IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

In re the Marriage of Navarro & LaMusga

SUSAN POSTON NAVARRO (LaMUSGA)

Appellant-Petitioner,

and

GARY LaMUSGA

Respondent-Respondent.

Case Number: S107355

RESPONDENT'S REPLY TO AMICI BRIEFS

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

Respondent, Gary LaMusga, respectfully submits this brief replying to the amici briefs submitted to date in this case.

I.
PRELIMINARY STATEMENT

The issues raised in amici Margaret Gannon, et al's brief (hereinafter referred to as the "Gannon Brief") and the California Women's Law Center, et al's

brief (hereinafter referred to as the "CWLC Brief") are all significant and Respondent does not seek to disparage them in any way. Moreover, he salutes the efforts of those who provide badly needed services to the poor and abused. However, he also believes that the briefs grossly exaggerate and misstate his position, distort the facts of this case and, in the case of the Gannon Brief, relies almost totally on anecdotal and unsupported allegations, significantly weakening the points that it attempts to make.

As this case does not involve issues of poverty or abuse, neither brief has any real relevance to the facts of this case. Although the CWLC Brief attempts to tie some of its arguments to the facts of the *LaMusga* case, its attempts will be shown to be weak and easily dismissed. Thus, both are seeking to sway the outcome of this appeal based upon arguments and issues that are not raised by the facts herein. Since both briefs weigh in on the side of Appellant, Respondent will comment on them. Interestingly, he believes that both briefs dramatically support his argument that a modification and/or clarification of *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 51 Cal.Rptr.2d 444, 913 P.2d 473 is needed.

As both briefs raise similar arguments, he will respond to the common arguments first.

A. Areas of Agreement: Respondent agrees with amici that custodial parents have a presumptive right to move with a child. He agrees that the burden must be to show prejudice unrelated to the move itself. He agrees that the interests of a child remaining in the custodial parent's care and custody will most often

prevail. He also agrees that the burden of preventing such a move should be on the objecting noncustodial parent. (See Respondent's Opening Brief on the Merits (hereinafter referred to as "ROBOM") at p. 37 and Respondent's Reply Brief on the Merits (hereinafter referred to as "RRBOM") at pp. 28-29.)

B. Point of Disagreement: Where then does he disagree with amici? The basic assumption in both amici briefs is that the mother has an absolute right to move away with the child – period.

Respondent, on the other hand, believes that if the noncustodial parent shows that the move will be prejudicial to the welfare of the child then the trial court has the right to restrain the move. In other words, the right to move is presumptive, but not absolute.

C. Respondent does not seek to "overturn" Burgess: Amici repeatedly state that Respondent is requesting this Court to "essentially overturn" *Burgess*. (E.g., Gannon Brief, pp. 1, 3 and CWLC Brief, at p. 2.) They assert that Respondent seeks to shift the burden to justify the move to the custodial parent. (Gannon Brief, p. 7.) These allegations are inaccurate.

Respondent's Petition for Review and Briefs on the Merits ask this Court to look at how *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 51 Cal.Rptr.2d 444, 913 P.2d 473 is being interpreted and applied in the trial and appellate courts. He argues that *Burgess* is being misinterpreted as giving the custodial parent an absolute right to move absent difficult to make showing of bad faith. In *Burgess*, this Court recognized that "bright line rules in this area are inappropriate: each

case must be evaluated on its own unique facts." (Id. at 13 Cal.4th at p. 39.) Yet, it appears that that is exactly how courts have interpreted *Burgess*. (See, in *In re Marriage of Bryant* (2001) 91 Cal.App.4th 789, 793-794, 110 Cal.Rptr.2d 791 ["The only exception (to a custodial parent's right to move-away) 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."] See also Justice Yegan's dissent at pp. 797-798)

The facts of the *LaMusga* case prove this to be true. Here, the evaluator found that it would be harmful for the children to move for reasons that were unrelated to the move itself, including a probable destruction of the father-child relationship. (Reporter's Transcript, (hereinafter referred to as "RT"), pp. 44/10-27; 52/18-53/7; 107/26-108/8.) The trial court, after listening to the witnesses and weighing their credibility, agreed and made express findings of detriment. (RT, pp. 105/25-109/9.) Nevertheless, the Court of Appeal reversed, ignoring the strong and unrebutted findings of detriment to the children from the move and trivializing the importance of the loss of the father-child relationship. Absent bad faith, which the trial court below came tantalizing close to finding, the Court of Appeal held that the mother's move could not be restrained. It also found that a probable destruction of the father-child relationship was not cognizable prejudice.

Respondent does not believe that this is what *Burgess* says or that this is the test that this Court intended.

Respondent believes that under the existing *Burgess* test, the Court of Appeal should be reversed. It was shown and found that the mother's planned move would be detrimental to the children. The detriment was independent of the move itself. Nothing more is required.

D. Amici ignore Appellant's role in creating the problem that is before this Court: Respondent finds it disturbing that neither amici brief criticizes Appellant's conduct herein. In fact, they criticize Respondent for fighting for a relationship with his children by repeatedly asking that his time with his children be expanded to include vacations. (Gannon Brief at p. 22.) By doing so, they trivialize the father's importance to a family and defend the mother's five-year course of conduct that the evaluator and the court found destructive to the children's relationship with their father and to the children's general well-being. This is unfortunate.

E. The argument that any change in *Burgess* will have devastating effects on poor women is exaggerated and unsupported: Both briefs argue that any change in *Burgess* will have a "devastating" impact on poor women. (Gannon Brief, p. 3; CWLC Brief, p. 1.) Again, the basic assumptions in this argument are that these women now have an unfettered right to move without restriction and that Respondent has requested a return to pre-*Burgess* law where the focus of inquiry was the mother's motives for moving rather than the children's best interests

thereby unduly interfering with that right. The second assumption is not true. The first probably is, but should not be. What amici really mean is that they don't want this Court to interfere with how its *Burgess* opinion is being interpreted and applied.

Conclusions such as "relocation restrictions ... will lead to the dangerous stagnation and impoverishment of custodial families headed by women" (CWLC Brief at p. 5) are simply unsupportable.

There is another problem raised in cases of poor women that neither amici brief addresses, namely long range visitation. One of the assumptions in *Burgess* is that the effects of the move-away can be ameliorated by making accommodations to visitation and communication. Those accommodations may be impossible in low income cases. This is simply another factor that trial courts should have the right to consider.

F. Amici view the mother's right to relocate as absolute. Amici mouth the words that prejudice to the child is an exception to the mother's right to move away with the parties' child (CWLC Brief, p. 30), but they don't really mean them. On the preceding page, they speak of the mother's right to move in absolutes. They assert that "[t[he forced confinement of custodial families in such cases is *never* in the best interests of the child," and "ordering the removal and separation of a child from the family unit and parent whom the child has primarily relied upon for daily emotional support and care, simply because the custodial parent needs to move, is also *never* in the best interests of the child." (Emphasis

added, CWLC Brief, p. 29.) In other words, in amici's view, it is *never* in the bests interest of a child to restrain a mother's desire to move away.

The problem is that amici view the issue solely from the eyes of the woman. But the reality is that there are three sides to the issue. The father and the child also have equally valid interests that are worthy of consideration. The father has an interest in preserving his relationship with his child. As this Court as aptly observed, this can usually be accommodated through a variety of accommodations such as increasing amount of visitation with noncustodial parent during vacations from school, allocating transportation expenses to custodial parent, or requiring custodial parent to provide transportation of the children to the noncustodial parent's home. (*In re Marriage of Burgess, supra.* at p. 40.) But, in some cases, it cannot. If, despite the father's best efforts, the mother has created a situation whereby permitting the move will effectively sever the father-child relationship which the father has tried in good faith to preserve, then the accommodations discussed above may not be sufficient. Amici and the Court of Appeal below believe that even if the mother's move has this result, it is acceptable collateral damage. The trial court below disagreed. Respondent believes that it was correct and should be affirmed.

There is another point of view that must be considered and one that both amici briefs gloss over, namely the best interests of the child. Implicit in both briefs is that the child's welfare always lies with the custodial parent, presumed to be the mother, no matter what. Both groups appear terrified at the notion that this

Court will clarify *Burgess* to state this is not always true and that the children's interests are not a nullity in the equation. Why are amici so afraid to permit trial courts to consider whether the move will be prejudicial to the child? *Burgess* certainly did not hold the children's best interests to be irrelevant. In fact, at p.35, n.4, *Burgess* states just the opposite:

> "It [Fam. Code §7501's presumptive right of the custodial parent to move] must, however, be harmonized with other provisions of the Family Code concerning custody; we do not suggest, of course, that a parent has the 'right' under Family Code section 7501 to remove a child if such removal would derogate the child's 'best interest.'" (n.4.)

Amici also ignore this Court's discussion of the right of the child to have the child's preferences and community ties, "circle of friends or particular sports or academic activities within a school or community" considered. (*In re Marriage of Burgess, supra* at p.39 and fn. 11.) They assume that the best interests of the child are always coincident with the mother's desires. Respondent does not agree. Neither did this Court in *Burgess* at p. 39 and in footnote 11.

G. Trial judges must be presumed to be willing to act in children's best interests: One of the fundamental and unsupportable premises in both briefs is that trial judges are callous to the economic realities of divorce and, if permitted to exercise their discretion, will choose to doom children to a live of poverty in California rather than approve a move that has the potential to improve their standard of living. (See especially Gannon Brief at pp. 10-14, 17-18.) They point to the facts of this case to prove their point. (CWLC Brief, at pp. 10-11.) The

answer to the general argument is that it is absurd. It assumes that trial courts will not recognize custodial parents' presumptive right to move and will make orders that any caring human being would find abhorrent. Respondent does not believe this to be true. He believes that if trial judges are instructed that custodial parents have a presumptive right to move, that the burden is on the non-custodial parent to establish that the move is not in the child's best interests and that the detriment must be something more than accompanies every move, they will follow the law. Respondent also believes that moves primarily for economic improvement[1] will be usually be approved.

However, even in cases where parents allege that the planned move is to improve their economic status, the move may still not be in the children's best interests. This case is a prime example. The first point to remember is that, in a figurative sense, Appellant at all times had the airline tickets to Ohio (or Arizona) in her pocket. At any time she could have left the state with the blessing of the trial court. All she had to do was act in the best interests of her children and help them develop a relationship with their father that could endure the separation.[2] Had she done so, the recommendation would have been in favor of the move. (RT, pp. 43/4-6, 106/22-28.) In spite of knowing what was required of her as a mother and as a litigant, she simply could not bring herself to act appropriately and in her

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[1] As opposed to cases such as this where a strong inference exists that the proposed moves are really pretexts for moving the children away from the other parent. (See, AA, p. 411/¶3.)

children's best interests. Thus, when amici lament how Appellant was denied the right to pursue her educational goals (e.g., CWLC Brief, pp. 10-11), they ignore the fact that Appellant's "confinement" to California was on her own making[3].

H. Respondent does not argue that move aways should be denied in all cases where fathers don't have a strong relationship with their children.

Both Briefs point to the trial court's statement that the father's relationship with his children was "tenuous and somewhat detached" to support their argument that the move should have been permitted. The Gannon Brief states:

"It is very odd to penalize the custodial parent, and reward the non-custodial parent because the children have a poor relationship with the non-custodial parent." (Gannon Brief at p. 21.)

They ignore Appellant's role in creating the situation and Respondent's efforts to correct it. Despite Appellant's attempts to rewrite the evidence at trial in her Brief to this Court, there was compelling evidence at trial that she had "alienated" the children (See list of citations to this term in the record at RRBOM, at pp. 9-10), "align[ed]" them with her against their father (RT, pp, 36/12 – 37/2, 109/27-110/4), denigrated him (Appellant's Appendix, hereinafter referred to as "AA", p. 405), attempted to interfere with his time with them (e.g., by asking their school teachers to keep track of the hours that he spent as a classroom assistant so

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[2] For the purposes of this illustration, Respondent is ignoring the other reasons detailed at ROBOM p, 30, why it would be detrimental to the children to move.

she could deduct the time from his visitation), and generally acted inappropriately. Dr. Stahl saw no evidence in five years that she had done anything to foster the children's relationship with their father. (RT, pp. 42-43.) Although the trial court referred to the children's "tenuous and somewhat detached relationship with the boys and their father," it also recognized that the relationship was improving due to the children's continued presence in close proximity to their father and in spite of the mother's interference. (RT, pp. 105/25-109/9.) Amici ridicule the trial court for its decision by saying that he was rewarding Respondent and punishing Appellant for the boys' "tenuous" relationship with their father. In fact, the trial court wasn't rewarding anyone or punishing anyone else. It was acting in the best interests of the children. Contrary to the position taken by amici, the best interests of the children do not always lie in moving with the custodial parent. This is one of those cases.

The argument that as a policy affirming this trial court order would discourage custodial parents from developing good relationships with the children (Gannon Brief, p. 21) is too silly to comment on.

I. Making an order that is in the child's best interests is not "punishment" or "reward."

Both the Court of Appeal and amici argue that it is improper to "punish" Appellant for her bad acts by denying her the right to move away. Respondent

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[3] They also ignore that fact that Appellant argues that she *voluntarily* abandoned her plans of attending law school in Ohio. She denies that she was forced to abandon

replies to this on two levels. First, he asks how making an order that is in the best interests of the child amounts to "punishment" or "reward?" Why is either parent being "punished" by the trial court's saying, "under the facts of this case, as they sit before me, the best interests of the children require that the move-away request be granted (or denied)"? True, one parent is getting the relief that he or she wants, but that is different than saying that parent is being rewarded.

On a more fundamental level, Respondent asks "why is it improper to 'punish' a parent for his or her bad acts towards the children?" Amici agree, provided the punishment is one-sided. They suggest that if a father is abusive, it is permissible to punish him by not only permitting the move-away, but also by denying him all visitation. (CWLC Brief, pp. 27-28.) Is this punishment or acting in the best interests of the children? It solely depends on your perspective. This Court has agreed in *Burgess*, making a parent's bad motive an exception to his or her right to move away with the child. (*In re Marriage of Burgess, supra* at p. 36, n.6.)

Here, the evidence was overwhelming that the mother had acted badly and that as a result of her actions, the children's relationship with their father had suffered and they had developed psychological problems as well. (See discussion at RRBOM, at pp. 17-18.) The trial court made orders appropriate to the facts and temporarily denied her move-away request. Why was that inappropriate?

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them. (ABOM, pp. 4, 6, 19.) Respondent agrees with amici on this point.

J. This should not be a gender-based issue.

Finally, unlike Appellant,[4] Respondent has never viewed the issue before this Court as a gender-based issue. He views it as a child-based issue. He wonders whether amici would be as vocal if he had custody and were the one who was trying to move away with the children?

II.
REPLY UNIQUE TO GANNON BRIEF

The first point is that it is difficult to respond factually to a brief where the argument is almost exclusively anecdotal and/or based on unverifiable data. Nevertheless, the arguments raised are certainly worthy of consideration in this case and Respondent does not dismiss them lightly.

He certainly does not agree that a decision in this case whereby this Court reiterates what it said in *Burgess*, namely that "bright line rules in this area are inappropriate: each case must be evaluated on its own unique facts" (id. at 13 Cal.4th at p. 39) will have the cataclysmic effect that this brief predicts.

A. Respondent's proposed standards are not unworkable nor against public policy. The Gannon Brief argues that public policy is violated by accepting the obvious proposition that when dealing with a move-away request, the situation is different when a mother elects to move without the child and when she elects

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[4] See Appellant's Answer Brief On The Merits (hereinafter referred to as "AABOM"), pp., 11-12, alleging that Respondent's appeal was "a frontal assault by the

not to move. (Gannon Brief, p. 19.) If a mother wishes to move away and the move is denied, does she automatically lose custody to the father? Of course not. Why? Because there has been no change of circumstances. If she does move in the face of a Fam. Code §7501 restriction, then custody switches to the father. Obviously, if the trial court has retrained the move-away, it did so with the express or implied finding that it is in the best interests of the child to have custody switch to the father if that happens. What is unworkable or contrary to public policy about that? Amici's answer is that it results in a game of chicken. They assert that they have *never* seen a case where a mother has moved away in the face of such an order and thus the order restraining the move itself is against public policy. (Ibid.)

This argument is the converse of the one made in *In re Marriage of Edlund and Hales* (1998) 66 Cal.App.4th 1454, 78 Cal.Rptr.2d 671, namely:

> "[W]e cannot imagine a case in which a child with any meaningful relationship with the noncustodial parent would not be 'significantly negatively impacted' by a good-faith decision by a custodial parent to move, over the noncustodial parent's objection, to a distant location But, if [that] evidence of 'detriment' ... were sufficient to support a denial of a move-away order in this case, no primary custodial parent would ••ever•• be able to secure such an order." (Id. at p. 1472.)

"Playing chicken" is an unseemly analogy. Phrased differently, if it is against public policy to tell a custodial parent that if he or she elects to move that an order will be made changing custody, then, since according to amici, custodial

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so-called Fathers Rights Movement on section 7501 and *Burgess*," yet it is she who has obtained amici briefs from 36 different women lawyers and women's groups.

parents never "abandon" their children[5] by moving without them, no move away request can ever be denied. Arguments such as those made on page 20, that permitting trial judges to consider the best interests of the children will not advance the best interests of the children are simply impossible to follow.

The rule is and should be reiterated to be that move away requests can be denied when the move will be prejudicial to he rights of the children. (Fam. Code §7501.)

III.
REPLY TO UNIQUE ARGUMENTS RAISED IN CWLC BRIEF

The CWLC Brief either ignores or glosses over the facts of the *LaMusga* case in its brief. For example, at page 2, it states that Respondent is arguing that a good-faith move-away should be restrained simply because "there may be some negative impact...," or "any resulting detriment to a child's relationship with the noncustodial parent from a proposed move...." (CWLC Brief, p. 2.) This, of course, is not the position that Respondent urges this Court to take. He understands that any move, whether to the next county or across the country may have "some negative impact" on the children's relationship with the nonmoving parent. As stated in his previous briefs, were this the only factor in this case, Appellant's position would be meritorious. (RRBOM, at p. 37.) The difference is

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[5] The mere fact that amici believe that an order whereby the children live with their father constitutes "abandonment' is distressing.

that here, the move will not only adversely affect the children because they will lose the benefits of their father's ameliorating the daily negative influence that their mother is having on the children (summarized at ROBOM at p. 30), but may also result in the destruction of their relationship with him. Amici do not equate this with "prejudice."

Continuing trying to mine this vein, CWLC inaccurately asserts that, "the only 'detriment' asserted by LaMusga in this case is his fear that his already strained relationship with his children will deteriorate even further if the move is allowed. The 'detriment' claimed by LaMusga is exactly the type of 'detriment' that has been rejected by the courts of this state as being insufficient to overcome a custodial family's presumptive right to relocate." (CWLC Brief, at pp. 33-34.) Respondent wonders how many times he has to state his position before it will understood.

The detriment that was found in this case was not "some negative impact" or a "deterioration" of Respondent's relationship with his children. It was the probable severing of that relationship altogether as a proximate result of the mother's five-year campaign of alienation/alignment of the children. The mother's actions have not only hurt the children's relationship with their father, they have hurt the children themselves. Their growing relationship with their father is acting as a buffer to the mother's negative impact on them. Dr. Stahl provided a list of detrimental effects that the mother was having on the children (ROBOM, at p. 30) and described how their frequent interaction with the father was helpful in

combating them. (Id. at p. 38.) Why did the Court of Appeal and both amici ignore this? Probably because to recognize it interferes with the basic tenet that the mother's right to move is absolute.

LaMusga is factually distinguishable from every reported opinion to date in that here the father's relationship with his children was not strong enough to survive the separation[6]. Had he not made Herculean efforts to preserve it, the trial court would have undoubtedly permitted the move. However, when the tenuousness of the relationship was the proximate cause of the mother's subversive campaign, whether intentional or unconscious, the situation is very different. This is where trial court discretion comes into play and it is why that discretion must be preserved.

B. Along with the responsibility of having children comes the possible curtailment of parents' liberties: CWLC argues that: "[C]ustodial parents remain the only group of individuals who may be subjected to judicial scrutiny when they need to relocate." (CWLC Brief, p. 5.) Although generally true, the argument is irrelevant. It ignores that fact that when people elect to have children, both parents enter into a judicially enforceable contract of adhesion imposed by both the state and federal governments that potentially limits a number of their personal freedoms. During marriage, it is usually only in cases such as those where the child is subject to the jurisdiction of the Juvenile Court (Welf. & Inst. Code §300)

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[6] See Dr. Stahl's testimony regarding the probable destruction of the father-child relationship. (RT, pp. 107/26-108/8.)

where the State limits parental rights. However, once parents divorce and/or disagree as to what is in the best interest of their children, the State steps in its role as parens patriae. (*In re Marriage of Leonard* (1981) 122 Cal.App.3d 443, 453-454, 175 Cal.Rptr. 903; *In re Marriage of Condon* (1998) 62 Cal.App.4th 533, 545, 73 Cal.Rptr.2d 33.) That is why the Legislature did not give custodial parents an absolute right to relocate with their children. (Fam. Code §7501.) If the move in not in the child's best interests, the freedom to move with a child can be restrained. If the custodial parent does not move, then there is no change of circumstances to consider and custody is usually not impacted. If the custodial parent insists on moving anyway, then the court must determine whether the child's best interests are served by changing custody or letting the child move anyway. That is what happened in *In re Marriage of Condon, supra,* 62 Cal.App.4th at p. 540, cited with approval on other grounds in the CWLC Brief at p. 17, n. 37) wherein one part of the appealed order was: "the court would require the children to remain in Los Angeles with primary physical custody to Mr. Condon if Ms. Cooper chose to relocate to France." This relocation restriction changing custody was affirmed by the Court of Appeal. (Id. at p. 562.) The similar order made in *LaMusga* was reversed.

Contrary to amici's statements, child support payors who are in arrears on child support, for any reason, also loose their rights to relocate freely across state lines. (18 U.S.C. §228; *U.S. v. Craig* (9th Cir. 1999) 181 F.3d 1124; *U.S. v. Mathes* (5th Cir. 1998) 151 F.3d 251, cert. denied 525 U.S. 1059.) In *U.S. v.*

Ballek (9th Cir. 1999) 170 F.3d 871, 874, the Court of Appeals found "child-support awards fall within that narrow class of obligations that may be enforced by means of imprisonment without violating the constitutional prohibition against slavery."

Paying parents also find that their freedom to change their occupations may be curtailed by their need to work in a job that provides a level of child support that is in the children's best interests. (*In re Marriage of Padilla* (1995) 38 Cal.App.4th 1212, 45 Cal.Rptr.2d 555; *In re Marriage of Ilas* (1993) 12 Cal.App.4th 1630, 16 Cal.Rptr.2d 345.) Just as Mr. Ilas' freedom to attend medical school was curtailed, so too was Ms. Navarro's freedom to relocate. In both cases the trial court acted in the best interests of the children. Both trial courts were correct. Presumably, amici would agree with *Ilas* but asks that *LaMusga* be overturned.

C. The Domestic Violence arguments have disturbing undertones: The CWLC Brief has some particularly disturbing undertones, especially when discussing how *Burgess* is being used in domestic violence cases. No one condones domestic violence[7] and, as discussed in the CWLC Brief at pp 24-28, the Legislature has been very active in combating it in recent years. In fact, the protections that exist include many statutes in addition to the ones discussed in the CWLC Brief:

Fam. Code §3011 requires that in making a custody order, the court shall consider any history of abuse by one parent or any other person seeking custody against any of a potentially large group of people.

Fam. Code §3044 provides that: "Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence against the other party seeking custody of the child or against the child or the child's siblings within the previous five years, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child, pursuant to Section 3011."

Once there has been a finding of domestic violence, there are a panoply of consequences, including:

- Fam. Code §3020: Domestic violence is exception to frequent and continuing contact policy.
- Fam. Code §6323: DVPA custody orders.
- Fam. Code §3031: Court should not make order inconsistent with TRO or protective order without specific findings; procedures for visitation.
- Fam. Code §3046: Court shall not consider absence or relocation from family residence due to domestic violence as a factor in determining custody or visitation.

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[7] This includes Respondent's attorney, who co-authored an article on domestic violence in family law cases, published at California Lawyer Magazine, "Family Matters: Domestic Violence" (Dec. 1999) p. 64.

- Fam. Code §3064: Custody orders should not be issued or modified ex parte absent showing of immediate harm to child, such as acts of domestic violence.
- Fam. Code §3030: Person convicted of child abuse or molest may not receive custody or unsupervised visitation absent finding of no significant risk to child.
- Fam. Code §6389: A person subject to a protective order shall not own, possess, purchase, or receive a firearm while that protective order is in effect.
- Pen. Code §12021: Person subject to residence exclusion or conduct TROs may not purchase or receive a firearm.
- 18 U.S.C. §922 (g): Federal law prohibits person subject to conduct TRO from possessing firearm.
- Fam. Code §6304: Court required to admonish Respondent about firearm restrictions and penalties for violation.

Moreover, the entire judicial system is more attuned to issues of domestic violence. For example, all judges are required to receive training in the area of domestic violence to familiarize themselves with the problem and tools they have available to combat it. (Cal Rules of Court, Appx, § 25.3 (2003) [Judicial education curricula provided in particular judicial assignments].) So are Family Court Services personnel (Cal Rules of Court, Rule 5.215. [Domestic violence protocol for Family Court Services]), peace officers (11 CCR § 1081) and court-

appointed custody evaluators (Cal Rules of Court, Rule 5.230 [Domestic violence training standards for court-appointed child custody investigators and evaluators]).

Despite this, the CWLC Brief states at p. 23 that "[o]nce an abuser has visitation rights, he also has the power to prevent his victim from moving away with her children." It then goes on to argue that *Burgess* provides an alternative for victims who choose not to utilize available protections. Using *Burgess*, they can simply move-away and, presumably, thereby prevent the children from having visitation with the alleged abuser. (Id. at pp. 27-28.) The Brief then goes on to argue that "restricting this Court's holding in Burgess, therefore, will be a devastating blow to efforts among policymakers in California and throughout the nation to increase protections for domestic violence and will render existing protections for battered women and their children meaningless." (Id. at p. 28.)

Putting aside the hyperbole and gross exaggerations in the argument, it is disturbing to know that *Burgess* is being used to deny visitation rights to men who have never been accused nor have been found to have abused anyone. If the parent is moving to deny visitation, that is a direct exception to the *Burgess* presumption of a parent's right to relocate. However, it also proves the point that Respondent is making, namely that *Burgess* is being applied as a bright-line, absolute test. The representation by these respected women's groups that this is being distorted into a means to sidestep the judicial process and spirit children away is disturbing. The suggestion that any change to the way *Burgess* is being applied, as opposed to

what *Burgess* actually says, will cause a breakdown in protection to domestic violence victims nationwide is unsupportable.

IV.
RESPONDENT IS NOT SUGGESTING A RETURN TO PRE-BURGESS LAW

Respondent is not suggesting that this Court return to pre-*Burgess* law and impose on the moving parent "an additional burden on a custodial parent in relocation matters of proving that relocation itself is 'essential and expedient' and 'or an imperative reason' or merely 'necessary'." (See *In re Marriage of Burgess, supra*, at p. 38, n.10.) All he is saying is that if the non-custodial parent carries his burden of proving that the proposed move is not in the best interests of the child, then Fam. Code §7501 and *In re Marriage of Burgess* expressly give the courts the ability to restrain the move. Respondent's position is that both authorities mean what they say, not what amici and all of the Courts of Appeal have interpreted them to mean, namely that an inquiry into the children's best interests is error.

The lone exception to the Court of Appeal decisions is *Cassady v. Signorelli* (1996) 49 Cal.App.4th 55, 56 Cal.Rptr.2d 545, which was the first post-*Burgess* published opinion. There, the Court looked into the mother's motives for moving to Florida and found them to be "whimsical." Her professed desire to change professions was rejected on the merits and the impact of the move on the father's relationship with his young daughter was considered. *Cassady* specifically approved of the trial court's inquiry into whether the proposed move was in the

child's best interests. Respondent believes that if this case were decided today under the since unbroken line of Court of Appeal opinions, and certainly under amici's proposed absolute standards, the result in *Cassady* would have been the opposite. In fact, under amici's interpretation of *Burgess*, the trial court would be reversed for even inquiring into the best interests of the child. That is what happened in this case. Respondent contends that this cannot be the law.

The assertion that Respondent views the possible need for custodial parents to move for economic reasons as a "whim" (CWLC Brief, p., 15) is offensive and unsupported. He has never taken that position and does not do so now. The Court in *Cassady v. Signorelli, supra* at p. 60) used this phrase to describe the mother's plans to move to Florida. Respondent does not believe that Appellant's desire to move was whimsical in the least. He believes that it was a carefully conceived plan to move the children away from him and thereby finalize the alienation that she had begun. (AA, p. 411/¶3.) [8] It is also true, however, that according to amici's construction of *Burgess*, it would not matter if the mother's reasons for moving were whimsical, frivolous or even misguided. According to them, once the trial court determined that the move is not in bad faith, no restrictions can be placed on the mother.

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[8] For example, it was never explained how it is that Ms. Navarro's husbands keeps getting job offers from distant locales when he knows that his wife is under a court order not to move with the children. Unless the intention is to move, why is he looking for jobs in locations that he knows that he cannot accept?

V.
CONCLUSION

The basic tenet of amici's arguments is that a mother's right to move-away at will trumps the children's rights to have their best interests considered and the father's right to have his parent-child relationship preserved. Respondent does not agree. He feels that as "bright line rules in this area are inappropriate" and "each case must be evaluated on its own unique facts" (*In re Marriage of Burgess, supra*, at 13 Cal.4th at p. 39) trial courts must have discretion to consider the best interests of the children. That is what happened below. The trial court's order should be affirmed.

Dated: May 12, 2003

Respectfully submitted,

Garrett C. Dailey
Attorney for Respondent
Gary LaMusga

CERTIFICATE OF COMPLIANCE

I, Garrett C. Dailey, attorney for Respondent, Gary LaMusga, hereby certify that, pursuant to Cal. Rules of Court, rule 14(c)(1), Respondent's Reply to Amici Briefs contains 6,204 words, including footnotes, as computed by the Microsoft Word98 word counter.

Garrett C. Dailey

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 May 12, 2003, I served a copy of the following document(s): **RESPONDENT'S REPLY TO AMICI BRIEFS**

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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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 May 12, 2003, at Oakland, California.

Brenda K. Butler