to select what is next best in the children's interest." (Ibid.)

Justice Yegan felt that the trial court and the majority interpreted *Burgess* as a "bright-line" rule where the trial court's inquiry begins and ends with whether the relocation is for a bad-faith purpose such as frustrating the non-custodial parent's frequent and continuing contact with his children. Where the relocation is not in bad-faith, the court may not require the relocating parent to show necessity or justification for the move.

> "I am hopeful that the California Supreme Court did not intend that *Burgess* be interpreted in a 'straightjacket' fashion. A family law court is a court of equity [citation] and it is required to weigh all relevant considerations in determining what is in the best interests of the children. *Burgess* speaks to the 'widest discretion' enjoyed by the trial court in determining what is in the best interests of the children in a custody dispute. (*Burgess, supra*, 13 Cal.4th at pp. 31, 34.) It also requires the trial court to consider the prejudice to the children from a relocation. (Id., at pp. 32, 34.) A move should not be allowed where such would be "'detrimental to the child.'" (Id., at p. 35, quoting *In re Marriage of Ciganovich* (1976) 61 Cal.App.3d 289, 293 [132 Cal.Rptr. 261].) *Burgess* expressly states that "'bright-line rules in this area are inappropriate: each case must be evaluated on its own unique facts.'" (*Burgess, supra*, 13 Cal.4th at p. 39.) In my view the trial court did not want to make the order that it did. [Fn.] Even from the cold record, it appears that the relocation of these children is to their detriment. [¶] When the trial court expressly indicated what the optimum scenario would be, it should have stopped and entered that order. By definition, and in the words of the trial court, it selected what was "next best." (*In re Marriage of Bryant, supra*, 91 Cal.App.4th at p. 35.)

It is important to note that there was no evidence in *Bryant* of actual prejudice to the child's welfare beyond that occasioned by any move involving children. (See, e.g., *In re Marriage of Edlund and Hales* (1998) 66 Cal.App.4th 1454, 1472, 78 Cal.Rptr.2d 671.)

The real issue was whether a trial court was required to choose the "next best" option simply because the custodial parent willed it. Interpreting *Burgess* as a "bright-line" test, the majority held that it was. However, the "bright-line" test in *Bryant* did not involve a situation where there was an affirmative showing of detriment to the children from the move. Detriment was present in the present case, but the Court of Appeal ignored it.

The *Bryant* majority and the *LaMusga* court appear to interpret *Burgess* as follows:

> "The only exception [to a custodial parent's right to move-away with the children] is where the reason for the move is to frustrate the non-custodial parent's relationship with the child. [Citation.] [¶] [¶] Here the trial court found that [wife] was not acting in bad-faith. No further inquiry was necessary or appropriate and court did not err in failing to evaluate the reasons for the move." [Footnote omitted.] (*In re Marriage of Bryant, supra* at pp. 793-794.)

The best interests of the children were not a consideration. This is not the test that this Court prescribed. Prejudice to children must be considered, and where it exists a parent's right to move must give way to the welfare of the children. Unless this Court clarifies its *Burgess* opinion, the bright-line rule that this Court eschewed will become cast in stone and the welfare of children will continue to be ignored by the very courts charged with keeping their best interests paramount.

STATEMENT OF THE CASE

The parties were married on October 22, 1988 and separated on January 1, 1995[2] after a six-year marriage. There were two children of the marriage, Garrett, born May 5, 1992, and Devlen, born May 5, 1994. Ms. Navarro requested that she be granted sole physical custody of the children. (AA, pp. 1-2.)

On July 2, 1996, Mr. LaMusga filed a Response requesting that the parties share "joint physical custody of the children." (AA, pp. 32-33.)

On July 8, 1996, the parties stipulated that a custody evaluation be performed by Philip M. Stahl, Ph.D. pursuant to Evid. Code §730. (AA, pp. 37-41.) Dr. Stahl completed his report and recommendation on October 10, 1996. (AA, pp. 378-395.) As those recommendations did not address holidays, Mr. LaMusga caused an Order to Show Cause with an order shortening time to be issued requesting time with his children during Thanksgiving and Christmas. (AA, pp. 69-74.) On November 14, 1996, the Court ordered that Thanksgiving and Christmas Days be split, with the future holiday visitation reserved for further hearing. (AA, pp. 82-84.)

On June 29, 1998, unable to get cooperation, Mr. LaMusga caused an Order to Show Cause with an order shortening time to be issued requesting time with his children during the summer vacation. (AA, pp. 93-97.) Thereafter, a stipulated order was entered awarding him summer visitation. (AA, pp. 99-101.)

On November 15, 1998, still unable to get cooperation, Mr. LaMusga caused an Order to Show Cause with an order shortening time to be issued requesting time with his children during Thanksgiving, Christmas, and other miscellaneous vacations or special days. He asked that the Court review the custody arrangement and modify it to grant him more time with the children. (AA, pp. 105-111.) As a result of this motion, the parties stipulated to an updated evaluation and report by Dr. Stahl. This stipulation was filed on April 14, 1999. (AA, pp.

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[2] On May 10, 1996, Ms. Navarro amended her Petition to allege a date of separation of May 3, 1996. (AA, p. 4.)

127-130.) Dr. Stahl's updated report to the Court was dated February 26, 2001. (AA, pp. 396-406.)

On February 13, 2001, before Dr. Stahl's report was received, Ms. Navarro caused an Order to Show Cause to be issued requesting permission to relocate with the children to Cleveland, Ohio. (AA, pp. 132-136.) On March 19, 2001, the trial court reappointed Dr. Stahl to update his latest report to address the issue of Ms. Navarro's requested relocation. (AA, pp. 150-152.)

On May 23, 2001, the parties were ordered to return to court for a recommendation conference regarding Dr. Stahl's report, and Mr. LaMusga was awarded visitation on Father's Day, 2001 and half of the boys' summer vacation. (AA, pp. 156-157.)

On June 29, 2001, Dr. Stahl prepared his third report and recommendation for the Court. (AA, pp. 407-416.)

On August 23, 2001, after reading and considering the declarations that were filed (RT, pp. 3/1-6; 74/22-23), the trial court heard three and one-half hours of testimony and thereafter made an oral statement of decision and denied Ms. Navarro's request to move to Ohio. On August 24, 2001, Ms. Navarro appealed from the minute order. (AA, p. 376.) The final terminology of the custody order was never resolved. (AA, p. 375; RT, p. 115/22-24.)

The Court of Appeal reversed the trial court in an unpublished opinion on May 10, 2002. Mr. LaMusga's Petition for Rehearing was denied on June 4, 2002. On August 28, 2002, this Court granted review. On September 16, 2002, Ms. Navarro purported to abandon her appeal because the family had elected to move to Arizona rather than Ohio. She

requested that the Court judicially notice the new request. On October 2, 2002, the request for dismissal was denied and the request for judicial notice granted.[3]

STATEMENT OF THE FACTS

The parties separated in 1996 after a six-year marriage and two children, Garrett, born May 5, 1992, and Devlen, born May 5, 1994. This began Ms. Navarro's attempts to limit Mr. LaMusga's access to and time with his children. (AA, pp. 6-16; 69-74; 93-97; 105-111.)

As detailed in the Statement of the Case, what followed the Petition for Dissolution was a series of motions by Mr. LaMusga seeking more time with his children over Ms. Navarro's objections.[4] These motions included repeated requests for time during holidays and summers because she refused to cooperate with him. The family was referred to a neutral evaluator, Philip M. Stahl, Ph.D, to conduct a series of child evaluations and assess risks and benefits of alternate parenting plans for the children.

Over the course of five years, Dr. Stahl developed a through understanding of the dynamics of the situation and wrote three reports which documented the children's developmental changes and changing relationships with their parents. His first report, dated October 10, 1996 (AA, pp. 378-395), was related to the parties' original custody disputes. The second, dated February 26, 2001 (AA, pp. 396-406), was occasioned by Mr. LaMusga's

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[3] Mr. LaMusga agrees with this Court's order taking judicial notice of Ms. Navarro's change in plans to move to Arizona, rather than to Ohio ostensibly to be with her family. However, he requests that the Court not take judicial notice of the allegations contained within the pleading. (*Day v. Sharp* (1975) 50 Cal.App.3d 904, 914, 123 Cal.Rptr. 918.)

[4] These motions continue even now.

request for a custody modification. The third, dated June 29, 2001 (AA, pp. 407-416), was commissioned because of Ms. Navarro's request for a move-away order. In the August 23, 2001 hearing, the Court considered all three reports.

Mr. LaMusga was originally given very limited visitation with the boys. (AA, p. 68.) After Dr. Stahl's first report, visitation was significantly expanded. (AA, pp. 82-84.)

The issues related to this appeal began on November 15, 1998, when Mr. LaMusga caused an Order to Show Cause to be issued requesting that the Court review the custody arrangement and modify it to grant him more time with the children. (AA, pp. 105-111.) As a result of this motion, on April 19, 1999 the parties stipulated to an updated evaluation and report by Dr. Stahl. (AA, pp. 127-130.) Dr. Stahl's updated report to the Court was dated February 26, 2001. (AA, pp. 396-406.) However, on February 13, 2001, before Dr. Stahl's report was received, Ms. Navarro caused an Order to Show Cause to be issued requesting permission to relocate with the children to Cleveland, Ohio. (AA, pp. 132-136.) Dr. Stahl mentioned the request in his second report but did not address it since it was outside the scope of his assignment. (AA, p. 406.) This report, recommending substantially more time with Mr. LaMusga due to the alienation that had occurred, suggested a three-phase plan:

- Phase 1: Thursday after school through Monday morning [or Tuesday if a holiday] one week and Thursday after school through Friday morning the other week.
- Phases 2 & 3: "If Ms. Navarro continues her denigration of Mr. LaMusga and continues her apparent reinforcement of this splitting, it might be appropriate to change this either to a truly joint custody arrangement or to primary custody with father." (AA, p. 405.)
- He also suggested that summers be split between the parents in two-week blocks. (See also, RT, p. 68/1-22.)

On March 19, 2001, the trial court asked Dr. Stahl to update his February 2001 report to address the requested relocation. (AA, pp. 150-152.) Mr. LaMusga's pending motion to modify custody, addressed in Dr. Stahl's February 13, 2001 report, was continued pending the receipt of Dr. Stahl's third report, which was made on June 29, 2001. That report recommended that the request to move be denied as being harmful to the children.

The August 23, 2001 trial was conducted with direct evidence being presented by testimony and declaration, subject to cross-examination. (RT, p. 3/1-6; AA, pp. 153-155.) The witnesses at the trial were the parties, Dr. Stahl and Maureen Henry, one of the boy's schoolteachers.

The parties' declarations and testimony were diametrically opposed. Ms. Navarro stressed that she had never interfered with the boys' relationship with their father, denied alienating them in any way and alleged that she had complied with all visitation orders. (See, e.g., AA, pp. 245 – 357.) She stated that she wanted to move to Cleveland because she had family and her husband had accepted an employment position there that constituted a promotion and an opportunity. She denied wanting to move to interfere with Mr. LaMusga's visitation. She assured the court that she would comply with its orders and would send the boys back to be with their father during vacation periods. (AA, pp. 223 – 225, 245-371.)

Mr. LaMusga's declarations and testimony focused on his attempts to develop a relationship with his sons despite Ms. Navarro's efforts to torpedo it. (See, e.g., AA, pp. 145 – 148; 158 – 198; 239 – 244.) He provided many examples of her overt and subtler

efforts to harm that relationship, culminating in Garrett's listing his stepfather, Mr. Navarro, as his natural father on a school genealogy report. (AA, pp. 162-163; RT pp. 45/14 – 46/2.) Mr. LaMusga denied that Ms. Navarro was "accommodating and flexible" in permitting him time with the boys. He gave as an example the 2001 spring break, where the court had ordered the boys to be with him. Ms. Navarro would only permit them to visit Monday through Friday 5:00 p.m. [five days], rather than from the time school was out until it resumed [Saturday through Monday morning – nine days]. (AA, pp. 160 – 161.) Among the examples of her alienation attempts were telling the boys' sports coaches that Mr. LaMusga was not to coach their teams (AA, pp. 161-162); telling the boys' teachers that he was not to attend their school functions (AA, pp. 162-163); telling Devlen not to tell him he was taking karate (AA, p. 409/¶2); and not permitting him to participate in his son's First Holy Communion. (AA, pp. 163.)

Dr. Stahl's Testimony: Dr. Stahl originally saw the family in 1996, shortly after separation. (RT, 24/11-13.) At that time, there was tremendous hostility and distrust between the parents. (RT, p. 24/20-25, AA, p. 379.) Ms. Navarro admitted that she had a problem controlling her anger toward Mr. LaMusga but stated that she was fearful for her safety and that of the boys. (AA, p. 382/¶1.) This appears to be related to threats that she reported he made to get custody of the children. (Ibid.) She made vague claims that Mr. LaMusga had hurt the boys and was negligent in his parenting (AA, p. 391/¶3), but Dr. Stahl never saw any evidence to support these claims and discounted them. (Ibid.) The parents were unable to agree on anything more than a temporary visitation schedule, with Mr. LaMusga seeing the boys only 12 hours per week. Ms. Navarro thought that his time

should be even more limited. (RT, p. 25/23-25; AA, p. 380/¶2.) Mr. LaMusga felt that Ms. Navarro was alienating the boys, who were only ages 2 and 4, against him. Dr. Stahl was hired to help the court "sort all of that out." (RT, pp. 24/26 – 25/5; AA, p. 380.)

As early as 1996, Ms. Navarro wanted to move to Cleveland. (RT, p. 25/6-8; AA, p. 380.) In 2001, Dr. Stahl felt that she had an "idealized" vision of life there. (RT, pp. 26/25 – 27/3.) When she thought about moving, she never considered any loss the boys would suffer relating to their father. (RT, pp. 27/4-14; 28/2-9.)

Dr. Stahl felt that Ms. Navarro "has a strong tendency to get very angry, and since their separation, her response to her concerns is to be withholding and to keep him at a distance. While this serves her needs very well, it seems to interfere with the children's needs because she appears to be keeping him at a distance from them as well." (Emphasis in original; AA, p. 384.)

Ms. Navarro reported to Dr. Stahl that she was limiting the boys' telephone contact with Mr. LaMusga because she perceived that the calls increased their anxiety levels. Dr. Stahl never observed any such anxiety in the boys. (RT, p. 27/15-26, AA, p. 383.)

During a school report on the children's genealogy, Garrett listed his stepfather, Mr. Navarro, as his natural father. (AA, pp. 162-163; RT pp. 45/14 – 46/2; 87/2-11.) Dr. Stahl said that this "would represent that the father is being discounted and replaced in some way by the step-father." (RT, p. 46/11-13.) Ms. Navarro admitted that this incident had occurred, but denied that either of the boys called Mr. Navarro "dad." (RT, p. 87/2-28.)

Dr. Stahl noted that if he focused solely on her parenting, without regard to the boys' relationship with their father, she was doing a good job. But when the father was

included in the mix, "she is struggling with supporting and encouraging frequent and continuing contact between them." (AA, p. 385/¶1.)

Dr. Stahl noted that the children were suffering from a "loyalty conflict" whereby they develop a sense that if they love one parent, they are hurting the other. He felt that their conflict was being fostered in part by Ms. Navarro and in part by the parent's conflict. (RT, pp. 28/18-29/4.) He noted that this was common in divorces and that the parents had an obligation to help the children overcome it. He did not see Ms. Navarro doing things that would help. (RT, p. 29/6-12.) He also noted that she was over-nurturing and fostering a sense of dependency. (RT, p. 29/13-21.)

In his 1996 report, Dr. Stahl characterized Ms. Navarro s relationship to Mr. LaMusga as "rigid, withholding, very angry, and [with] a tendency to view things very negatively." Although she might like to believe that the boys could have a better relationship with their dad, she held on strongly to her negative views. All of her other negative feelings still held as well. (RT, p. 30/8-17; AA, p. 384.) Dr. Stahl did not expect this; he had hoped that the parents could learn to resolve some of their conflicts in a healthier way and begin to let go of some of others. (RT, p. 30/18-27.) Further, the children's observations of their mother's anger became part of their formulation as to what their father was about. (RT, pp. 31/18 -27.) This had been fostered over the previous five years. (RT, pp. 31/28-32/2.)

Although Ms. Navarro felt that it was detrimental for the children to be around their father, Dr. Stahl felt the opposite was true. (RT, p 32/8-20.) Mr. LaMusga was always willing to work through existing problems with a therapist. Ms. Navarro's willingness was

"marginal." She never supported mediation with Mr. LaMusga. (RT, p. 33/3-17.) They tried numerous times, but Ms. Navarro would always get frustrated when they told her how to act and she would quit. (AA, p. 385/¶4.) She blamed any problem with the boys on Mr. LaMusga. He, however, never made any attempts to discount her as a parent or person. (RT, p. 34/7-19.)

Although Dr. Stahl was not certain in his 1996 report whether Ms. Navarro was alienating the children against their father, later with the benefit of five years of experience, he suspected that she had been. (RT, p. 35/16-26.) The Court interjected a question as to whether Ms. Navarro's behavior constituted active alienation or "alignment," whereby the children respond to one parent's feelings about the other. Dr. Stahl agreed with the Court that what they were seeing were the children's responses to their parents' actions. (RT, pp. 36/12 – 37/2.)

In 2001, Ms. Navarro told Dr. Stahl that the boys didn't like their father and often didn't want to see him. (AA, p. 396/¶2.) Her views had not changed. She still felt that the boys weren't doing well with their dad. (RT, p. 52/8-9.) Mr. LaMusga was seeking equal joint custody, while Ms. Navarro wanted to "help the boys" by reducing their father's time with them. (AA, p. 396/ ¶3) Both parents' versions of what was happening were very similar to that which he related in his 1996 report. Dr. Stahl's discussions with the boys were instructive, as he stated that they appeared to have "an agenda in which they were very critical of their father, but ... almost always in vague terms or with petty criticisms." (AA, p. 400/¶5.) They would say that he was "mean" but could not provide any substance to the characterization.

> "Almost everything negative that they expressed was related to their father and almost everything positive that they expressed was related to their mother. In this way, it appeared as if father was 'all bad' and mother was 'all good.'" (Ibid.)

Dr. Stahl also felt that the boys' were suffering from an "enmeshed relationship" with their mother. (RT, pp. 38/23 – 39/1.) He basically defined this as a relationship with the parent that was so close that the child will cling to a parent for fear that the parent will feel badly if they separate. This relationship results when there isn't sufficient separation or boundaries between the parent and child. (RT, pp. 37/10 – 38/10.) Divorced families are especially susceptible since one parent is already on the outs and the other can overtly or unconsciously foster an image of him as bad. (RT, p. 37/13-19.)

Dr. Stahl and Dr. Tuttle (a psychologist working with the boys and their father) both noted that the boys would state that Mr. LaMusga is "bad" and "lies" but were totally unable to provide any specific examples of that conduct. (RT, pp. 39/22 – 40/2.) To the extent that enmeshment was occurring, this was a manifestation.

> "Enmeshment in and of itself has a detrimental effect on development. In the dynamics of this family, and in the dynamics of divorce it can clearly have a detrimental effect on the other parent. In this family, that is the father." (RT, p. 40/11-15.)

Dr. Stahl went on to say that enmeshment also had a detrimental effect on the children (RT. p. 40/1-17), where it may manifest itself with the boys' having "significant struggles emotionally, especially with their peers, and with authority figures." The boys "struggle a bit with difficulties in self-image and feelings of inadequacy in comparison to others." (AA, p. 403/¶3.) This was consistent with "children who feel alienated within the context of their parent's high conflict divorce." (Ibid.) He also characterized this as a result of the boys'

"extreme polarization" and their "overindulged emotions." (Ibid.) He felt that Ms. Navarro was "contributing to the alienation of the boys." (Id/¶5.) Although he did not observe overt alienation, "some alienation is definitely more covert and more unconscious, and it is my opinion that her unconscious alienation is real." (AA, p. 404/¶1.)

Dr. Stahl believed that Ms. Navarro's actions were motivated by her concerns over the children and her opinion of how to manage her concerns was to limit the boys' contact with their father. (RT, p. 41/1-10.) She chose not to be enlightened as to other alternatives. (RT, p. 41/11-13.)

Since no progress had been made in five years, Dr. Stahl recommended a major change in custody sharing:

> "As for the time share, I actually agree more with Mr. LaMusga than Ms. Navarro in their thinking on this matter. Research suggests that alienated children do better with longer rather than shorter blocks of time with each parent, and also that it's helpful if fathers participate with children in schooling. I certainly believe that the current schedule in which the boys spend limited weeknights and short weekends with him doesn't do them much good. Instead, I would recommend a schedule in which they are with their father every other week from Thursday after school until return to school on Monday morning and every other week from Thursday after school until Friday morning. ... However, if Ms. Navarro continues her denigration of Mr. LaMusga and continues her apparent reinforcement of this splitting, it might be appropriate to change this, either to a truly joint custody arrangement or to primary custody with father." (AA, p. 405.)

As to Ms. Navarro's planned move to Cleveland, Dr. Stahl was clearly concerned, based on his five years' experience with her, that "she may not act as she says she will" when it comes to facilitating contact between Mr. LaMusga and the boys. (RT, pp. 41/14-42/2.) When asked if he could point to any conduct on Ms. Navarro's part in the preceding five years which suggested that she would follow through with facilitating contact Dr.

Stahl could only cite, with "a mixed level of confidence" her strong will to act based upon how she feels about things: believing that it is in her best interests to be in Cleveland, if she were given the right to go, that might be sufficient for her to act as she says she will, not as she has acted for the previous five years dealing with a custody plan that she had "not supported" and has resisted. (RT, p. 42/3-25.) However, Dr. Stahl could point to no affirmative act on her part that demonstrated that she would be willing support a positive relationship between Mr. LaMusga and the boys. (RT p. 42/26 – 43/3.) Had there been such a track record, he would not be making the recommendation that he was. (RT, p. 43/4-6.)

In his 1996 report, Dr. Stahl recommended against permitting the children to move to Cleveland because he did not think that such young children could maintain a relationship with their father over that distance. He saw no evidence that Ms. Navarro would be any more supportive of that relationship when the children were 2,000 miles away than when they were only five miles away. Dr. Stahl did not think that the move would be healthy for the boys. (RT, p. 43/16-25; AA, pp. 392-393.) He felt it important that there be greater attachment between the boys and their father and a stabilized relationship prior to any move. (RT, pp. 43/26 – 44/2.) He recommended substantially increased visitation for Mr. LaMusga. (AA, pp. 393-394.)

The situation that Dr. Stahl saw in 2001 wasn't a significant departure from what he saw in 1996. (RT, pp. 44/4-9; 47/21 – 48/1.) He did not see any advances in cooperative parenting. He still saw boys that viewed their father as all bad and their mother as all good. (RT, p. 48/2-7.) He had written a book on parental alienation and felt that the boys "clearly

feel the loyalty conflict of alienation," caused in part by their mother's "continued negativity toward father and her continued belief that he's not ... healthy for the boys ... [a]nd the children being aware of those beliefs." (RT, p. 48/15-24.) One of the hallmarks of alienation is a tendency of the children to view one parent as all good and the other as all bad. That tendency is present in this family. (RT, p. 50/3-8.)

Dr. Stahl felt that Ms. Navarro was contributing to the alienation of the boys and that they were affected by it. (RT, p. 51/25-27; AA, p. 404/¶1.) He considered her actions both "unconscious and real." (RT, p. 51/10.)

The antidote for their mother's alienation was for the boys to have quality blocks of time with their father so as to have a "balanced set of relationships" and "a break from that enmeshment [with their mother.]" This solution would be even more difficult if the boys were a great distance from their father. (RT, p. 44/10-27.)

Dr. Stahl stated that the better approach for the welfare of the children was to see positive evidence of a stronger relationship between the children and their father prior to their being permitted to make such a move. (RT, pp. 44/28- 45/3.) The real problem was that if Ms. Navarro "continues to be forced into behaviors, custody, whatever it is that she doesn't agree with, has a difficult time supporting a different outcome for the boys and their father.... [T]hat's part of what makes this so difficult." (RT, p. 45/3-8.)

A manifestation of this loyalty conflict was Devlen's telling Dr. Stahl that on the outside it may look like he is having fun with his father, but on the inside he is not. Since he made this statement at his mother's house, it connoted to Dr. Stahl that he was "unable to ... have a sense of balance in what he feels good about and what he doesn't feel good about,

and be clear enough within himself about that. He has to maybe put on a show for somebody, either on the outside, when he's with his dad and looking good, or for his mom when he comes back and needs to make it look as if it is bad. Regardless of what kind of show he's putting on, that is not healthy for him." (RT, pp. 48/25 49/18.)

Dr. Stahl's opinion was that permitting the boys to move to Ohio would worsen their relationship with their father. It would not "give them frequent enough contact to be able to hold on to the good parts of the relationship that hopefully, though intermittently, have been going on over the last several months with the therapeutic work. And the risk is that by their absence, by the ongoing, certainly unconscious and to whatever extent there is any overt behaviors by Ms. Navarro that are denigrating the father, that that will make it very difficult for them to improve their relationship with their dad." (RT, pp. 52/18-53/7.) Garrett's genealogy report in which he listed Mr. Navarro as his natural father was further evidence of the risk of permitting the move. Lastly, a move could potentially reinforce the idea, evidenced by Devlen's genealogy report, that Mr. Navarro was their father, not "this guy back in California." (RT, p. 55/17-21.)

On cross-examination, he reiterated his recommendation against permitting the move most strongly:

> "I think the reasons are two fold: One, there is no evidence that I've seen in the five years I've known this family that Miss Navarro will really do what she said she will do. In terms of being supportive of the boys' relationship with their father in a way that truly will reduce loyalty conflicts and truly help them fell better about things with him. The other is it is still a tenuous relationship. And in that it's a tenuous relationship, I'll stick with what I said in 1996: It makes it very difficult to predict that it's likely to get better rather stay tenuous or get worse if the move is allowed." (RT, p. 63/6-21.)

Ms. Navarro's counsel focused on whether Dr. Stahl had any evidence that Ms. Navarro would not comply with court orders regarding visitation. He replied that his focus was on whether she would foster a healthy and better relationship with their father. (RT, p. 63/22-28.) And he did not think that she would. He gave as an example the total lack of "buffering" offered by Ms. Navarro over the previous five years to protect her children. (RT, p. 64/1-19.)

When asked whether Ms. Navarro's failure to report her marriage to Mr. Navarro while continuing to accept her spousal support payments adversely affected her credibility, Dr. Stahl replied that it would definitely be a "red flag," and gave him additional concern whether she would really follow through and do what she said that she would do. (RT, pp. 65/21-67/14.) [5]

Dr. Stahl agreed with Ms. Navarro's counsel that Mr. LaMusga was not without some degree of responsibility for his relationship with his children because he "gets frustrated and impatient sometimes." (RT, p. 57/17-23.) Any contributions that he might make to the conflict with Ms. Navarro also contributes to the children's alienation. (RT, pp. 57/26-58/8.) He agreed that both parents "at certain levels" had a degree of responsibility. (RT, p. 58/12-13.)

The Court then questioned Dr. Stahl about his recommendation that if Ms. Navarro continued her pattern of alienation, the court modify custody and make Mr. LaMusga the primary custodial parent. Dr. Stahl explained that the preferred first step was more equal

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[5] Ms. Navarro failed to inform Mr. LaMusga of her remarriage and continued to accept $4,500 per month in spousal support for eight months after her remarriage. (RT, pp. 78-83.)

joint custody, perhaps alternating weeks. Then, if that didn't work, an actual change of primary custodians was in order. (RT, p. 68/1-22.) If she was going to be permitted to move with the boys, "[s]he truly needs to do what she says she will, not what the actions have suggested over the last several years." (RT, p. 68/23-28.) Permitting her to move would likely solidify "bad dad and good mom" in the boys' eyes. (RT 69/18-23.)

One of the major problems that Dr. Stahl encountered was Ms. Navarro's failure to have any personal insights into her own unconscious alienating behaviors. This would make it harder for her to modify these behaviors without therapy and explain her not having done so in the previous five years. (RT, p. 72/19 – 73/3.) When asked if she had sought therapy, Ms. Navarro confirmed that she had not, because she "didn't feel the need." (RT, p. 89/9-11.) If the court were to grant the move, it would have to put its faith in a hope that a person who has no insights into the effect of her own behavior would somehow attempt to modify that behavior. (RT, p. 73)

Kindergarten Teacher's Testimony: Maureen Henry, Garrett's kindergarten teacher testified both by Declaration (AA, pp. 199-222) and in court. (RT, pp. 3 – 23.)

She complemented Ms. Navarro by noting that she was totally devoted to her children. "She wants to experience everything that has to do with school or their lives." (RT, p. 7/16-17.)

However, she also stated:

> "It is now my opinion that Ms. Navarro had at the time I met her, and continues to have, a need to alienate the affections of Garrett LaMusga and Devlen LaMusga from their biological father, Gary LaMusga." (AA, p. 200/¶5.)

She gave several examples. Ms. Navarro failed to disclose that Mr. LaMusga was a co-parent on school forms and did not list him as a person authorized to pick up Garrett from school, although she did list her boyfriend. (AA, p. 200/¶¶ 6-7.)[6] [7] Ms. Navarro did not even mention Mr. LaMusga's existence to Ms. Henry (AA, p. 200/¶8), who only learned of the shared custodial arrangement when Mr. LaMusga met her at the Back to School Night. (AA, p. 200/¶9.) When Ms. Henry spoke to Ms. Navarro about Mr. LaMusga's existence, her first response was how Mr. LaMusga "lied." (AA, p. 201/¶11.) Ms. Navarro told Ms. Henry to expect that Garrett would be "cranky and fatigued" after weekends with his father. Ms. Henry made a note of the comment but never saw any evidence to confirm it. (RT, p. 17/15-20, AA, p. 201/¶11.)

Mr. LaMusga was very active in Garrett's school, including volunteering in his classroom. (AA, pp. 201-202.) Ms. Navarro told Ms. Henry that Garrett had told her that he didn't want his dad at school because "he's mean at home" and that he "is not like that at school...." (AA, p. 202/¶15.) When Mr. LaMusga was at school, Garrett seemed happy and proud that he was there and she observed nothing but positive behaviors from both of them. (AA, pp. 202-203.)

Ms. Henry was also informed that Devlen was exhibiting similar behavior and making similar statements. (AA, p. 203/¶21.) Mr. LaMusga also volunteered in Devlen's class and they interacted well while they were together. However, Devlen was telling his

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[6] School policy was that either parent could pick up children at any time, absent a restraining order. (RT, p. 13/13-25; 18/19-20.)

[7] Mr. LaMusga signed the boys up for a Bible camp without informing Ms. Navarro or listing her name on the application. He explained the difference was that the entire camp

teacher things that sounded to her as though they were an adult's words, not a child's. She wondered if Ms. Navarro were putting the ideas in Devlen's head. (AA, p. 203/¶23.)

What stood out in Ms. Henry's mind was that while Ms. Navarro always volunteered negative feelings about Mr. LaMusga and told Garrett to tell adults negative things about his father (AA, p. 204/¶24), Mr. LaMusga never reciprocated. (AA, p. 204/¶25.)

The trial judge was keenly interested in Ms. Henry's testimony and had frequent questions of his own, among them confirming that Ms. Navarro had requested that she keep track of Mr. LaMusga's time spent on field trips and in the classroom so that she could deduct those hours from his visitation. (RT, p. 16/10-25; AA, p. 201/¶11.) Ms. Henry refused to comply with the request. He then asked her about conversations that she had with Garrett. She related how he would often come to school with his head down and ask to speak to her privately. (RT, p. 19/7-10, AA, p. 202/¶17.) He told her that his father lied in court and that his mother had asked if Garrett would ask Ms. Henry to "tell the Judge." (RT, p. 20/5-13, AA, pp. 202-203.) That was all Garrett knew. (RT, p. 20/16.) The next day he told her that his father yells at him all the time. Ms. Henry then sat down with him and told him that both of his parents loved him very much and that he had permission to love his father. He seemed brightened by that (RT, p. 10/18-24), and the talk had an immediate impact on him. The next day that Mr. LaMusga had him, he came in and asked Ms. Henry what she had said to his son because: "He is so happy. He just greeted me with open arms.... We had one of the best evenings that we have had in a long time." Ms. Henry told him how

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took place within a two week block of time that the children were with him and she was going to be in Ohio. (RT, pp. 94/9- 95/7.)

he had given Garrett permission to love his father. "And I'm not sure that he was aware he could do that." (RT. pp. 20/28-21/11.)

Ms. Henry characterized Ms. Navarro's attitude towards Mr. LaMusga at school as "aggressive," but she did note a change in the spring of 1998 when it became somewhat "less aggressive." She never said anything "positive" or "affirming" about him. (RT. p. 21/17- 22/6; AA, p. 204/¶24.) Ms. Henry could not recall Mr. LaMusga's ever saying anything "aggressive" or "disparaging" about Ms. Navarro. The most negative thing was his answering her question about counseling by relating how there had been several court-ordered sessions but Ms. Navarro would refuse to cooperate and would walk out when they got to a certain point. (RT, p. 22/7-22; AA, p. 204/¶24.)

She summarized her feelings as the boy's teacher as follows:

> "It saddens me that Ms. Navarro did not see fit to shield her children from the details of this family law matter, and in fact, actively engaged in alienating these boys from their father and the possibility of a strong, loving relationship with each of their parents. Mr. LaMusga is a loving, 'hands-on' father, and would be an asset to the development and spiritual growth of his children." (AA, p. 204.)

Testimony of the Parties: Both parties testified on cross-examination. Ms. Navarro said that if the court denied her request to move, she would remain in California. (RT, p. 89/12-15.) She had not given any thought to Mr. Navarro's job in Ohio. (RT, p. 89/21-23.) Mr. LaMusga felt that he had seen recent improvement in his relationship with the boys, although it was not yet strong enough to sustain a 2,000-mile separation. (RT, p. 95/8-21.) He was also worried that Ms. Navarro's family, and in particular her sister, was hostile to him and that the atmosphere in Ohio was not positive to his maintaining his relationship with his sons. (RT, p. 97/1-28.)

Trial Judge's Decision: After listening to argument of counsel, the trial judge made a comprehensive statement on the record explaining his reasoning. He first noted that the issue before the Court "was not whether either of the parents are competent and qualified to be custodial parents, I think the evidence indicates that they are... The issue is the effect on these children of relocating, and the effect of the relationship with their father if they are permitted to relocate." (RT, pp. 75/27-76/12.)

The Court then made the following statement on the record:

> "This presents a very difficult case with respect to the move-away. I'm not convinced this is literally a Burgess move-away circumstance. While Miss Navarro has been the primary custodial parent, prior to the present request for move-away the Court already was being required to consider substantial modification of the custodial arrangement, or even change in physical custody given the continuing problems with the parents in being able to co-parent the children.
>
> And the continuing pattern of – I hesitate to say alienation, because I think that I view alienation as a conscious effort on the part of one parent to interfere with the relationship between the children and to attempt to cut off the relationship of the other parent. I don't think that is what is happening here.
>
> But I do think that the all too familiar pattern with one parent – one of both parents being unable to let go of their own anger toward the former spouse, projecting their own feelings or reactions on the children, and reinforcing the children when they respond – when they respond the way they are expected to when in the custody of one parent. That aligns the children with one parent and results in a strained or hostile relationship with the other parent.
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> That seems to me to be the pattern which as been demonstrated over a period of years in this relationship.
>
> Clearly if the parties had been co-parenting with the children and cooperative in this matter, under those circumstances there might well be a presumptive right for Ms. Navarro to relocate with the children, regardless of the fact that the contact with the other parent, in this case Mr. LaMusga, would inevitably suffer to some degree. But there are ways to ameliorate those sorts of problems.
>
> Again, at the same time I don't think that this is a bad-faith move-away. I don't think this is an instance where [Ms. Navarro] attempting to relocate with the children for the specific purpose of limiting their contact or relationship with their father. I think it's far more subtle than that. If that were the case, it would be easy to deny the relocation.

I think [Ms. Navarro] has legitimate reasons for wishing to relocate. And perhaps as Dr. Stahl says, it might even be that the – her relationship with Mr. LaMusga would improve and as a consequence the relationship with the boys would improve. Unfortunately, that is speculative at this point.

Given what appears to be the case here, I think that it's reflected in Miss Henry's testimony, reflected in Dr. Stahl's reports from 1996, earlier this year, and in the current report, I think that at the moment Ms. Navarro is incapable of promoting the relationship between the children and Mr. LaMusga because she doesn't believe in it and because she doesn't believe it is in the children's best interests.

She conveys to the children that she does not believe that Mr. LaMusga is – I don't think that she denigrates him as much as reinforces negative comments that the children make to her. In other words, they get a positive response to the negative comments which they make about Mr. LaMusga.

The primary importance, it seems to me at this point, is to be able to reinforce what is now a tenuous and somewhat detached relationship with the boys and their father. That there is a process with Dr. Tuggle which is in fact promoting that relationship. That disrupting that would be extremely detrimental.

I think the concerns about the relationship being lost if the children are relocated at this time are realistic. Certainly I would find that the preponderance of the evidence would indicate that would likely result at this time of a relocation.

Therefore, I think that a relocation of the children out of the State of California, the distance of 2,000 miles is – would inevitably under these circumstances be detrimental to their welfare. It would not promote frequent and continuing contact with their father, and I would deny the request to relocate the children.

If Ms. Navarro wishes to relocate to the state of Ohio, certainly she is entitled to do that. Should she choose to do so, then I would implement the recommendations contained in Dr. Stahl's supplemental report of June 29th of 2001 which would provide for primary physical custody of the children, at least during the school year, to Mr. LaMusga.

I would hope that if that were the case we could revisit this at the beginning of the next summer to insure that the children had frequent and continuing contact with both parents. And should the – should the situation improve to the extent that the relationship with Mr. LaMusga could be maintained at a distance, then these issues could be revisited.

In other words, I think that if Ms. Navarro does elect to relocate, and primary physical custody of the boys is transferred to the father, then I would set this for review in 12 months, with Dr. Stahl to consult with Dr. Tuggle, to interview the children and to advise the Court whether the circumstances had sufficiently improved to permit the children to relocate with [Ms. Navarro]. That would be a – in other words, I would make this a temporary order without a

requirement of showing of changed circumstances to effect the modification...." (RT, pp. 105/25-109/9.)

Dr. Stahl had also recommended that a special master be appointed, but Ms. Navarro refused to consent to it. (RT, pp. 109/27-110/4.)

The trial judge then continued the hearing until 11:30 a.m. on September 7, 2001 for further hearing on the custody motion (RT, p. 113/16-18), including "finalizing the terminology of the order." (RT, p. 115/22-25.) However, on August 24, 2001, Ms. Navarro filed a Notice of Appeal.

ARGUMENT
I.
THE STANDARD OF REVIEW IS THE DEFERENTIAL ABUSE OF DISCRETION TEST

The Court of Appeal's Opinion ignored the rule that the trial court's decision must be upheld if there is any evidence to support its findings or implied findings.

> "The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test. (*Gudelj v. Gudelj* (1953) 41 Cal.2d 202, 208.) The precise measure is whether the trial court could have reasonably concluded that the order in question advanced the 'best interest' of the child. We are required to uphold the ruling if it is correct on any basis, regardless of whether such basis was actually invoked. (*Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329.)" (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32, 51 Cal.Rptr.2d 444, 913 P.2d 473.)

As amply shown in the statement of the facts, the trial judge acted squarely in the best interest of the children. This was not a case where there would simply be a disruption or reorganization of the father's time with his children. (See, e.g., *In re Marriage of Lasich* (2002) 99 Cal.App.4th 702, 718, 121 Cal.Rptr.2d 356 [actual custody sharing percentage unchanged].) At stake was the very existence of a parent-child relationship that the mother was either consciously or unconsciously undermining. Evidence of parental alienation drips

from the record. Although the mother may have had good-faith motives for wanting to move to Cleveland, the court's expert and the judge agreed that the effect of her desired move would be detrimental to the children. (RT, pp. 44/10-27; 52/18-53/7; 63/6-21; 107/26-108/12; AA, pp. 392-395; 410-416.) The trial court specifically made that finding, (RT, pp. 107/26-108/12), substantial evidence supported this finding, and nothing more is required to affirm the trial court's order.

An appellate court will affirm a judgment if it is correct on any legal theory that is supported by the evidence. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19; *In re Marriage of Fithian* (1977) 74 Cal.App.3d 397, 402.) Accordingly, this Court is not restricted to the rationale in the Order.

As discussed above, the record is replete with evidence that it would be harmful for the boys to be solely in their mother's custody for extended periods of time. Their "enmeshed relationship" with her, their "loyalty conflicts," her failure to "buffer" them, their "extreme polarization" and their "overindulged emotions" all have had a detrimental effect on the children. (RT, p. 40/16-17.) These might manifest themselves with the boys' having "significant struggles emotionally, especially with their peers, and with authority figures." The boys now "struggle a bit with difficulties in self-image and feelings of inadequacy in comparison to others." (AA, p. 403/¶3.) Dr. Stahl felt that the antidote for the boys' situation was for them to have substantially more frequent and longer quality blocks of time with their father so that they could have a "balanced set of relationships" and "a break from that enmeshment [with their mother.]" This would be difficult if the boys are a great distance from their father. In fact, given the five-year history of this case, it would

be even more difficult. (RT, p. 44/10-27; AA, pp. 404-405.) Thus, there was extensive evidence in the record justifying and supporting the trial judge's order that was related to the children's need to be in frequent contact with their father, independent of Fam. Code §3040. *The evidence would have supported an order changing custody irrespective of Ms. Navarro's intention to move.*

Furthermore, the Court of Appeal should have applied the doctrine of implied findings, since the trial court was precluded by Ms. Navarro's immediate appeal from setting forth its reasons with any more particularity than was set forth in the transcript. Under the doctrine of "implied findings," when a party waives a statement of decision expressly or by not requesting one in a timely manner, appellate courts reviewing the appealed judgment must presume the trial court made all factual findings necessary to support the judgment for which there is substantial evidence. (*In re Marriage of Condon* (1998) 62 Cal.App.4th 533, 549, fn. 11, 73 Cal.Rptr.2d 33; *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 275 Cal.Rptr. 797, 800 P.2d 1127; Hogoboom & King, Cal. Practice Guide, Family Law 3 (The Rutter Group) ¶16:215, p. 16-42.1.) As there is substantial evidence to support any number of findings of detriment to the children from the move, the order appealed from must be affirmed.

Although the Opinion stated that it was applying the "deferential abuse of discretion test," it ignored almost all evidence in favor of the trial court's decision and instead proceeded to search the record for evidence -- most of which Appellant did not even cite (e.g., Opinion, pp. 12-13) and on which the trial court did not rely -- in support of its decision to reverse. In fact, the Opinion focused on evidence that the trial court weighed and discounted. This is

precisely what the Supreme Court decried in *In re Marriage of Bonds* (2000) 24 Cal.4th 1, 35, 99 Cal.Rptr.2d 252, 5 P.3d 815:

> "We agree with the dissenting justice in the Court of Appeal that the majority's opinion departed from the appropriate standard of review in this respect. As noted above, when asked to determine whether a factual determination is supported by substantial evidence, the reviewing court should draw all reasonable inferences in favor of the judgment below. The Court of Appeal, by contrast, recounted evidence from which a number of inferences could be drawn, and incorrectly chose to draw those inferences least in favor of the judgment below."

As Appellant herself noted in her Reply Brief below, Respondent cited almost 48 pages of Appellant's misdeeds and strong evidence that her conduct was detrimental to the children. This evidence was before the trial judge, who weighed it and found that it was significant in making his decision. This evidence was summarized by the Opinion simply as Mother's conduct being "less than estimable." (Slip Opinion, p. 9.)

There was important additional evidence before the trial court that must have concerned it enough to conditionally change custody if Mother decided to move. This included evidence that:

- The children suffered from an "enmeshed relationship" with their mother that was causing a detrimental effect on them. (RT, pp. 37-40.)
- It could manifest itself with the boys having "significant struggles emotionally, especially with their peers and authority figures." (AA, 403.)
- As a result of this enmeshed relationship, the boys were "struggl[ing] with difficulties in self-image and feelings of inadequacy in comparison to others."(AA, p. 403.)
- The Mother caused "extreme polarization" and "over indulged their emotions." (Ibid.)
- The boys were suffering from loyalty conflicts. (RT, pp. 28-29.)
- The Mother failed to "buffer" the boys. (RT, pp. 64, 72.)
- The Mother was over-nurturing and fostered a sense of dependency in the boys. (RT, p. 20/11.)

Dr. Stahl not only listed these symptoms, he explained their significance and their negative effects they were having on the children. All of the above is evidence and is sufficient to

sustain the trial court's order. Yet, instead of assuming that the trial court relied on this powerful evidence, as it would have had it presumed the trial court's order correct and implied findings in its favor, the Opinion appears to have done the opposite, stating that there was "no evidence of detriment to the children if they moved with Mother other than the potential detriment of regression of their relationship with Dad." (Opinion, p. 13.)

Dr. Stahl recommended the increased custody sharing with the father in large part to counteract her negative influence on the children. He felt that they needed a "balanced set of relationships" and a break from that enmeshment [with their mother]," which would not have been practical if the Mother relocated them to Ohio. (RT, p. 44).)

Instead of focusing on the portions of Dr. Stahl's testimony that supported the trial court's order, the Opinion drew all inferences against the validity of the order below. It reweighed Dr. Stahl's testimony by focusing on some ambivalent statements in his written report and ignored the strong and emphatic ones he made at trial, as well as the gravamen of his opinion. The relative weight of the differing opinions was for the trier of fact to determine, not the Court of Appeal. (*In re Marriage of Birnbaum* (1989) 211 Cal.App.3d 1508, 1513, 260 Cal.Rptr. 210.)

The evidence was overwhelmingly one-sided. Although Father was justifiably upset over Mother's conduct, there was very little evidence that he manifested that feeling in any demonstrable way. Yet, the Opinion recast the evidence as "A history of disharmony and lack of cooperation *between the parties*...." (Opinion, p. 10.)

The Opinion recast Mother's history of fostering and facilitating a healthy relationship between the children and their father as "inconsistent." (Opinion, p. 13.) The evidence was to

the contrary: her conduct was 100% consistent. Dr. Stahl testified that he saw no evidence in five years that she had done *anything* to foster that relationship. (RT, pp. 42-43.)

The Opinion stated that the trial court's comments were "implicitly" directed to Mother. (Opinion, p. 9.) With all due respect, they were explicitly directed to the Mother.

The Opinion ignored the testimony of the children's teacher, Maureen Henry, who cited numerous examples how the mother was intentionally alienating the children. The trial judge found her testimony persuasive and even referred to it in his verbal findings on the record. (RT, pp. 16, 107/15-20.) This highly probative evidence was ignored in the Opinion

The Opinion stated that "Dr. Stahl's evidence can fairly support a finding that moving to Ohio *could* result in some detriment to the children: a possible deterioration of their fragile but improving relationship with Father." (Opinion, p. 13.) However, it then went on to describe Dr. Stahl's opinions as ambivalent and speculative.[8] (Id.) A fair reading of his reports and testimony would not cast them as speculative or ambivalent. The trier of fact did not find it to be so. It was firm, consistent and supported by substantial evidence and five-year track record with the family. Despite this, the Opinion took a few statements out of context where Dr. Stahl admitted to not being omniscient and agreed that it was *possible* that Mother might change her behavior pattern if she were permitted to move. However, he was emphatic in his opinion that he had seen nothing in her conduct over the previous five years that would

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[8] Dr. Stahl's written report, from which the Opinion quotes, admittedly attempted to be balanced and offer guidance to the trial court depending upon whether it elected to permit or restrain the move. However, Dr. Stahl's in-court testimony cannot fairly be described in these terms. He was emphatic that the move was not in the children's best interests and that its likely effect would be a worsening of their relationship with their father and the loss of his counterbalance to Ms. Navarro's enmeshment. (RT, pp. 52-53,

support such an optimistic hope. The trial judge found that the "preponderance of the evidence would indicate that [the father's relationship with the children being lost if he permitted her to relocate with them at that time.]" (RT, p. 108.) The Opinion reweighed the evidence, ignored that which supported the trial court's decision, and reached a different result. This is precisely what was proscribed in *Marriage of Bonds*.

The Opinion stated: "The court's remarks imply that Mother was losing her presumptive right to move with the children as punishment for her inability or unwillingness to refrain from masking her discord with Father in front of the children." (Opinion, p. 9.) Here the Opinion not only failed to apply the deferential abuse of discretion test, it did exactly the opposite: it indulged in inferences contrary to the trial court's express findings and the overwhelming evidence supporting them. The trial court's order was a narrow, *temporary* order that focused on the welfare of the children. Based on the evidence before it, it ordered that it was in the boys' best interests to remain in California *temporarily* and that the matter would be evaluated in 12 months to see if the situation had improved sufficiently to permit the children to relocate. (RT, pp. 108-109.) The Mother was not at all the focus of the order; the needs of the children were. There simply was nothing to support the Opinion's "inference" that this order was made to "punish" the Mother's conduct.

Likewise, at page 7, the Opinion stated that despite its express reference to the best interests of the children, the trial court didn't really use that standard.[9] As the trial judge was

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55, 63.) The trial judge gave more weight to the testimony and discounted the report, the Opinion did the reverse.

[9] For example, at RT, p. 52/14-16, the trial judge made it clear to Appellant's trial counsel what he was interested in hearing about: "The issue isn't what is in the interest of either of the parents, it is what is in the best interests of the children."

relying in large part on the extensive work done by Dr. Stahl, the Opinion likewise impliedly found that Dr. Stahl, who had followed these children for five years, was not considering their best interests. Here again, the Opinion drew all inferences against the validity of the judgment, rather than in its favor.

Had the deferential abuse of discretion test been applied, Respondent believes that the Court of Appeal's decision would have been different.

II.
BURGESS DOES NOT GIVE CUSTODIAL PARENTS THE UNFETTERED RIGHT TO RELOCATE THE CHILDREN WHEN THE MOVE WILL BE HARMFUL TO THE CHILDREN'S BEST INTERESTS

A. Family Code §7501 Does Not Provide An Absolute Right To Move-Away With Children: The source of a custodial parent's right to change the residence of a child is Fam. Code §7501. However, even that statute gives the Court the right to restrict a move if it "would prejudice the rights or welfare of the child." The evidence strongly supported the trial court's finding that the move would be detrimental. Nothing more should have been required.

B. *Burgess* Did Not Establish A Bright-Line Rule That Move-Away Requests Must Invariably Be Granted Absent A Showing of Bad-faith: Although some Courts of Appeal have held that *Burgess* established a bright-line test that if a custodial parent wishes to move and no bad-faith motive is shown, the trial court's inquiry must stop and the request rubber-stamped (see, e.g., *In re Marriage of Bryant* (2001) 91 Cal.App.4th 789, 793-794,

110 Cal.Rptr.2d 791[10] [discussed *infra* at pages 43-47]), that could not be farther from the truth.

Let's start by looking at the opinion itself where it expressly recognized that "bright-line rules in this area are inappropriate: each case must be evaluated on its own unique facts." (*In re Marriage of Burgess, supra*, 13 Cal.4th at p. 39.) The best interests of the children do not become irrelevant simply because the issue is denominated a "move-away":

> "Under California's statutory scheme governing child custody and visitation determinations, the overarching concern is the best interest of the child. The court and the family have 'the widest discretion to choose a parenting plan that is in the best interest of the child.' (Fam. Code, §3040, subd. (b).)" (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255, 109 Cal.Rptr.2d 575, 27 P.3d 289.)

Moreover, as *Burgess* pointed out, there are circumstances when a move-away *does* justify a change of custody in favor of the non-moving spouse. As an example, citing *In re Marriage of Rosson* (1986) 178 Cal.App.3d 1094, 224 Cal.Rptr. 250 [which it disapproved on other grounds], *Burgess* noted that a trial court could properly consider, in *denying* a move-away request, the preferences of children aged 10 and 13 for remaining where they already were in a situation where both parents had "de facto physical custody of the children" and the non-moving spouse "had assumed substantial parenting responsibilities relating to the children's academic, athletic, social, and religious activities." (*In re Marriage of Burgess, supra*, 13 Cal.4th at p. 39.) In other words, the best interests of the children trumped the custodial parent's right to move-away with the children.

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[10] "The only exception [to a custodial parent's right to move-away with a child] is where the reason for the move is to frustrate the non-custodial parent's relationship with the child. [Citation.] [¶] [¶] Here the trial court found that [wife] was not acting in bad-faith. No further inquiry was necessary or appropriate and court did not err in failing to evaluate the reasons for the move." [Footnote omitted.] (Id. at pp. 793-794.)

Likewise, in *Cassady v. Signorelli* (1996) 49 Cal.App.4th 55, 56 Cal.Rptr.2d 545, the Court of Appeal felt that the trial court could properly have concluded that it was in the child's best interests to have continued regular visitation with her father, with whom she had a good relationship, and that a move to Florida would almost entirely frustrate this relationship. Also, it could have found that a relocation of the child's residence based only upon the mother's "somewhat whimsical plans and very uncertain prospects" were not in the child's best interest.

In the instant case, the reason for the trial court's denial of the move-away was the well-documented prejudice to the children that the move was likely to occasion.

C. A Parent's Right To Move-away May Be Restricted If It Will Be Detrimental To The Child: While *Burgess* confirmed the presumptive right of the custodial parent to move with the children, it qualified that right to situations where "the removal would not be prejudicial to [the children's] rights or welfare." (E.g., *In re Marriage of Burgess, supra,* 13 Cal.4th at p. 38.) This test is reiterated in every case that follows *Burgess*. (See, e.g., *In re Marriage of Bryant, supra,* 91 Cal.App.4th at pp. 793-794 ["...subject to the power of the court to restrain a move that would prejudice the rights or welfare of the child"]; *In re Marriage of Edlund and Hales, supra,* 66 Cal.App.4th at pp. 1468-69 [same]; *In re Marriage of Biallas* (1998) 65 Cal.App.4th 755, 762, 76 Cal.Rptr.2d 717 [same]; *In re Marriage of Condon* (1998) 62 Cal.App.4th 533, 543, 73 Cal.Rptr.2d 33 [same]; etc.) Thus, it is not the test that is disputed herein, it is its application.

D. There Was Substantial Evidence That The Proposed Move Would Be Detrimental to The Children: Generally, the prejudice that noncustodial parents allege in

their oppositions to move-away requests is the potentially adverse effect on their "frequent and continuing contact" with their children. Mr. LaMusga understands that this cannot be the only detriment shown because it is present every time a parent, whether custodial or noncustodial, seeks to relocate. (See, e.g., *In re Marriage of Bryant, supra*, 91 Cal.App.4th at p. 794; *In re Marriage of Edlund and Hales*, *supra*, 66 Cal.App.4th at p. 1792.)

Although admittedly a factor here as well[11] (RT, p. 108/12 – 14), if loss of contact were the only detriment to the children, Ms. Navarro's appeal would be meritorious. It is not the only factor. The record is replete with a well-qualified expert's findings as to why, for a host of other independent reasons, this move would be prejudicial to the children.

Ms. Navarro's presumptive right to move with the children (Fam. Code §7501) was recognized by the trial judge (RT, p. 106/22-28) and is not disputed here. However, the trial judge specifically found, and the record amply supports, "that a relocation of the children out of the State of California, the distance of 2,000 miles is – would inevitably *under these circumstances* be detrimental to their welfare." (RT, p.108/9-12, emphasis added.) This finding was not the only one that the trial judge made regarding the detrimental effects of the proposed move:

> "The primary importance, it seems to me at this point, is to be able to reinforce what is now a tenuous and somewhat detached relationship with the boys and their father. That there is a process with Dr. Tuggle which is in fact promoting that relationship. That disrupting that would be extremely detrimental. I think the concerns about the relationship being lost if the children are relocated at this time are realistic. Certainly I would find that the preponderance of the evidence would indicate that would likely result at this time of a relocation." (RT, pp. 107/26-108/8.)

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[11] As discussed at page 9 and Section V herein, the frequent and continuing contact in this case also has a meaning independent of Fam. Code §3040.

Dr. Stahl supplied ample additional evidence to support the Court's order, including his testimony regarding the boys' suffering from "loyalty conflict" due to their mother's actions. (RT, pp. 28-29.) Over the previous five years, Ms. Navarro failed to provide her children with any of the "buffering" that loving parents give to protect their children. (RT, p. 64/1-19.) Because of her actions vis-à-vis Mr. LaMusga, the boys had developed an "enmeshed relationship" with her, which was harmful to their development and well-being. (RT, pp. 37-39.) She was also engaging, consciously or not, in a pattern of alienation towards Mr. LaMusga. (AA, p. 404/¶1; 403/¶5: RT, pp. 35/16–26; 48/15-24; 51; etc.) Her actions were having an adverse effect on the boys. (AA p. 403/¶3.)

The antidote for the boys' situation was frequent blocks of quality time with their father so that they could have a "balanced set of relationships" and "a break from that enmeshment [with their mother.]" This would be difficult if the boys were a great distance from their father and even more difficult given the five-year history of this case. (RT, p. 44/10-27.)

Dr. Stahl's opinion was that permitting the boys to move to Ohio would also worsen their relationship with their father. It would not "give them frequent enough contact to be able to hold on to the good parts of the relationship that hopefully, though intermittently, have been going on over the last several months with the therapeutic work. And the risk is that by their absence, by the ongoing, certainly unconscious and to whatever extent there is any overt behaviors by Ms. Navarro that are denigrating the father, that that will make it very difficult for them to improve their relationship with their dad." (RT, pp. 52/18-53/7.)

This is an important point. Dr. Stahl recommended against permitting the children to move to Cleveland in 1996 because he did not think that the children, as young as they were, could maintain a relationship with their father over that distance. He saw no evidence that Ms. Navarro would be supportive of that relationship when the children were 2,000 miles away since she had not been with them only five miles away. He did not think that the move would be healthy for the boys. (RT, p. 43/16-25; AA, pp. 392-393.) In that 1996 report, he felt it important that there be greater attachment between the boys and their father and to stabilize that relationship prior to any move taking place. (RT, pp. 43/26 – 44/2.) He recommended substantially increased visitation for Mr. LaMusga and the boys. (AA, pp. 393-394.)

This history is crucial to understanding the dynamics of this case and why the trial judge's decision was the only proper one for the welfare of these young boys. Ms. Navarro expressed a desire to move-away in 1996. She knew what was required of her for that move to be permitted -- help the children develop a relationship with their father that could withstand a 2,000-mile separation, yet, she could not bring herself to be the least bit supportive of that relationship. A reasonable inference from the five-year history is that her hatred of Mr. LaMusga was so great that she could not bring herself to be supportive of the father-child relationship under any terms. Dr. Stahl in fact was unable to point to a single affirmative act of hers in five years that was aimed at fostering that relationship. (RT, p. 42/26 – 43/6.) The problem is that she refuses to accept her significant role in the boys' problems with their father. (RT, pp. 72/19 – 73/3.) Although therapy could help her, she

refused any because she "didn't feel the need." (RT, p. 89/9-11.) Thus, the Order she appeals from is in a real sense one that she had, and still has, the power to avoid.

When evaluating the facts of this case in their entirety, how can it be concluded that this trial judge abused his discretion in denying her request? To hold otherwise would be to hold that the right to move is absolute, even when the move is contrary to the children's welfare and destructive of their relationship with the other parent. That is exactly contrary to the holding in *Burgess*.

E. The Court of Appeal Improperly Reweighed The Evidence Of Detriment: The Opinion below totally ignored all of the evidence of detriment except the adverse effect on the father-child relationship. Both Dr. Stahl and the trial judge found that a probable destruction of that relationship would be prejudicial to the children. (RT, pp. 43, 52-53, 55, 108.) The Opinion, however, held that this was not a "substantial showing" of "detriment." (Opinion, p. 14.) It then held that the detriment to the children of losing their primary caregiver outweighed the detriment of "possibly jeopardizing a relationship with the noncustodial parent." (Opinion, p. 14.) Both holdings ignored the implied findings that the trial court could have made based upon the evidence before it. The trial court was aware that an order changing custody necessarily meant that the children would be in California with their father if the mother moved to Ohio. That is precisely why it made the *temporary* order a measured response giving the children 12 months to stabilize before the Court looked again at the situation. That it didn't just order an immediate "permanent" change of custody should make it obvious that the trial court was keenly aware of the children's best interests and the need to continue to monitor

their condition. The Opinion totally ignored the evidence and inferences that support the trial court's order.

There is another point that has to be made. The trial court found that the loss of the father-child relationship would be detrimental to the children. It found that permitting the mother to move would likely have this result. (RT, pp.107-108.) This was not, as the Opinion characterized the move's probable effect, "some detriment," "possible loss," or even "significant detriment." (Opinion, p. 11.) It was the foreseeable loss of the parent-child bond. (RT, p. 108/4-8.)

The Opinion seemed to hold that as a matter of law the foreseeable loss of a parent-child relationship is not the type of detriment that can prevent a move-away.[12] What message does this send about the value of children's relationships with their fathers? In an analogous situation, *In re Marriage of Williams* (2001) 88 Cal.App.4th 808, 814, 105 Cal.Rptr.2d 923, while ruling that siblings cannot be separated without compelling circumstances, stated: "Children are not community property to be divided equally for the benefit of their parents. The parents of these children have chosen to divorce from each other. The children have not chosen to divorce from each other. At a minimum, the children have a right to the society and companionship of their siblings." Why is it not equally impermissible to destroy a parent-child relationship?

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[12] Compare *In re Marriage of Condon, supra,* 62 Cal.App.4th at p. 547 where an international move-away was affirmed only after ascertaining that they did not result in a "de facto termination of ... the child's rights to maintain a relationship with [the non-moving] parent." (Accord, *In re Marriage of Lasich, supra*, 99 Cal.App.4th at p. 719.) The *Condon* opinion also held at page 547 that when the move-away was likely to have this effect, the burden was on the "moving parent to satisfy the burden of showing the termination of those rights would be in the best interests of the child."

Devlen was benefiting from the therapy that he was in. (RT, p. 49/19-22.) The trial judge expressly found that it would be "extremely detrimental" for the children to stop the therapy with their father through Dr. Tuggle. Although obviously aware that there were therapists in Ohio, the trial judge felt that interfering with the current therapy's progress would be harmful to the children. The Court of Appeal noted this finding but did not appear to give it any weight.

The Court of Appeal ignored all of the evidence of detriment except the effect on the parent-child relationship and there held that, as a matter of law, it was insufficient to restrain Ms. Navarro's proposed move. In doing so it ignored virtually all of the evidence favorable to the Order and reweighed the rest. This an appellate court may not do. (*In re Marriage of Birnbaum*, *supra*, 211 Cal.App.3d at 1513.)

III.
THE WELFARE OF THE CHILDREN NEEDS TO BE CONSIDERED AS WELL AS THE RIGHTS OF THE CUSTODIAL PARENT

In his dissent in *In re Marriage of Bryant* (2001) 91 Cal.App.4th 789, 110 Cal.Rptr.2d 791 Justice Yegan raises the issue that is squarely before this Court: must a proposed move be rubber-stamped when the evidence is that such a move will be detrimental to the welfare of the children? Another way of asking this is at what point does "not in the children's best interests" rise to the level of "prejudice" or "detriment" such that a move-away can properly be restrained?

In *Bryant*, the parties had two children, ages six and nine. When the father filed for dissolution the mother requested custody of the children and announced that she wanted to

move to New Mexico to be with her family. She said that she and the children needed the emotional support of her family and admitted she was not moving for financial reasons.

The trial court found that the mother was not motivated to move by bad-faith, nor had she unreasonably interfered with visitation. The court "mused" that the "optimum scenario for the best interests of the children" would be for them to stay in Santa Barbara as it would preserve "their lifelong social structure ... with very successful schooling, church, sports, paternal extended family and maternal aunt and would maximize the children's frequent and continuing contact with both parents." However, interpreting *In re Marriage of Burgess* as a bright-line rule, it overruled the father's objections. He appealed, contending that the trial court failed to evaluate the mother's reasons for the move. The Court of Appeal affirmed, holding that once it found that the mother was not acting in bad-faith, the trial court was bound to permit her to move.

> "A custodial parent has a statutory right to change the residence of the child, subject to the power of the court to restrain a move that would prejudice the rights or welfare of the child. (Fam. Code §7501.) The parent proposing to move-away is not required to establish a need or even a justification for relocating to another geographic area. [Citation.] The only exception is where the reason for the move is to frustrate the non-custodial parent's relationship with the child. [Citation.] [¶] [¶] Here the trial court found that [wife] was not acting in bad-faith. No further inquiry was necessary or appropriate and court did not err in failing to evaluate the reasons for the move." [Footnote omitted.] (Id. at pp. 793-794.)

The Court of Appeal noted that the policy of assuring frequent and continuing contact must be viewed in light of other policies, for instance allowing a custodial parent the freedom to move.

> "That the move of a custodial parent may have an adverse effect on the frequency of contact by the non-custodial parent, is not by itself determinative. What is determinative is the best interest of the children, given that one parent is moving

> and the other is not. [Citation.] [¶] From [husband's] point of view, it may be unfair that because he provided primary financial support for his family he had less contact with his children. But the question presented to the trial court is the best interest of the children, not fairness to [him]. Unfortunately where, as here, both parents are competent and loving, there is frequently no solution that is fair to everyone involved." (Id. at p. 794.)
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> "Having found that [the mother] was not acting in bad-faith and that it is in the best interests of the children for custody to be with [her], the trial court was bound to rule as it did. We agree with the dissent that [*In re Marriage of Burgess*] is disquieting because in cases such as this one it leaves the children with the second best solution. But under *Burgess* there was no abuse of discretion." (Id. at p. 796.)

It is important to note that there was no evidence presented of actual detriment beyond that occasioned by any move involving children. The real issue was whether a trial court was required to choose the "next best" option simply because the custodial parent willed it. Interpreting *Burgess* as a "bright-line" test, the majority held that it was. However, the majority's "bright-line" test did not involve a situation where there was an affirmative showing of detriment to the children from the move.

Justice Yegan's dissent focused on the "detriment" to children caused by having to rubber-stamp requests to move-away where that was not the best alternative for the children. He quoted the trial judge's thinking on the subject:

> "There are two realistically possible scenarios in this case. The court could conditionally grant physical custody of the children to the father (with liberal visitation to the mother) if the mother moves away, with joint physical custody if the mother remains in Santa Barbara. In all likelihood, the court could force the joint-physical-custody scenario, since it is unlikely that mother will move-away if it means she thereby becomes the non-custodial parent. This would be the optimum scenario for the best interests of the children, since it would preserve their lifelong social structure in the Santa Barbara area with very successful schooling, church, sports, paternal extended family and maternal aunt and would maximize the children's frequent and continuing contact with both parents." (Id. at p. 797.)

Nevertheless, the dissent noted, the trial court opted for what can be and must be characterized as a custody arrangement that was not the optimum scenario for the children. It expressly said that it was "compelled to select what is next best in the children's interest." (Ibid.)

Justice Yegan felt that the trial court and the majority interpreted *Burgess* as a "bright-line" rule where the trial court's inquiry begins and ends with whether the relocation is for a bad-faith purpose such as frustrating the non-custodial parent's frequent and continuing contact with his children. Where the relocation is not in bad-faith, the court may not require the relocating parent to show necessity or justification for the move.

> "I am hopeful that the California Supreme Court did not intend that *Burgess* be interpreted in a "straightjacket" fashion. A family law court is a court of equity [citation] and it is required to weigh all relevant considerations in determining what is in the best interests of the children. Burgess speaks to the 'widest discretion' enjoyed by the trial court in determining what is in the best interests of the children in a custody dispute. (*Burgess, supra*, 13 Cal.4th at pp. 31, 34.) It also requires the trial court to consider the prejudice to the children from a relocation. (Id., at pp. 32, 34.) A move should not be allowed where such would be "'detrimental to the child.'" (Id., at p. 35, quoting *In re Marriage of Ciganovich* (1976) 61 Cal.App.3d 289, 293 [132 Cal.Rptr. 261].) *Burgess* expressly states that "'bright-line rules in this area are inappropriate: each case must be evaluated on its own unique facts.'" (*Burgess, supra*, 13 Cal.4th at p. 39.) In my view the trial court did not want to make the order that it did. [Fn.] Even from the cold record, it appears that the relocation of these children is to their detriment. [¶] When the trial court expressly indicated what the optimum scenario would be, it should have stopped and entered that order. By definition, and in the words of the trial court, it selected what was "next best." (*In re Marriage of Bryant, supra*, 91 Cal.App.4th at p. 35.)

The trial judge, the majority of the Court of Appeal and the dissent were addressing the inherent detriment of permitting a custodial parent to move and thereby cause prejudice to the children from the dislocation of existing familiar environment, friends, family, school and relationships, in other words, the type of prejudice that often accompanies moves. (See,

e.g., *In re Marriage of Edlund and Hales, supra,* 66 Cal.App.4th at p. 1472.) Justice Yegan might have been saying that at some point when a trial court determines that the cumulative effect of these factors rises to such a level that the move would be harmful to the child, it should be able to restrain it, even if it impinges on the 'rights" of the custodial parent. As discussed in section VI below, courts often restrict parental freedom of choice when children are adversely impacted. Why should the right to move-away, when it is not in the best interest of the child, be any different?

That said, the type of "detriment" at stake in this case is of a different type and a different order of magnitude. It included the mother's negative influence on the children which could only be ameliorated by more frequent contact (on the order of every other week) with their father, and the probable destruction of the father-child relationship if the move were permitted. Although *Bryant* helps frame the issues before this Court, it can be distinguished by the type of "detriment" being discussed.

It is unfortunate that as *Burgess* is being applied courts feel compelled to rubber-stamp move-away requests that they feel are not the best available choice for the children affected by them. When they don't rubber-stamp the requests they are reversed, as was the trial judge in this case.

IV.
THE BAD FAITH TEST IS NOT HELPFUL IN EVALUATING MOVE AWAY REQUESTS

Ms. Navarro assumes that her right to move is automatic and can only be restrained if it can be shown that she is moving in bad-faith. Her position was buttressed by holdings in cases such as *In re Marriage of Bryant*, discussed above.

The bad-faith test, which is akin to a "mens rea" test in criminal law[13], is generally unworkable. How do you show bad-faith? It is a clumsy parent who makes the express provable statements necessary to sustain such a finding. Moreover, some moves made for improper motives may be less detrimental than others made for good faith reasons. Focusing on the parent's motives is not helpful. The instant case is a good example: had the trial judge found that the mother's move was in bad-faith, the evidence was strong enough to have made the finding virtually appeal proof. However, since the court preferred to use the term "alignment" rather than "alienation," a different test is applied and the legal outcome may be different. However, whatever her subjective motivation, the negative impact on the children is the same.

What should matter is whether the move will be detrimental to the children. In making that determination, this Court gave trial courts a number of factors to consider:

> "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 - including de facto as well as de jure custody arrangements - and the child's age, community ties, and health and educational needs. Where appropriate, it must also take into account the preferences of the child. (Fam. Code §3042 (a).)" (*In re Marriage of Burgess* (1996) 13 Cal.4th at p. 39.)

The trial judge in this case did exactly that. He considered "the nature of the child[ren]'s existing contact with both parents - including de facto as well as de jure custody arrangements - and the child[ren's ages]" and found that the proposed move was prejudicial to their welfare. How can that be an abuse of discretion on this record?

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[13] Defined in part in Black's Law Dictionary (6th ed., 1990), p. 985, as: "... a guilty

V.
THE USUAL REMEDIES THAT *BURGESS* RECOMMENDED TO CURE THE PROBLEMS OF DISTANCE WON'T WORK IN THIS CASE

Burgess and subsequent cases have recognized that permitting a custodial parent to move adversely impacts the State's policy of fostering "frequent and continuing contact" between the parents. (Fam. Code §3020.) However, they hold that ordering "liberal visitation" will generally satisfy that policy. (*In re Marriage of Burgess, supra,* 13 Cal.4th at pp. 36, 40.) In this case, that option was specifically considered and rejected as not in the children's best interests. To counter the mother's negative influences, including the "good Mom/bad Dad" syndrome, lack of buffering, enmeshed relationship, loyalty conflicts and alienation behavior, even more frequent interactions were required, not less frequent ones.

The Opinion assumed that the detriment would be caused by the move to Ohio rather than the change in the frequency and nature of the Father's contact with the boys. It erroneously assumed that an order for "liberal visitation" cured the problems. (Opinion, p. 11.) The problem here was not "frequent and continuing contact" as an abstract legal principle (see e.g., *In re Marriage of Edlund and Hales, supra,* 66 Cal.App.4th at p. 1475 [policy fulfilled even where father gets less visitation than he had before the move]), but as a practical fact in the children's lives. It was an essential part of the immediate welfare and best interests of the boys. Due to the mother's negative impact on the children, the antidote for the boys' was for them to have constant quality blocks of time with their father so that they could have a "balanced set of relationships." (RT, p. 44/10-27.)

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mind; a guilty or wrongful purpose...."

What was at stake was not only the welfare of the children directly, but also the preservation of the father-child relationship. The irony, of course, was that had Ms. Navarro been able to ameliorate her behavior towards Mr. LaMusga, the recommendation and order would have been different. (RT, pp. 43/4-6; 106/22-28.)

It is instructive to note that in the face of this evidence, Ms. Navarro argued below that there was "absolutely no evidence in the record" to support a finding that "the children would suffer "detriment" from the move. (AOB, p. 13.) Why? Because she believed that the less contact the children had with their father, the better it was for them. (RT, pp. 41/1-10; 42/3-25, AA, pp. 380/¶2; 383/¶2.) How can she be expected to recognize that a potential destruction of the father-child relationship from such a move would be detrimental to her children? Her brief mirrored her beliefs.

The evidence was that the move would be detrimental to the boys not only because it would probably result in the destruction of the relationship with their father, but also because they would lose his counterbalancing effect to their mother's negative influence. This entire body of evidence supporting the trial court's order was totally ignored by the Opinion.

VI.
THE PROSPECTIVE CHANGE OF CUSTODY ORDER WAS THE ONLY ORDER THAT THE TRIAL COURT COULD MAKE

Ms. Navarro's objection to the change of custody order evidences a lack of understanding what took place on August 23, 2001. The trial court does not have the power to restrain a custodial parent from moving; to do so would violate her constitutional right to travel. (*In re Marriage of Fingert* (1990) 221 Cal.App.3d 1575, 1581, 271 Cal.Rptr. 389.) Thus, an order denying the custodial parent the right to move with the children is by

definition a conditional change of custody order. It must be in the children's best interests to remain with the formerly noncustodial parent rather than move with the custodial parent. (*In re Marriage of Burgess, supra,* 13 Cal.4th at p. 39.)

Conditional change of custody orders are not unheard of nor automatically reversed. In *In re Marriage of Condon, supra*, 62 Cal.App.4th 533, for example, the trial court made a conditional change of custody order. If the mother moved to Australia, the child could go with her. However, if she moved to France, custody was transferred to the father. Although the Court of Appeal remanded with instructions to the trial court to add language to its order assuring continued jurisdiction of the California courts, it affirmed the conditional change of custody.

The Opinion implied that the move could not be restrained unless an immediate change of custody was appropriate irrespective of the move. (Opinion, pp. 6,14.) It ignored that fact at trial Dr. Stahl recommended exactly that: an immediate modification to true joint physical custody, perhaps alternating weeks. Then, if the Mother continued her pattern of alienation, the custody arrangement should be reversed. (RT, p. 68/14-21.)[14]

The Opinion further stated at page 14 that a trial court cannot use the denial of a move to test the custodial parent's commitment. The problem with this argument is these issues are not decided in a vacuum. The operative change in circumstances is that the custodial parent has elected to move-away. It is that decision and its inevitable impact on the child that must be evaluated. If the move-away is denied and the custodial parent elects to

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[14] In his earlier report, he had recommended a somewhat different initial schedule of Thursday through Monday one week and then Thursday through Friday the next. Then, if

move anyway, then the order amounts to a change of custody. If the parent elects not to move then there is no change of circumstances to evaluate.[15] If there is no change in circumstances, there is no change in custody. So, while it can be "essential and imperative" to change custody if the parent moves, it is not if she does not. Can this be viewed as coercive? Possibly. Is this wrong? No. With parenthood come certain responsibilities. Parents necessarily lose certain freedoms that they might otherwise have, such as the right to pursue endeavors that do not generate "adequate" amounts of income for the support of children.

> "Once persons become parents, their desires for self-realization, self-fulfillment, personal job satisfaction and other commendable goals, must be considered in context of their responsibilities to provide for their children's reasonable needs. If they decide they wish to lead a simpler life, change professions or start a business, they may do so, but only when they satisfy their primary responsibility: providing for the adequate and reasonable needs of their children." (*In re Marriage of Padilla* (1995) 38 Cal.App.4th 1212, 1220, 45 Cal.Rptr.2d 555.)

This point was also made by Justice Baxter in his dissent to *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 43-44, 51 Cal.Rptr.2d 444, 913 P.2d 473:

> "This policy [of maximum contact between a minor child and *both* of his separated parents] must be considered in the 'best interest' balance. Doing so does not constitute an undue interference with a parent's personal rights. When one assumes parental responsibilities, his obligations include good faith efforts to foster both his own bond with the child and the relationship which exists between the child and a coparent. When a custody dispute arises, the court must weigh the child's 'best interest' even where that may affect a parent's freedom, travel, lifestyle, and economic interests."

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the Mother continued her denigration, it would move to joint custody or an actual shift in primary physical custody. (AA, p. 405.)

[15] Ms. Navarro testified that if the court denied her request to move, she would remain in California. (RT, p. 89/12-15.)

Another right one loses is the right to relocate when that move will be prejudicial to the welfare of the children.

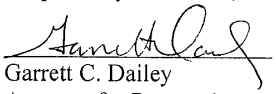
To hold that a court can only deny a move-away if it finds it "essential and imperative" to change custody even if the custodial parent does not move is illogical and circular. It ignores the fact that the detriment to the child is being caused by the move-away. *Burgess* says that if the trial court finds that the move will be detrimental to the child, it can restrain the move. In doing so, the trial court must weigh the relative effects on the child from a change of custody to the noncustodial parent versus the detriment caused by an ill-advised move. The implied findings are that this trial court did precisely that. Its order should be affirmed.

CONCLUSION

For the reasons stated, Respondent requests that the order of the trial court be affirmed and that *Burgess* be clarified such that trial judges understand that they are not powerless to consider the welfare of the children when ruling on requests to move-away and may restrain them when they are detrimental to the children, irrespective of the motives of the moving parent.

Dated: October 18, 2002

Respectfully submitted,



Garrett C. Dailey
Attorney for Respondent
Gary LaMusga

PROOF OF SERVICE

I, BRENDA K. BUTLER, declare as follows:

I am over eighteen years of age and not a party to the within action; my business address is 2915 McClure Street, Oakland, California 94609; I am employed in Alameda County, California. I am familiar with my employer's practices for the collection and processing of materials for mailing with the United States Postal Service, and that practice is that materials are deposited with the United States Postal Service the same day of office collection in the ordinary course of business.

On October 18, 2002, I served a copy of the following document(s): **RESPONDENT'S OPENING BRIEF ON THE MERITS**

On the addressee(s):

__X__ **BY MAIL --** by placing a true copy of the above-referenced document(s) enclosed in a sealed envelope, with postage fully prepaid, in the United States mail at Oakland, California, addressed as set forth below, on the date set forth above.

____ **BY FACSIMILE --** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below, on the date set forth above, before 5:00 p.m.

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San Francisco, California 94102

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on October 18, 2002, at Oakland, California.

Brenda K. Butler