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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 BRIEF ON THE MERITS

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RESPONDENT'S REPLY BRIEF ON THE MERITS

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 Reply Brief on the Merits.

I.
PRELIMINARY STATEMENT

The matter before this Court can be addressed on two levels. Its most basic level involves the narrow issue set forth in the Petition for Review and the first few pages of Mr. LaMusga's Opening Brief on the Merits. Family Code §3040 (b) reserves to the trial court "the widest discretion to choose a parenting plan that is in the best interest of the child...." Here, the trial judge exercised that discretion based on substantial, and perhaps even overwhelming, evidence and was reversed.

Mr. LaMusga has challenged the Court of Appeal's interpretation of *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 51 Cal.Rptr.2d 444, 913 P.2d 473 as a bright line rule whereby, absent a showing of bad faith, courts are required to rubber stamp a custodial parent's decision to move-away without regard for the effect that the decision has on the minor children. *Burgess* relied on authorities such as Fam. Code §7501, *In re Marriage of Ciganovich* (1976) 61 Cal.App.3d 289, 293, 132 Cal.Rptr. 261 and *Forslund v. Forslund* (1964) 225 Cal.App.2d 476, 494, 37 Cal.Rptr. 489, all of which recognized the rule that the custodial parent has a right to change the residence of the child unless the move is "detrimental" or "inconsistent with the child's welfare" (Ibid.) However, all also recognize either the right to restrain the move or to change custody if the proposed move is detrimental..

In this case, the trial court made express findings of detriment on the basis of substantial evidence and was reversed. To do so, the Court of Appeal was

required to ignore virtually all of the evidence in favor of the order, reweigh the evidence below and reach different conclusions than did the trial court. This is simply not permissible. As substantial evidence supported the trial court's order, it should be affirmed. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133, 275 Cal.Rptr. 797, 800 P.2d 1127; *In re Marriage of Bonds* (2000) 24 Cal.4th 1, 35, 99 Cal.Rptr.2d 252, 5 P.3d 815.)

The second level on which this matter can be viewed involves a potential examination of the fundamental underpinnings of the *Burgess* decision itself. The areas that the Court might want to examine are: (1) Whether trial courts are permitted in practice to consider the best interests of the children when deciding whether to restrain a move-away request. (2) Whether a "bad faith" test on the part of the moving parent is really the most appropriate measure to use to evaluate these cases since it is exceptionally difficult to prove and puts the emphasis on the wrong place, namely the motives of the moving parent rather than the move's effect of the move on the children. (3) What is required to show a change of circumstances sufficient to justify a change of custody when a move-away is being evaluated? (4) Does *Burgess* require that a move-away be denied only if a change of custody would be ordered even if the custodial parent does not move? and (5) Whether due emphasis is being placed on both parts of Fam. Code §7501 or only the first portion?

The latter question is an interesting one as Mrs. Navarro begins her Answer Brief on the Merits (hereinafter referred to as "AB") by asserting that the issue before this Court is controlled by Fam. Code §7501, which states:

> "A parent entitled to the custody of a child has a right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child."

There are two parts to the statute: "A parent entitled to the custody of a child has a right to change the residence of the child..." and, "... subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child." Mrs. Navarro puts all of her emphasis on the first clause (in fact, she sets it off in bold type) and ignores the import of the second. Both parts will be discussed herein.

II.
APPELLANT'S REVISIONIST FACTUAL HISTORY SHOULD BE DISREGARDED

Although Mr. LaMusga believes that the Court of Appeal below made the same mistake as the Court of Appeal in *In re Marriage of Bonds, supra,* 24 Cal.4th at p. 31, by reweighing the evidence to make it fit the result that it wanted to achieve, that was mild compared to the revisionist history that Mrs. Navarro propounds in her Answer Brief.

Mrs. Navarro begins her Brief with a 16-page argumentative narrative that contains a myriad of factual and legal allegations, virtually all of which are made without citation to either legal authority or to the record. Mr. LaMusga asks this

Court to disregard it. (Cal. Rules of Court, rule 14 (a)(1)(c) ["Each brief must: ... (C) support any reference to a matter in the record by a citation to the record.]; *Gotschall v. Daley* (2002 95 Cal.App.4th 479, 481 n.1, 116 Cal.Rptr.2d 882; *In re Marriage of Schroeder* (1987) 192 Cal. App. 3d 1154, 1164, 238 Cal. Rptr. 12; 1987; *Dahl-Beck Electric Co. v. Rogge* (1969) 275 Cal. App. 2d 893, 902, 80 Cal. Rptr. 440.) As the evidence *cited from the record* in Mr. LaMusga's Opening Brief so strongly supports the trial court's order, he declines the invitation to dispute these unsupported and grossly inaccurate factual allegations line by line.

Even in her Statement of the Facts, where she tries to rewrite the record below, she fails to provide citations to support many of her important allegations. Others are simply wrong. For example:

- She repeatedly asserts that Mrs. Navarro "voluntarily" abandoned her desire to move to Ohio in 1996. (AB, pp. 4, 6, 19.) She gives no citations for this "fact" because it isn't true. Dr. Stahl did an evaluation and in a report dated October 10, 1996 recommended against her proposed move. Thereafter, in her Reply Declaration filed October 22, 1996, she argued that Dr. Stahl's opinion was against the weight of authority and that she should be permitted to move nonetheless. (AA, p. 54.) On November 14, 1996, the initial custody order was "established." (AA. pp. 82 – 88.) Not only did Mrs. Navarro not voluntarily agree to abandon her move, her attorney refused to even approve as to form the Order After Hearing providing visitation to Mr. LaMusga. (AA, p. 84.)

- Mrs. Navarro attempts to belatedly impeach the testimony of the boys' kindergarten teacher with her version of inconsequential disputed facts, but ignores the most compelling parts, such as her asking that the school keep track of the time that Mr. LaMusga spent assisting in the boys' classrooms so she could deduct it from his visitation (RT, p. 16/10-25; AA, p. 201/¶ 11), the children's statements to her, Mrs. Navarro's denigration of Mr. LaMusga to her face, the children's behavior in her presence, etc. (See facts summarized in ROB, pp. 21 – 24.)
- She alleges that "Dr. Stahl's only expressed concern regarding Susan was about 'ways she might *inadvertently or unconsciously* promote loyalty conflicts … and alienation.'" (AB, pp. 29-30, emphasis in original.) That was certainly part of it, but to say that was his only concern is unduly myopic. For example, Dr. Stahl was seriously concerned over her failure to buffer the boys (RT, pp. 64, 72), her engendering "loyalty conflicts" (RT, pp. 28-29), their "enmeshed relationship" (RT, pp. 37-40), her "overindulging their emotions" (AA, p. 403), her inability to see other alternatives as to how to manage the boys other than limiting their relationship with their father (RT, p. 41/1-10), and her "denigration" of their father (AA, p. 405; RT, p. 68/1 – 28). He was concerned, based on his five years of 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.) He was concerned that he could not point to

any conduct on Mrs. Navarro's part in the preceding five years that suggested that she would follow through with facilitating contact between the boys and their father. (RT, pp. 42/3 – 43/7.) He saw no evidence that Mrs. 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.)

Dr. Stahl was concerned about the move, but for a lot of reasons other than just Mrs. Navarro's "inadvertently or unconsciously promot[ing] loyalty conflicts."

Respondent could go on.

Similarly, Mrs. Navarro's accusations that Mr. LaMusga's Brief misstates the facts are repeatedly and demonstrably false. Mr. LaMusga believes that by any standard the Court will find the factual allegations in Respondent's Opening Brief on the Merits (generally referred to hereafter as "ROB") to be meticulously documented. Her allegations to the contrary are simply false. For example:

- In her Brief at page 20, footnote 30, she alleges that Mr. LaMusga inaccurately stated at pages 13-14 of his Opening Brief that he was always willing to work through existing problems with a therapist while Mrs. Navarro's willingness was "marginal." She states that he provides no citation to the record to support this statement. In fact, he cites the Court to

RT, p. 33/3-17 where that is precisely the evidence, essentially word for word.

- She alleges that Mr. LaMusga improperly stated that Dr. Stahl had recommended that he have substantially more frequent contacts with the children. (AB, p. 27, fn. 56.) Mr. LaMusga did make that allegation and cited this Court to RT, p. 44/10-27 and AA, pp. 404-405, where this is precisely what Dr. Stahl recommended. He stated: "As to the time share, I actually agree more with Mr. LaMusga than Mrs. 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...." He then recommended that Mr. LaMusga have half of the summer in alternating two week blocks, every other week from Thursday after school until Monday morning and on alternating weeks every other Thursday after school to Friday morning. This replaced "limited week nights and short weekends." He also went on to recommend that all other special time be evenly divided. (AA, p. 405.) He further recommended moving to full joint custody or even full custody to Mr. LaMusga if Mrs. Navarro "continues her denigration of Mr. LaMusga." (Ibid; RT, p. 68/1 – 28.)
- She asserts that Mr. LaMusga's "allegations of 'parental alienation' [were not] supported by the evidentiary record." (AB, p. 8.) In fact, even ignoring Mr. LaMusga's description of her conduct, detailed in ROB, pp. 8 – 11,

variations of the term *alienation* appear throughout the record when Mrs. Navarro's conduct is being described by others. See, for example:

- AA, p. 405 [Dr. Stahl recommending father have increased time with the children: "Research suggests that alienated children ..."].
- RT, pp. 35/16-26 [Dr. Stahl suspects that Ms. Navarro has been alienating the boys all along].
- RT, p. 48/15-24 [Dr. Stahl believes that the boys are experiencing "the loyalty conflict of alienation" due to their mother's "continued negativity toward father..."].
- RT, p. 51/10 [Dr. Stahl believes mother's alienation is "unconscious also real"]
- RT, p. 51/25-27 [Dr. Stahl believes the LaMusga children are "affected by the alienation."].
- AA, p. 404/¶1 [Dr. Stahl's opinion that Mrs. Navarro's "unconscious alienation is real."].
- AA, pp. 402/¶6 and 403/¶5 [Dr. Stahl using the label of "alienation" when describing her conduct or its effect on the boys].
- AA, p. 200/¶5 [Maureen Henry stating that she had witnessed Mrs. Navarro "alienate the affections of Garrett LaMusga and Devlin LaMusga from their biological father, Gary LaMusga."].
- Other terms equally as descriptive were used to describe Mrs. Navarro's conduct, including "denigration," as when Dr. Stahl

recommended moving to full joint custody or even full custody to Mr. LaMusga if Mrs. Navarro "continues her denigration of Mr. LaMusga." (AA, p. 405, RT, p. 68/1 – 28.)

In fact, evidence of Ms. Navarro's attempts to alienate the children from their father drips from the record and would have fully supported a finding of alienation had the trial judge elected to make that finding instead of using the more benign term "alignment" when describing her conduct. (RT, p. 106/6 – 18.)

- She alleges that Mr. LaMusga distorted the record by suggesting that she was not "accommodating and flexible" concerning his time with the boys. (AB, p. 31, fn. 76.) Let's again ignore Mr. LaMusga's testimony and look only to the fact that he had to continually file motions to get more time with the boys. (Summarized at ROB, pp. 6-7.) Let's look at Mrs. Henry, who testified how Mrs. Navarro asked her to keep track of the time that Mr. LaMusga spent assisting in the children's classes so she could deduct it from his visitation. (RT, p. 16/10-25; AA, p. 201/¶ 11.) Look at Dr. Stahl's narrative in his three reports of how Mrs. Navarro opposed Mr. LaMusga's spending time and improving his relationship with his children. (AA, pp. 380/¶2; 383/2 [limiting phone calls with Dad]; 384/¶3; 385/¶1; 392/¶3; 398/¶5; 399/¶1; 399/¶3; 400/¶2; 403/¶5; 404/¶2 ["Mrs. Navarro definitely wants to restrict his time…."]; 409/¶2; 411/¶3 ["Underneath, however, it has always appeared that Mrs. Navarro has wanted to move so that she can

remove herself and take the boys from day-to-day interactions with Mr. LaMusga. She has difficulty dealing with him and prefers to have as little communication with him as possible."], etc., etc., etc.

- She alleges that Mr. LaMusga falsely characterized Dr. Stahl's opinion as opposing the desired move for being harmful to the children. (AB, pp. 12, 28.) One cannot objectively read Dr. Stahl's reports (AA, pp. 396-416) and his testimony (RT, pp. 23 – 74, especially pages 63/6-21 and 43/25) and have the opinion that he was not gravely concerned that permitting the move would be detrimental to the children for all of the reasons set forth in ROB p. 30, as well as the probable destruction of the parent-child relationship with their father. (See, e.g., RT, pp. 44/10-27; 52/18 – 53/7; 55/17-21; 63/6-28; etc.) One cannot read the transcript of his testimony and his two 2001 reports and not come to the conclusion that he felt that it would be harmful for the children to move. Not only was Dr. Stahl not in favor of the move, immediately prior he had recommended that custody be changed to the father if "Mrs. Navarro continues her denigration of Mr. LaMusga and continues her apparent reinforcement of this splitting...." (AA, p. 405.)

No, Mr. LaMusga has not distorted the record in his Opening Brief. If anything, he has understated it.

Appellant's Answer Brief attempts to make Mrs. Navarro look like the "Mother of the Year." Not even the Court of Appeal agreed with that as it found

her conduct to be "less than estimable" and suggested that the trial judge made the order he did to punish her for her bad behavior. (Opinion, p. 9.)

The trial judge, although being diplomatic, still sent the message that her conduct was unacceptable:

> "...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 or 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.
>
> That seems to me to be the pattern which as been demonstrated over a period of years in this relationship.
>
> ...
>
> ...[A]t the moment Mrs. 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...." (RT, pp. 106/12 – 107/25.)

After following the family for five years, Dr. Stahl came to the conclusion that Mrs. Navarro had probably been alienating the children from the very beginning. (RT, pp. 35/16-26; 51/10, 25-27.) He even recommended shifting custody to the father if mother continued her course of conduct of "denigrat[ing] Mr. LaMusga" and "her apparent reinforcement of this splitting." (AA, p. 405; RT

68/1-22.) He further declared that her "unconscious alienation is real." (AA, p. 404/¶1.) He repeatedly used the label of "alienation" when describing her conduct or its effect on the boys. (See also AA, pp. 402/¶6,403/¶5.)

Mrs. Maureen Henry, Garrett's kindergarten teacher, was equally forthright. She flatly declared that she had witnessed a continuing course of conduct by Mrs. Navarro designed to "alienate the affections of Garrett LaMusga and Devlin LaMusga from their biological father, Gary LaMusga." (AA, p. 200/¶5.)

Mrs. Navarro argued to the trial court that her conduct had been above reproach (AA, pp. 223 – 225; 245- 370) but she was not believed. Her Brief to this Court is the same and merely reinforces Dr. Stahl's opinion, namely that she refuses to accept responsibility for any of her actions and the effect that they have on the boys. (RT, pp. 72/19 - 73/3.)

The basic legal premise that controls the "short version" of this case is that when substantial evidence supports the trial court's findings the evidence cannot be reweighed on appeal. (*In re Marriage of Bonds, supra*, 24 Cal.4th at p. 31; *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571, 38 Cal.Rptr.2d 139, 888 P.2d 1268.) The evidence and the findings of the trial court cannot be described as anything other than highly critical of Mrs. Navarro's behavior. There was substantial evidence supportive of the trial court's order. The trial court's discretion after listening to the testimony and looking all of the witnesses in the their eyes should have been sustained, not reweighed.

III.
APPELLANT'S UNSUBSTANTIATED FACTUAL ALLEGATIONS IN HER SUBSEQUENT TRIAL COURT MOTIONS SHOULD BE DISREGARDED

Mrs. Navarro attempts to argue that somehow the events that occurred after the case was tried and the Court of Appeal issued its opinion are relevant herein. She attempted to dismiss her appeal and deprive this Court of jurisdiction based upon the ruse that she had changed her objective and no longer wanted to move to Ohio, despite her reliance below on the fact that her family lived there (see AA, p. 135) and apparently now wants to move to Arizona, to "facilitate contact between the boys and their father." (AB, p. 7.) This change should be relevant, but not in the way that Mrs. Navarro wants. What it really does is substantiate Dr. Stahl's opinion that Mrs. Navarro really wants to move away from Mr. LaMusga with the children. (AA, p. 411/¶3.) What this new position shows is that what Mrs. Navarro really wants is not to move to Ohio, but to move *anywhere* that Mr. LaMusga does not live. She has not explained why her husband gets job offers everywhere but in the Bay Area. She has not explained why, in the face of these very uncertain circumstances, he continues to seek employment in other states. Nor should these issues be relevant herein. Presumably they will be raised where they belong – in the trial court when the case is sent back down. Her attempt to dismiss her appeal and deprive this Court of jurisdiction exposes her motives clearly.

However, this illustrates why the focus of the legal and factual inquiry should be on the LaMusga boys' best interests rather than Mrs. Navarro's

subjective motives. Perhaps her planned move to Ohio was in good faith but her planned move to Arizona is not. Perhaps the reverse is true. Perhaps both are in good faith. Perhaps both were for the purpose of moving the boys away from their father. (AA, p. 411/¶3.) The effect on the boys is the same regardless of her motives. This line of inquiry is neither productive nor, at the end of the day, relevant to what should be the primary focus: the best interests of the LaMusga children.

This Court agreed to take judicial notice of Mrs. Navarro's new pleadings, not necessarily the factual allegations contained therein, many of which Mr. LaMusga disputes. (*Day v. Sharp* (1975) 50 Cal.App.3d 904, 914, 123 Cal.Rptr. 918.) He specifically objects to factual allegations such as those on AB pp. 14, 16 and 49, setting forth unsubstantiated allegations regarding what has occurred with Mrs. Navarro's husband, his motivations, etc. Mr. LaMusga asks the Court to disregard the factual allegations contained therein.

IV.
THE AMICI CURIAE LETTERS IN SUPPORT OF A GRANT OF REVIEW ARE UTTERLY IRRELEVANT

At pages 11 and 12 of her Answer Brief, Mrs. Navarro engages in gender-based politics and attacks positions taken in letters submitted by amici ("Gary's supporters") in favor of granting review. These letters are not part of the substantive record on appeal and disputing them in her Answer Brief is akin to trying to knock down a strawman. Nowhere in Mr. LaMusga's Opening Brief does

he raise any of these issues nor will he respond to her diatribe further here. If amici curiae are permitted to file briefs supporting one position or the other, Mr. LaMusga may respond to them. (See Cal. Rules of Ct., rule 29.1 (f).) Disputing letters submitted by persons opposing or supporting the granting of review is simply irrelevant at this stage. (See Cal. Rules of Ct., rule 28 (g).)

As for the allegation that Mr. LaMusga is making a "frontal assault" on *Burgess* and Fam. Code §7501, he requested review on a very narrow issue, namely whether *Burgess* is being properly interpreted. That hardly seems like a frontal assault. Moreover, the agendas of individuals or groups who may submit amici briefs supporting their own positions are irrelevant to Mr. LaMusga, whose goal is far more focused, namely the welfare of his two minor children.

Having said that, it is also true that the *Burgess* opinion has some problems in its application and the Court might want to take this opportunity to address them. However, Mr. LaMusga's primary focus is the affirmance of the trial court's order.

V.
APPELLANT FOCUSES ON ONLY ONE ELEMENT OF PREJUDICE, IGNORING ALL OF THE OTHER INDICIA, ALL OF WHICH SUPPORT THE TRIAL COURT'S ORDER

Not surprisingly, Mrs. Navarro focuses solely on one of the many indicia of prejudice that would accompany her planned move to Ohio or Arizona, or wherever, and ignores all of the others, such as the need to increase Mr.

LaMusga's time with the children to counteract her harmful effects on them. (RT, p. 44/10-27; see also AA, pp. 404 - 405.) Dr. Stahl testified to all of the following additional detrimental effects that Mrs. Navarro was having on the children and how Mr. LaMusga was playing a role counteracting them. (RT, p. 44/10-27.) For Mr. LaMusga to have that counterbalancing effect requires that the boys be with him for both longer and more frequent periods of time, which would not be possible from a long distance. (Ibid.) As did the Court of Appeal, Mrs. Navarro ignores this substantial evidence. She does not dispute Mr. LaMusga's version of it nor the importance that he believes the trial court placed on it. Thus, for the purposes of this appeal, the Court should consider these points conceded.

Dr. Stahl hoped Mr. LaMusga's improving relationship with and enhanced presence in the children's lives would counteract numerous prejudicial effects:

- The children suffered from an "enmeshed relationship" with their mother. (RT, pp. 37-40.)
- This was causing a detrimental effect on them. (RT, p. 40.)
- It could manifest itself with the boys having "significant struggles emotionally, especially with their peers and authority figures." (AA, p. 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.)
- She was over nurturing and fostering a sense of dependency in the boys. (RT, pp. 20/11, 29/13-21.)

Although pointed out to the Court of Appeal below and this Court in the Opening Brief, Mrs. Navarro does not even mention these prejudicial effects in her Answer Brief. As this Court said in *Burgess*:

> "Accordingly, in considering all the circumstances affecting the "best interest" of minor children, it may consider any effects of such relocation on their rights or welfare. [¶] 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*, supra, 13 Cal.4th at p. 32.)

Mrs. Navarro does not dispute Mr. LaMusga's position that this evidence is sufficient in and of itself to sustain the trial court's order. (See ROB, p. 29.) The mere fact that the judge did not articulate all of the reasons that the move would be prejudicial does not mean that they can be ignored, especially when the evidence is substantial and strongly supports the order below.

Even if we rely solely on the trial judge's oral statement of reasons and ignore all of the other supporting evidence, the trial court still should have been

affirmed. The parent-child relationship is paramount and cannot be ignored as blithely as was done by the Court of Appeal below. (Opinion, p. 11.)

> "The relationship of . . . natural parent . . . [and] . . . children is a vital human relationship which has far-reaching implications for the growth and development of the child. (*In re Carmaleta B* (1978) 21 Cal.3d 482, 489, 146 Cal.Rptr. 623, 579 P.2d 514; *In re Marriage of Halpern* (1982) 133 Cal App.3d 297, 312, 184 Cal.Rptr. 740.)

Even if the only prejudice was the probable loss of the children's parent-child relationship with their father, the trial court felt that this amounted to prejudice sufficient to restrain the move. The Court of Appeal held that as a matter of law, this was an insufficient showing of prejudice. For obvious reasons, Mr. LaMusga disagrees.

The only case that Respondent has been able to locate discussing this issue is *In re Marriage of Lasich* (2002) 99 Cal.App.4th 702, 717-718, 121 Cal.Rptr.2d 356, wherein the father argued that permitting the children to move from Sacramento to Barcelona would amount to the severing of their parent-child relationship. The key difference is that the trial court made express findings that this was not likely to occur.[1] Further, it was obvious from the record that the children had a strong relationship with their father, who had been actively involved in their lives and was likely to continue to be so.

What distinguishes all of the move-away cases that Mrs. Navarro cites in her Brief is that the children had a strong relationship with the noncustodial parent. In every case, the visitation orders that were being made were deemed adequate to

counteract the inevitable "negative impact" on the "meaningful relationship" of the noncustodial parents and the moving children. (See, e.g., *In re Marriage of Edlund and Hales* (1998) 66 Cal.App.4th 1454, 1472, 78 Cal.Rptr.2d 671.) In every case, there was nothing to suggest that the moving parent would not comply with the spirit as well as the letter of the orders designed to preserve the relationship. In this case, none of the above is present. This is why Dr. Stahl had recommended that the trial court consider moving to full joint custody or even full custody to father if Mrs. Navarro "continue[d] her denigration of Mr. LaMusga." (AA, p. 405/¶5; RT, p. 68/1 – 28.) This recommendation was made independent of the requested relocation.

VI.
RESPONDENT BELIEVES THAT BOTH APPELLANT AND THE COURT OF APPEAL INTERPRET FAM. CODE §7501 INCORRECTLY

Mrs. Navarro argues that Mr. LaMusga's agreeing that she has a presumptive right to move somehow equates to "game, set and match." (AB, pp. 37-41.) This is because she reads Fam. Code §7501 to hold that the custodial parent's presumptive right to move trumps the trial court's ability to "restrain a removal that would prejudice the rights or welfare of the child," absent bad faith. There is nothing *in the statute* to support the interpretation that there is any greater burden on the party seeking to show that the move "would prejudice the rights or welfare of the child" then there is on the party seeking to "to change the residence

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[1] There, as here, the factual findings of the trial court should prevail.

of the child." The statute appears to give the trial court the right to consider both clauses equally and to use the best interests of the children as the tiebreaker. There certainly is nothing *in the statute* that would require that to restrain a move a parent must prove that an immediate "change in custody is "'essential or expedient for the welfare of the child'" even if the parent elects not to move. (*In re Marriage of Burgess*, *supra*, 13 Cal.4th at p. 38.)

The interpretation that she relies on is from *Burgess*:

> "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.' (Fam. Code, §7501.) The dispositive issue is, accordingly, *not* whether *relocating* is itself 'essential or expedient' either for the welfare of the custodial parent or the child, but whether a *change in custody* is '"essential or expedient for the welfare of the child."'" (Id. at p. 38, emphasis in original.)

The underlying test comes from *In re Marriage of Carney* (1979) 24 Cal.3d 725, 157 Cal.Rptr. 383, 598 P.2d 36, which held that a child should not be removed from prior custody of one parent and given to the other "'unless the material facts and circumstances occurring subsequently are of a kind to render it essential or expedient for the welfare of the child that there be a change.'" (Id at p. 730; quoted in *In re Marriage of Burgess, supra* at p. 38.)

In *Carney*, however, it was the mother who wanted "to remove [the children] abruptly from the only home they could remember to a wholly new environment some 3,000 miles away." (*In re Marriage of Carney*, *supra,* 24 Cal.3d at 740.) Here, it is Mrs. Navarro who wishes to do so.

Although the Court does not have to reach this issue to decide *LaMusga*, the real tension is often the interplay between Fam. Code §7501 and the test required for an immediate change of custody, as enumerated in *In re Marriage of Carney*, namely "essential and expedient." Section 7501 states that trial court can restrain a move-away if it will be prejudicial to the children's "rights or welfare." *Burgess* says that a trial court may not "test parental attachments or [] risk detriment to the 'best interest' of the minor children [by assuming the custodial parent is 'bluffing' and will not move rather than lose custody]. Nor should either parent be confronted with Solomonic choices over custody of minor children." (Id. at p. 36, n.7.) Yet *Burgess* also states that the prejudice required for a change of custody based on a custodial parent's desire to move was that which will occur "as a result of relocation." (Id. at p. 38.) But if there is no move-away, there is no prejudice as a result of relocation.

In the instant case, Appellant has made it clear that she will not move if it means that custody of the boys will be transferred to their father. The trial court made conditional orders appropriate to that situation. It ordered that she retain custody if she stayed and that there be a temporary change of custody if she moved. Having found that the proposed move would be detrimental to the children

at this time, what other order was the trial court supposed to make? If she didn't move, there was no change of circumstances. A variant of this type of conditional custody order that depended upon the custodial parent's future actions occurred in *In re Marriage of Condon* (1998) 62 Cal.App.4th 533, 549, 73 Cal.Rptr.2d 33. There, if the mother moved to Australia, the child could go with her. If she moved to France, custody was transferred to the father. The conditional change of custody order was left untouched.

As the statute does not mandate a change of custody if the custodial parent does not move, this Court might want to examine why it has been interpreted to so require. Section 7501 simply requires that the "rights and welfare" of the child be considered and permits the move to be "restrained" if they will be "prejudice[d]." Another way of saying this is that trial courts can restrain moves that are harmful or prejudicial to children's best interests. Understanding that a custodial parent's "right to move" may conflict with the children's "best interests," the real issue is whose "rights" are paramount. *Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255, 109 Cal.Rptr.2d 575, 27 P.3d 289 came down squarely for the children:

> "Under California's statutory scheme governing child custody and visitation determinations, the overarching concern is the best interest of the child."

Yet, in move-away situations, trial courts and courts of appeal seem to believe that the children's best interests are irrelevant to the equation. Absent bad faith, move-aways must be rubber-stamped. *Burgess* is viewed as a bright-line test (see *In re Marriage of Bryant* (2001) 91 Cal.App.4th 789, 793-794, 110 Cal.Rptr.2d 791),

yet that was never this Court's intention: "[W]e recognize that bright line rules in this area are inappropriate: each case must be evaluated on its own unique facts." (*Burgess* at p. 39.) Yet, when a trial court does that and comes down in favor of the children's rights, it is overturned. Mr. LaMusga does not believe that this was this Court's intention.

It is only if the custodial parent elects to move despite the restraint permitted by Section 7501 that the issue of whether it is "essential and expedient" to change custody "as a result of the relocation" (*id.* at p. 38) becomes ripe. To impose this burden when the custodial parent has made it clear that he or she will not move if it means a change of custody is unfair to the children. It squarely puts the custodial parent's desires ahead of the children's best interests. It is only in cases such as *In re Marriage of Rosson* (1986) 178 Cal.App.3d 1094, 224 Cal.Rptr. 250, disapproved on other grounds *In re Marriage of Burgess, supra*, 13 Cal.4th 25 when the custodial parent is moving regardless of the change in custody that such a high test should be imposed before a move can be restrained pursuant to Fam. Code §7501.

VII.
GIVING RESPONDENT THE SAME AGGREGATE CUSTODIAL PERCENTAGE DOES NOT OVERCOME THE PREJUDICE CAUSED BY THE DECREASE IN THE FREQUENCY OF CONTACT

Mrs. Navarro incorrectly argues that the trial court's order improperly denied her move-away request because it would conflict with Fam. Code

§3020(b)'s preference for "frequent and continuing contact." (See, e.g., AB, pp. 15, 41-42.) It is true that the trial judge mentioned this phrase (not the statute) once during his almost five-page oral statement, but it is also clear that he was not focusing on it in the same way that other appellate courts have when discussing move-away requests. The judge focused on whether the relocation would be prejudicial to the "rights or welfare" of the children. If the evidence had been that the LaMusga children would not be prejudiced by their mother's planned move(s), then the trial court's order would have been the opposite of what it was and Mr. LaMusga would not have appealed, even though the move would have negatively impacted the frequency with which he would see his children. As the trial judge stated, recognizing that a move would inevitably adversely affect the children's contact with their father, "there are ways to ameliorate those sorts of problems." (RT, p. 106/27-28.) Thus, the judge was aware that lack of frequent contact can be ameliorated through longer, albeit less frequent contact. (See, e.g., *In re Marriage of Burgess, supra,* 13 Cal.4th at p. 35; *In re Marriage of Edlund and Hales*, *supra*, 66 Cal.App.4th at p. 1472.)

As hard as Appellant may try to frame the issue in terms of "frequent and continuing contact," she is arguing about another case, not this one. The instant case involves a substantial showing of prejudice to the children independent of the move. The prejudice begins with the possible loss of the their father-child relationship, includes the prejudice of having their therapy with Dr. Tuggle interrupted and continues through a list of other problems that could worsen if the

children were deprived of the break from the enmeshment that they get when they are with their father. Since Dr. Stahl was focusing on the frequency, as well as the duration, of the contact (see, e.g., RT p. 44/10 – 27; AA, pp. 404 – 405), the logical conclusion is that the prejudice would be similar whether the children stayed here and the custody sharing schedule changed to what it would be if the children were 2,000 miles away. This is why all of the cases cited by Appellant discussing the aggregate percentage of timeshare are inapposite: the issue is not the aggregate amount of time, but the need for "frequent and continuing contact" in a context that is *totally independent* of Fam. Code §3020. "Liberal visitation" of the type this Court had in mind in a "normal" move-away situation (*In re Marriage of Burgess, supra,* 13 Cal.4th at p. 40) would not prevent the type of prejudice that concerned Dr. Stahl and the trial court.

VIII.
THE APPLICABLE TEST IN THIS CASE IS THE CHILDREN'S BEST INTERESTS

It is not clear from Appellant's Brief, but at times she appears to suggest that the "changed circumstances" test applies rather than simply what is in the children's best interests. (See, e.g., AB, pp. 43-44.) Although Respondent does not believe that this is an issue in this appeal, as it has never been seriously argued at any level, including this one, he will address it briefly. The "changed circumstances" rule applies when there has been a "final judicial custody determination." (*Montenegro v. Diaz*, *supra*, 26 Cal.4th at p. 258.) In this case,

Mr. LaMusga does not believe that that ever occurred. There have been a number of judicial determinations and "stipulations" (usually after Mr. LaMusga's motions seeking increased time with his sons). There have likewise been three formal evaluations. The "original" order was filed December 23, 1996 (AA, pp. 82-84), but there is nothing about it to suggest that it was intended as a "permanent" or "final" custody determination or even a "judgment." In fact, it states that it was an order to "establish a custody/visitation order." (AA, p. 82/18.) From an examination of the record, it is clear that the custody and visitation situation for this family has been and remains in a state of flux.

The :changed circumstances" versus "best interests" dichotomy should not be an issue in this case. Both parties seem to agree that the proper test is the "best interests" of Garrett and Devlin LaMusga, which is where the focus should be.

IX.
THE FOCUS SHOULD BE ON THE BEST INTERESTS OF THE CHILDREN, NOT THE WORDS USED BY THE TRIAL COURT TO DESCRIBE ONE PARTY'S CONDUCT

Here, everyone seems to agree that had the trial court used the word "alienation," instead of "alignment," the case would have fallen into the only generally recognized exception to *Burgess*, namely, "where the reason for the move is to frustrate the non-custodial parent's relationship with the child" (*In re Marriage of Bryant* (2001) 91 Cal.App.4th 789, 793-794, 110 Cal.Rptr.2d 791), and we wouldn't be here. (See AB, p. 40.) Had the trial judge chosen to do so, he could have made a finding of bad faith and that finding would have been

unassailable. Thus, if Mrs. Navarro's position is accepted, the future of the LaMusga children is determined by one word. Mr. LaMusga believes that this is too slender a reed on which to support such an important decision. At some point, the children's best interests must also be considered. If the move is determined to be "prejudic[ial] to the rights and welfare of the child," then the trial court should have the right to restrain it. If the custodial parent elects to move anyway, then there is a change of circumstances to weigh. If the custodial parent elects not to move, then there is none and the status quo should continue. If the custodial parent views this as coercive, so be it. Restrictions on one's personal rights is a price that one pays for having children. (*In re Marriage of Burgess, supra,* 13 Cal.4th at pp. 43-44, Justice Baxter's dissent; ROB, p. 41.)

The important point, however, is that the children's welfare should control, not one parent's desire to move, whether for good reasons or otherwise, or whether a trial court describes the custodial parent's conduct as "alignment" rather then "alienation."

In most cases, this is not going to be an issue. Usually, the children's best interests will be served by following the established caregiver to his or her new home. (*In re Marriage of Burgess, supra,* 13 Cal.4th at pp. 32-33.) Mr. LaMusga does not contend that a custodial parent should be restrained from moving when the move simply involves a restructuring of the noncustodial parent's time with the children. (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].) This is true in most cases, especially when the custodial parent has been nurturing the relationship of the children and the noncustodial parent such that there is no risk to the children or to the parent-child relationship from a restructuring of parental time. That is not true in this case. Here, the father has gone to extraordinary lengths to preserve the parent-child relationship over unremitting resistance from the custodial parent. To the extent that the father's improving relationship with his children can still be described as "tenuous and somewhat detached" (RT, p. 107/26 – 28), it is squarely due to the mother's alienation/alignment, whether unconscious or purposeful. In this case, the move was likely to be prejudicial on the children for a number of reasons, one of which was the possible loss of the children's parental relationship with their father, due to the mother's influence. The trial court properly restrained the move, as permitted by Fam. Code §7501.

X.

BURGESS CONTINUES TO BE MISAPPLIED

The recent case of *In re Marriage of Abrams* (1/28/03) C040855, is the latest example of the bright-line interpretation of *Burgess* trumping the best interests of the children. There, a move-away restriction in the custody order, the children's desire to remain in the Sacramento area with their father and the mediator's recommendation that there be a change of custody if the mother left the area combined were deemed to be an insufficient showing of changed

circumstances to justify restraining the move-away. Given the undeniable fact that a move is traumatic on children even in intact families, the obvious question is "what would be a sufficient showing"?

In *Burgess*, citing to *In re Marriage of Rosson, supra,* 178 Cal.App.3d 1094, it was held that trial courts may properly consider the preferences of the children who will be affected by the move-away when they are mature enough and wish to remain in their community. (*In re Marriage of Burgess, supra,* 13 Cal.4th at p. 39.) Nevertheless, in *Abrams,* despite the children being of "sufficient maturity and capacity to reason," the trial court held that the mother's desire to move outweighed the children's desire to remain in the Sacramento area with their father.

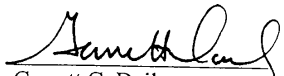
Burgess stated: "The policy of Family Code section 3020 in favor of 'frequent and continuous contact' does not so constrain the trial court's broad discretion to determine, in light of *all* the circumstances, what custody arrangement serves the 'best interest' of minor children." (Id. at p. 39.) Family Code §3040 (b) reserves to the trial court "the widest discretion to choose a parenting plan that is in the best interest of the child...." The problem is the perception by most trial courts and courts of appeal that this discretion can only be exercised in one direction. If the discretion is exercised to restrict the custodial parent's "right to move," the decision is overturned. *In re Marriage of LaMusga* is a case in point.

XI.
CONCLUSION

Mr. LaMusga requests that the opinion of the Court of Appeal be reversed and the decision of the trial court affirmed.

Dated: February 10, 2003

Respectfully submitted,



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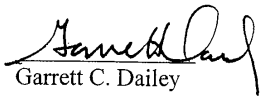
CERTIFICATE OF COMPLIANCE

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 Brief on the Merits contains approximately 7,733 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 February 11, 2003, I served a copy of the following document(s): **RESPONDENT'S REPLY 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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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 February 11, 2003, at Oakland, California.

Brenda K. Butler