SUPREME COURT
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DEPUTY

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

In re the Marriage of Navarro & LaMusga

SUSAN POSTON NAVARRO (LAMUSGA) Case Number: S107355

Appellant-Petitioner

and

GARY LAMUSGA,

Respondent - Respondent

______________________________/

RESPONDENT'S REPLY TO AMICI BRIEF SUBMITTED BY AMICA HILL, AMICA BLUMBERG, AMICA BRUCH, ET AL.

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References

7 Witkin, Cal. Procedure (3d. ed. 1985) Trial, §398, pp. 404-405	42
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Bruch, Carol, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong In Child Custody Cases* 35 Fam. L.Q. 527 (2001)	20, 21
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	Page Number
Stahl, Philip, 2003 Child Custody Training for California Rul of Court 5.225	23
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Stahl, Philip, *Conducting Custody Evaluations*	23
Stahl, Philip, *Parenting After Divorce: A Guide to Resolving Conflicts* (see www.amazon.com)	23
Warshak, Richard A., *Brining Sense to Parental Alienation: A Look at the Disputes and the Evidence* 37 L.Q. (2003)	11, 21

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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 brief reply to the brief submitted by *amici curiae* Herma Kay Hill, Grace Ganz Blumberg, Carol Bruch, et al.

Preliminary Statement

The amicus brief filed by Professor Bruch and thirteen other distinguished law professors and one legislator (hereinafter referred to as the "Bruch Brief" and "Amici", respectively) helps to define the issues before this Court in a stark fashion. Contrary to the allegations in all of the amici briefs filed herein, Father's position is a simple one. He does not directly challenge the underpinnings of the *Burgess*[1] opinion. He acknowledges Fam. Code §7501, agrees that it provides a presumptive right for the custodial parent to move with a child, and agrees that such a legislative presumption exists in this case. He contends that he rebutted the presumption and only the tendency of courts to view *Burgess* as the "bright line" test that Amici wish it to be caused the Court of Appeal to reverse a carefully constructed, individualized trial court order despite strong, virtually uncontroverted evidence that the proposed move would be prejudicial to his children's welfare.

In *Burgess*, this Court stated that bright line rules in the area of move-aways are inappropriate and that each case must be evaluated on its own unique facts.

> "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 even a distance of 40

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1 *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 51 Cal.Rptr.2d 444, 913 P.2d 473.

> or 50 miles, 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."[2]

The trial court in this case focused on just such considerations. The court stated quite firmly that it was not concerned about the best interest of the parents but about the children.[3] It did not apply broad presumptions such as that indulged in by the Court of Appeal that a "loss" of the children's relationship with the custodial parent always outweighed that which would result from a "loss" of the relationship with their noncustodial parent, assumed to be the father[4]. Instead, the trial judge crafted an individualized order tailored to the needs of this family and was reversed.

Amici argue strenuously that it is error for a trial court to even conduct an inquiry into the children's best interests, at least as it is generally understood. They see this as a women's rights issue; Father sees it as a children's rights issue.

What is interesting is that both sides contend that their goal is to "place children at the center of the analysis."[5] The problem is that Amici for Mother claim that a traditional "best interest" analysis is not part of this process.[6]

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2 Id. at p. 39.

3 RT, p. 52/14-16.

4 *LaMusga*, slip opinion, pp. 13-14.

5 See, e.g., Bruch Brief, p. 75.

6 See, e.g., CWLC Brief, p. 29 and Bruch Brief at p. 4, calling for a "specific version of the 'best interests' test," which is legalese for not considering it at all.

They cleverly disguise this position by calling it the "best interest rubric for custody transfers," which is the functional equivalent of the best interests analysis being barred from the inquiry.[7]

The Amici filing the Bruch Brief, though all distinguished scholars, are not practitioners. They are not the ones who actually deal with the heartache of move-aways on a daily basis.[8] They are not the ones who see parents say good-bye to their children with whom they may have had a very close relationship or who, like Mr. LaMusga, were desperately trying to maintain a relationship over unrelenting interference by the parent moving away. Whether those efforts are labeled "alienation," "alignment," or not labeled at all, the effect on the children and the parent left behind is still the same.

Unfortunately, in their zeal to support the mother, Amici view the record through the prism of women's rights, leading to distortions.

A. Amici distort the facts of the case.

1. Amici continually chose to ignore powerful evidence that supported the trial court's decision.

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7 Bruch Brief, p. 15.

8 Although Professor Bruch certainly falls into the general description of distinguished scholars, she has handled at least one move-away client, having represented Donna Signorelli of *Cassady v. Signorelli* [*Cassady v. Signorelli* (1996) 49 Cal.App.4th 55, 56 Cal.Rptr.2d 545] in the trial court (Contra Costa County Case No. 9004601), three appeals to the Court of Appeal (A081913, A082444 and A083148) and two requests for review to this Court (S079739 and A079739). Thus, there is no doubt that she passionately believes, both as counsel for a litigant and as an academician, in the right of mothers to move away at will.

Amici focus solely on whether the evidence that the children's relationship with their father would be irreparably lost was sufficient or even material to the trial court's decision. They totally ignore, as did the Court of Appeal, the other compelling evidence of prejudice to the children from the move and its effect on the issue before this Court. This evidence included:

- 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.)

Quoting from Respondent's Brief on the Merits:

> "[T]he 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."*[9]

Amici argue "[t]he kinds of harms Mr. LaMusga cites ... are essentially the kinds of harms any move will occasion and therefore cannot rebut §7501."[10] The harms listed above are *not* the usual detriments that accompany a move: they are unique to this family and these children. They are by-products of Mother's efforts to "align" the children with her and are likely to cause long-term harm to them. More importantly, the harms are a major reason why Amici's suggestion of simply awarding Father more time during vacation periods will not alleviate them.[11] Dr. Stahl found that the children needed not just more time with their father, but also more frequent contact with him,[12] and not in the Fam. Code §3040 sense. *Neither Mother's nor any of her Amici's briefs have challenged this argument or evidence.*

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9 RBOM, pp. 28-29.
10 Bruch Brief, p. 52.
11 See Burgess, p. 40.
12 AA, pp. 404-405; RT, p. 44/10-27.

Why? Perhaps the theory is to ignore facts which you cannot counter and which do not support your paradigm. The problem is that this evidence supports the trial court's order and provides an alternative reason to deny the move-away. Since no Statement of Decision was requested and Mother did not wait for a written order to be entered before filing her appeal, we must presume that the trial court relied on this evidence. The Bruch Brief agrees that the doctrine of "implied findings" is viable, but tries to distinguish it on one basis and never discusses its effect on this evidence.

Ignoring evidence simply because it does not fit your argument does not make it go away.

2. Amici fail to understand the substantial evidence rule.

The problem with all of the briefs submitted by Mother's Amici, including the Bruch Brief, is that they ignore the substantial evidence rule, the effect of which is discussed in detail later in this Brief. All ask that this Court ignore the strong and compelling evidence that supports the trial court's order. Further, they attempt to introduce new evidence and to cross-examine witnesses on appeal, and they focus on what evidence would have supported an order approving the move-away without understanding that the appellate court's role is not to reweigh evidence.

Given the compelling and often poignant testimony about the effect that Mother was having on the children, for example Ms. Henry's description of the relief that young Garrett felt after she told him that he had "permission to

love his father,"[13] it is quite disturbing that not one Amica has even slightly criticized the mother's behavior.

The record is replete with evidence that Mother was doing all that she could to distance the children (both emotionally and geographically) from their father. For example, one teacher confirmed that Mother asked the children's teachers to keep track of the time that Father spent as a classroom assistant so she could deduct it from his visitation.[14] The teacher confirmed that Mother was consistently "bad mouthing" Father, but that he never spoke ill of her.[15] The children would parrot negative sentiments about Father that had no substance and which they had obviously heard from Mother.[16] One would think that Amici would condemn this behavior, but none even criticize it. In fact, Amici's Brief simply asserts that it will adopt Mother's Statement of the Facts as more accurate than Father's,[17] thereby making all of these behavior problems disappear. Even though Father demonstrated that Mother's brief had major inaccuracies and factual recitations without support in the record,[18] Amici still chose to rely on it. That is convenient, as they can then discount

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13 RT, pp. 10/18-24; 20/28-21/11.

14 RT, p. 16/10-25; AA, p. 201/¶11.

15 See Facts summarized in ROB, pp. 21 – 24.

16 See Facts summarized in Respondent's Opening Brief on the Merits, pp. 21-24.

17 Bruch Brief, p. 8, fn. 10.

18 See discussion of all of the factual inaccuracies in Mother's Reply Brief on the Merits in Respondent's Closing Brief on the Merits, pp. 4 – 9.

virtually all of the evidence on which the trial court is presumed to have relied. Of course, this violates that pesky substantial evidence rule again.

3. Many of Amici's citations are to suspect and highly partisan "authorities," or none at all, and should be disregarded.

(a) Unreliable sources: Mr. LaMusga is not certain how to respond to citations to authority that comprise Amici's discussions among themselves wherein they cite each other or obscure and unavailable citations. For example:

- Amica Bruch's perception of her own case, *Cassady v. Signorelli.*[19] (Page 32, n. 93.)
- Amica Bruch's discussion with "three 'senior' family lawyers" in Marin County." (Page 43/120.)
- Amica Bruch's personal account of legislation. (Page 49, n. 139.)
- Amica Gannon's anecdotal descriptions of selected pre-*Burgess* cases. (Page 43, n. 121.)
- Amica Bruch's conversation with Amica Schulman regarding a move-away case that Amica Schulman is currently litigating in Contra Costa County and does not like the way that it is going. (Page 67, n. 177.)
- Emails between Amica Bruch and Amica Wallerstein. (Pages 71, n. 184 and 75, n. 188.)

[19] See note 8, *supra*.

- Amica Bruch's Petition for Review in *Signorelli v. Cassady* (S068879).[20] (Pages 32, 46, 62, 70.)
- Quote from an amicus brief in a Maryland case. (Page 54, n. 151.)

(b) No authority: Many dramatic assertions in the brief are supported by no authority whatsoever. For example:

- Court mediators and court evaluators completely ignore *Burgess* and §7501. (Page 52.)
- Judicial practice now labels 20% timeshares as "joint physical custody." (Page 49.)
- Counsel and judges hostile to relocation are disregarding *Burgess* and §7501 and trial courts are misapplying it. (Pages 43-44.)
- Bad faith allegations appear in virtually ever case. (Page 45, n. 123 and n. 124.)
- "This common practice [of judges increasing custody sharing to 50/50] is designed to ensure that the non-custodial parent will qualify for a *de novo* hearing rather than come within §7501, should an order prohibiting relocation be reversed on appeal or should the custodial parent later seek to relocate." (Page 42, n. 120.)
- "The [trial] court expressly held that the §7501 presumption, if applied, would have authorized Ms. Navarro's move." (Page 34, n. 100.)

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[20] The unpublished opinion of the Court of Appeal for this appeal is not available on LEXIS.

- Trial judge only issued the order it did because it believed that Mother would not move. (Page 39.)

(c) Unsupportable generalizations: The Bruch Brief also takes liberties that are hard to explain.

- "Where [the term "temporary"] does not appear, [custody] orders are automatically deemed permanent."(Page 26.)
- At page 55, it states that at RT, p. 106/6-21, the trial judge found that the LaMusga children were "behaving in ways common for children in their circumstances." There is nothing in the transcript to support such a statement. Although probably not what Amici meant, this assertion may nonetheless be true: children whose custodial parent is actively aligning them against the other parent *do* act the way that the LaMusga children act.[21]
- The Bruch Brief further asserts "it is doubtful that the court would have increased Mr. La Musga's time with the children substantially in any event, given the continuing deficiencies in the father-son relationships."[22] In fact, the Court *had* just significantly increased his time with the children[23] and has *continued* to do so, including

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[21] See, Richard A. Warshak, Ph.D., Bringing Sense to Parental Alienation: A Look at the Disputes and the Evidence, 37, Fam.L.Q. (2003)

[22] Bruch Brief, p. 42, n. 120.

[23] AA, pp. 150-152.

alternating two-week blocks during the summers of 2002 and 2003.[24] Moreover, it ordered that custody transfer to him if Mother moved out of state.[25] How much more evidence does Amici need to dispel any doubt?

- "California also accounts for 100% of the national increase in children living in poverty that has taken place since the late 1970s." (Page 21.)
- "[V]iolent behavior is seemingly ignored by courts who decide child custody," [on the basis of their reading of a couple of opinions]. (Page 72.)
- "No grant of custody to [Father] could survive appellate review." (Page 70.) Father refers the Court to Dr. Stahl's recommendation that the Court that physical custody be awarded to him if mother continued her denigration of him[26] as well as the evidence recited in section A.1. above.
- "Mr. LaMusga surely prefers that Ms. Navarro have custody of the children...." (Page 70.) He most certainly does not and has requested that custody be transferred to him multiple times,[27] including in response to her recent provocation of moving the children to Arizona in

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24 See Court Order of June 18, 2002 stating: "Mother is permitted to move-away, however the children shall not be allowed to move their place of residence at his time."

25 AA, p. 375. This is the order appealed from.

26 AA, p. 405.

27 AA, p. 237.

direct violation of repeated court orders that the children were not to be moved from California.

(d) Incorrect statements of fact:

- Amici assert that Father never requested full custody of the boys.[28] He most certainly did. The final sentence in his Trial Brief requests "primary custody be granted to Respondent."[29] He has since filed an Order to Show Cause asking that the August 23, 2001 Order, granting him custody if Mother moves out of state, be implemented.[30] How much clearer can he be?
- At page 9, Amici state: "During that period [after the December 1996 custody order through 2000] Ms. Navarro and Mr. LaMusga each obtained mental health counseling." They cite to AA, p. 379, which is Dr. Stahl's report predating that order, and RT, p. 73/17-23, wherein Dr. Stahl testifies that Ms. Navarro had therapy "around the time of the original [October 1996] evaluation. No evidence supports her having *any* therapy between the December 1996 order and 2000; in fact, Dr. Stahl lamented that her refusal to do so was making it more difficult for her to understand the effect of her actions.[31]

All Father can do is ask the Court to disregard these assertions.

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28 Bruch Brief, page 42, n. 119.

29 AA, p. 237.

30 Order to Show Cause, filed July 16, 2003.

31 RT, pp. 72/19 - 73/3.

4. **Father objects to Amici's "appendices" to their Brief.**

Amici have attached various Appendices to their Brief. Father objects to Appendices B, C and D as not a proper way to introduce evidence into a trial and certainly not into an appeal. There are many articles that support Father's positions, however, he will refrain from also violating procedure and simply attach them to his brief.[32]

B. **Amici raise issues that have no relevance to this case.**

1. ***Montenegro* is not an issue in this case.**

If Amici want this Court to overrule *Montenegro,*[33] this is not the proper vehicle. *Montenegro* involved a question of when a noncustodial parent is entitled to a custody modification based on the best interests of the children rather than having to prove changed circumstances. In this case, there were three full custody evaluations to determine the best interests of the children, the first two of which were done by stipulation.[34] The second was done in response to Father's motion for significantly more time with the children. The third report was simply a refinement to the second, done to inquire into how Mother's planned move would affect the pending issue, namely a modification of the custody-sharing schedule. As there were three full custody evaluations

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[32] Many will be discussed in the Warshak Amicus Brief that Father has incorporated as his response to the Wallerstein Brief.

[33] *Montenegro v. Diaz* (2001) 26 Cal.4th 249, 109 Cal.Rptr.2d 575, 27 P.3d 289.

[34] AA, pp. 37-41 and 127-130.

cited by both sides in support of their positions herein, the issue of whether Father was entitled to one is simply not relevant.

Montenegro was never cited by either party to the trial court nor to the Court of Appeal. It was cited once in Appellant's Brief on the Merits simply for the general proposition that trial courts have the widest discretion to choose an appropriate custody plan;[35] it was not cited in the Reply Brief on the Merits (RBOM). It was cited in the Answer Brief on the Merits solely to confirm that it was not an issue.[36] Both parties have argued this case as a best interests case. Although Amici confirm that *Montenegro* is irrelevant,[37] they spend a great deal of time attacking it.

They appear to want to use this case as a soapbox to crusade against a host of tangential or simply unrelated issues, including a general assault on *Montenegro*, which the Bruch Brief refers to as an "unfortunate misunderstanding"[38] and "untoward."[39] Why Father should be defending an issue that has never been raised in either of the courts below or by Mother is a mystery. How his "reading" of *Montenegro* requires this Court "to renounce doctrines that have long protected children and provided guidance to

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35 Appellant's Brief on the Merits (ABOM), p. 35.
36 ABOM, pp. 26-27.
37 Bruch Brief, pp. 31.
38 See Bruch Brief, pp. 5, fn. 4, 27.
39 Bruch Brief, p. 75.

California courts"[40] is an even greater mystery. All Father said was that the issue had not been raised and was not before the Court.

Amici here are injecting an entirely new argument into the mix,[41] namely, was there a "permanent" custody order from which a change of circumstances was required to be shown? Putting aside the procedural problem of Amici raising a totally new procedural issue for the first time on appeal,[42] it is simply meritless on the face of the record.

At Bruch Brief, p. 29, n. 83, Amici allege that there was a prior custody determination[43] and that the December 23, 1996 Order After Hearing constituted a permanent custody order.[44] They allege that this order was issued "after trial."[45] They are mistaken.

Neither party considered the December 23, **1996** order final. Mother considered this to be a temporary custody order,[46] as did Father.[47] Amici argue that it is the "*absence* of a request for a temporary order" that often signifies

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40 Bruch Brief, p. 33.

41 Bruch Brief, p. 8, "Our goal is to identify issues, including some that the parties have not addressed...."

42 *Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 48 Cal.Rptr.2d 235 ["A party is not permitted to change his position and adopt a new and different theory on appeal."]

43 Bruch Brief, p. 28.

44 Bruch Brief, p. 29.

45 Bruch Brief, p. 29, n. 83.

46 AA, pp. 75-76 wherein Mother requests "temporary child custody" orders.

47 AA, pp. 69-74 and especially p. 73 where Father requests "temporary custody/visitation" orders.

that the resulting order is permanent.[48] It is odd they would fail to notice that *both* parties had requested "temporary" orders.

This 1996 order was the result of Father's motion for a temporary custody order,[49] filed because the winter holidays were fast approaching and based upon mother's reluctance to let him have time with the children. This order was entered pendente lite. Custody had not been bifurcated for early resolution. The parties' status was not even terminated until December 31, **1997** and that Judgment stated that jurisdiction over all other issues was reserved.[50] The Stipulated Judgment on Reserved Issues was finally filed March 6, **2001** and even it contained no mention of custody.[51] Moreover, the Court did not consider custody resolved.[52] Nor should it have. What followed the 1996 temporary order was a series of requests by Father for additional time, resistance by Mother, orders by the Court and a subsequent custody evaluation that was unrelated to the requested move-away.[53]

In fact, custody has never stabilized into anything that anyone could reasonably call a "permanent" or "final" order. Realizing this, neither party raised the need to show a change of circumstances or the applicability of *Montenegro* as an issue at trial or at the Court of Appeal. Father only

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48 Bruch Brief, p. 26.

49 AA, p. 73.

50 AA, p. 89.

51 Respondent's Appendix on Appeal, pp. 7 – 10.

52 AA, pp. 103-104.

53 AA, pp. 93-97; 99-100; 105-116; 120-123; 124-126; 127-130.

mentioned it tangentially in his Answer Brief on the Merits to this Court by way of saying that change of circumstances was not an issue.

Perhaps the confusion comes from what each side means when it says that *Montenegro* is not an issue. Father means that we need not discuss whether a change of circumstances had to be shown in order to qualify for a best interests analysis because there has never been any order that could remotely be construed as "permanent" or "final" and hence there is no reason to analyze *whether* he was entitled to an inquiry into the children's best interests–he was. Mother obviously agreed: she stipulated to the subsequent evaluation.[54]

Thus, Amici's request to this Court to "clarify" *Montenegro* to hold that any custody order that is not specifically labeled "temporary" is "permanent"[55] is unworkable. In the context of this case, the December 23, 1996 Order was undeniably "temporary." It was entered a year before the parties were even divorced and 4 ½ years before the resolution of the other issues in response to a dispute over upcoming winter holidays.

Just as Amici request the Court to disregard custody labels in favor of reality when determining who is the "primary caregiver,"[56] so too should it

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[54] AA, pp. 127-130.
[55] Bruch Brief, p. 29, n. 83.
[56] Bruch Brief, p. 51.

disregard the absence of a specific label when determining whether a custody arrangement is permanent or temporary.[57]

Although Amici believe *Montenegro* to be an "unfortunate" decision, this is not the appropriate platform for them to use to attack it.

That said, one wonders why the best interests of the child should ever *not* be considered when a change of custody is requested or when a determination is being made whether a "removal [will] prejudice the rights or welfare of the child."[58]

Father does concede that Mother has been the de facto primary caretaker of the boys since their separation. He does not concede that this arrangement has been in the boys' best interests, with his acquiescence or pursuant to any order of the court that could be considered as "permanent." He contends that it is the result of a carefully planned strategy from Day One to limit his contact and to fight every halting step towards joint parentage. He certainly does not concede that this situation should continue. He does not contend that Mother should be punished for her "less then estimable" conduct,[59] nor that the children should be punished by authorizing a move-away that will ultimately result in a loss of their father-child relationship, a

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[57] Conversely, the inclusion of such a label in a custody order should be given great weight.

[58] Fam. Code §7501.

[59] *LaMusga*, slip opinion, p. 9.

loss Dr. Stahl called "significant,"[60] or the loss of the opportunity for a "balanced set of relationships" and "a break from that enmeshment [with their mother]."[61]

2. The diatribe against Parental Alienation Syndrome is likewise misplaced in this case.

Amici spend a great deal of their brief attacking Parental Alienation Syndrome (PAS). As with their attack on *Montenegro*, one wonders what it has to do with this case. Dr. Stahl never relied on PAS, nor did the Father, nor did the Court.

Amici's entire argument is confusing. On the one hand, they argue that the trial court's order erroneously relied on "parental alienation,"[62] and on the other they note that the trial court found that no alienation occurred.[63] Calling it "junk science"[64] and "the latest fad posing as science in relocation field,"[65] Amica Bruch viciously attacks PAS, yet it was never mentioned nor relied upon by Dr. Stahl and has no relevance here. Amici are simply attempting to use this case as a vehicle to crusade against a pet peeve.

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60 AA, p. 413.
61 RBOM, pp. 28-29.
62 Bruch Brief, p. 40 [ok?] and p. 40, n. 116 and n. 117.
63 Bruch Brief, pp. 36; 42, n. 120; 47; 54-55.
64 Carol Bruch, Parental Alienation Syndrome and Parental Alienation: Getting It Wrong In Child Custody Cases," 35 Fam.L.Q. 527 (2001)
65 Bruch Brief, p. 57.

Amici relies heavily on the article "Parental Alienation Syndrome and Parental Alienation: Getting It Wrong In Child Custody Cases." This article has not been well received and has been severely criticized. For example, Richard A. Warshak, Ph.D., in his article "Bringing Sense to Parental Alienation: A Look at the Disputes and the Evidence," dismisses much of it as relying on "arguments ad hominem [that] merit no response in a learned journal."[66] Dr. Warshak responds to the article's claims that alienation research is rife with intellectual deficiencies by stating: "Presumably these intellectual deficiencies extend not only to the many clinicians, attorneys, and parents who have found the concept helpful, but to the authors of the more than 125 articles on PAS published in refereed journals and the panels of reviewers, chosen for their expertise in the field, who recommended publication of all these articles."

Amici's argument that Dr. Stahl was relying on a "non-validated taxonomy," namely "unconscious alienation," to support his recommendation is an example of their resistance to any suggestion that a mother would ever attempt to use the children as a weapon and attempt to alienate them from their father.[67]

It is absolutely true that Dr. Stahl felt that Mother's behavior was having an adverse effect on the children and interfering with their relationship

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66 Richard A. Warshak, Ph.D., Bringing Sense to Parental Alienation: A Look at the Disputes and the Evidence, 37, Fam.L.Q. (2003)

67 See Carol Bruch, "Parental Alienation Syndrome and Parental Alienation: Getting It Wrong In Child Custody Cases," 35 Fam.L.Q. 527 (2001)

with the children. He suspected that she was alienating the children.[68] One does not need a Ph.D. to interpret Mother's conduct this way. Their teacher, Ms. Henry, testified extensively to conduct that she also viewed as alienating the children.[69] In fact, she flatly 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.)

Admittedly, her opinion was not an expert psychological opinion based upon a scientific theory submitted to peer review. It was the opinion of a trained teacher who dealt with the LaMusga children, and many others, on a daily basis. She talked to Mother, talked to Father, talked to the children, and saw the effects of Mother's behavior first hand.

Mother's behavior has been summarized repeatedly in Father's briefs to this Court[70] and he will spare it yet another recitation. Amici contend that allegations of Ms. Navarro's behavior are not supported by the facts of this case.[71] How much evidence is required? Suffice it to say that few, except perhaps Amici, can read this litany and believe that the Mother was not a major impediment to the boys' improving their relationship with their father.

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68 RT, p. 35/16-26.

69 AA, pp. 199-222; RT, pp. 3-23.

70 See, e.g., Respondent's Opening Brief on the Merits, pp. 8 – 24.

71 Bruch Brief, p. 54.

As a Court of Appeal[72] recently said in a different context regarding the need for expert testimony on certain issues:

> "The correct rule on the necessity of expert testimony has been summarized by Bob Dylan: 'You don't need a weatherman to know which way the wind blows.'"

If Mother wanted to cross-examine Dr. Stahl on whether his recommendations were based on the objective behavior that he observed or on subjective "unproven taxonomies," she had the opportunity to do so at trial. This is not the appropriate place for that exploration. In fact, Dr. Stahl never testified that he was relying on any psychological theory or syndrome for his opinion -- simply on what he observed and his expert opinion. And, as Amici admit, he is well qualified to do so. Philip Stahl, Ph.D. is the author of several books on this topic[73] and widely regarded as an expert. Last month he gave the 2003 Child Custody Training for California Rule of Court 5.225 to evaluators. Moreover, he was reappointed by stipulation of the parties in 1999 to update his initial 1996 report.

Whether the trial court was correct that Mother was not consciously "alienating" the children from Father but instead merely "aligning" them with her, the result was still the same -- she has been actively interfering with their

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72 *In re Marriage of Rosen* (2002) 105 Cal.App.4th 808, 820, 130 Cal.Rptr.2d 1 [no need for expert testimony to show that income from law firm with varying income should be averaged].

73 Dr. Stahl's published books include: "Conducting Custody Evaluations"; "Complex Issues in Custody Evaluations"; and "Parenting After Divorce: A Guide to Resolving Conflicts." (See www.amazon.com.)

relationship with him. Even the Court of Appeal below found her conduct to be "less than estimable."[74]

The proof of the issue is this–although the trial court made a binding finding that Mother was not intentionally alienating the children, would the trial court have been reversed on this extensive body of evidence had it found that she was?

Although Amici may not choose to believe that parents alienate their children and use them as weapons in divorce, attorneys who deal with families in divorce see this conduct every day. It was present here in spades.

It should be noted that Amici back peddle on some of their criticisms of Dr. Stahl in their "Errata."

C. Amici's attacks on Dr. Stahl are unwarranted, unfair, and untimely.

As noted above, Dr. Stahl is a recognized expert in child psychology and the effects of move-aways. The parties twice stipulated to his appointment as a neutral expert. Amici quote extensively from his 1996 report, ignoring his testimony that while he initially did not believe that alienation was occurring, after viewing the family over the five years, he suspected that it had been going on all along.[75] They allege that his report contained "factual

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[74] *LaMusga*, Slip opinion, p. 9.

[75] RT, p. 35/16 – 36/9. Following this is where the trial judge interjected his own theory that what was occurring was "alignment" rather than "alienation."

carelessness."[76] Yet, Mother's attorney thoroughly cross-examined Dr. Stahl at trial. If she had felt that he was relying on "unproven taxonomies," she would have challenged him on them. Amici attack Dr. Stahl simply because they disagree with his conclusions.

D. The key issue appears to be how the two sides define "best interests."

1. The way that Amici define "best interests," it cannot be considered at all.

Amici begin their brief with a scholarly discussion of the common law evolution of the *Burgess* rule whereby the change of circumstances test of *In re Marriage of Carney*[77] and *Burchard v. Garay*[78] were grafted onto Fam. Code §7501. Under *Burgess*' interpretation of the 7501 presumption, there are really two distinct hurdles that parents seeking to prevent a move-away must overcome. First, they must establish that they are entitled to have the best interests of the child even considered. This is the result of *Burgess*' incorporating the *Carney* change of circumstances test, which effectively prohibits a *de novo* best interests analysis absent a "persuasive showing of changed circumstances."[79] Since subsequent case law says that the change of

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76 Bruch Brief, p. 57.

77 *In re Marriage of Carney* (1979) 24 Cal.3d 725, 157 Cal.Rptr. 383, 598 P.2d 36

78 *Burchard v. Garay* (1986) 42 Cal.3d 531, 229 Cal.Rptr. 800, 724 P.2d 486

79 *In re Marriage of Carney, supra,* 24 Cal.3d at 730-731.

circumstances cannot be the move itself,[80] the usual result is that unless a noncustodial parent can establish that there is *de facto* joint custody or that there has never been a permanent custody order, the court will not even reach the question of the best interests of the child.[81] Thus courts are in the awkward position of determining whether a move will prejudice the rights or welfare of a child without being able to inquire into the child's best interests.

The second hurdle is the quantum of proof needed to overcome the presumption. Fam. Code §7501 simply requires that the parent show that the "removal that would prejudice the rights or welfare of the child." However, *Burgess* has been interpreted to provide a bright line rule.

> "'Once the trial court determined that the mother did not relocate in order to frustrate the father's contact with the minor children, but did so for sound 'good faith' reasons, it was not required to

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[80] *In re Marriage of Edlund and Hales* (1998) 66 Cal.App.4th 1454, 1472, 78 Cal.Rptr.2d 671, Bruch Brief, p. 52

[81] See, e.g., *In re Marriage of Lasich* (2002) 99 Cal.App.4th 702, 121 Cal.Rptr.2d 356 [In move-away case under *Burgess-Biallas*, H not entitled to *de novo* custody review where arrangement, however denoted in judgment, amounted to sole physical custody for W and liberal visitation for H]; *In re Marriage of Edlund and Hales*, *supra*, 66 Cal.App.4th 1454, [Once court determines that primary parent's motives for moving are in good faith and not to frustrate visitation, cannot weigh the wisdom of the move.]; and *In re Marriage of Biallas* (1998) 65 Cal.App.4th 755, 76 Cal.Rptr.2d 717 [Out of state move not a change of circumstances where parties don't have joint physical custody; *de novo* review incorrect where mother had primary physical custody; "joint physical custody" discussed]; and *In re Marriage of Whealon* (1997) 53 Cal.App.4th 132, 61 Cal.Rptr.2d 559 [the fact that the custodial parent is moving away does not mean family court should examine the custody question anew]. But see, *Brown v. Campos* (2003) 108 Cal.App.4th 839, 134 Cal.Rptr.2d 300

> inquire further into the wisdom of her inherently subjective decision making.'" [82]

The reason for this is that courts have latched onto the following sentence from *Burgess*, in which the change of circumstances test had been engrafted onto the move-away test, and elevated it to almost a conclusive presumption favoring the move.

> "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."'"[83]

When the disapproval of contingent change of custody orders is added to the mixture, the result is a test that sets the bar so high that only one published opinion has approved the actual denial of a move-away request.[84]

If a trial court believes that a move-away will be harmful to the children, what quantum of proof is required to avoid criticism? The court in this case had what Father believes was compelling evidence, yet it was reversed. If a court believes that a move-away will be harmful to the children, what order can it make? It cannot order an immediate change of custody, as the move has not occurred. It cannot order the mother not to move, as that would violate her right to travel. If it cannot order a contingent change of custody if the mother moves, what option is left? It must approve the move-away.

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82 *In re Marriage of Edlund & Hales, supra*, 66 Cal.App.4th at p. 1471; see also Ruisi v. Thieriot (1997) 53 Cal.App.4th 1197, 62 Cal.Rptr.2d 766

83 *Burgess, supra*, 13 Cal.4th at p. 38.

84 *Cassady v. Signorelli, supra*, 49 Cal.App.4th 55.

The way *Burgess* is being interpreted, trial courts perceive no option but to approve moves that they know are not in the best interests of the children affected.

How should *Burgess* be interpreted? Since Amici have raised this issue as an abstract legal principle rather than its interpretation in this case, Father will respond.

First, there has to be a recognition that parents do not always move when offered the opportunity for better jobs or to be near family. Intact families may choose not to move or to delay moves that would offer economic advantages because of the effect they may have on their children. It is a choice that intact families make together.

When parents divorce, they may disagree on decisions relating to the welfare of their child. When that occurs, courts will often be required to break the tie. This may include decisions relating to schooling and medical treatment,[85] parent's use of alcohol,[86] whether children can fly in private planes or engage in what one parent considers hazardous activities, with whom the child will spend holidays, and a host of other decisions that normal intact families decide among themselves all the time. If this is true for relatively mundane decisions such as these, *a fortiori* it must be true for a decision as significant as whether or not a child should relocate.

Fam. Code §7501 tells us that the "parent entitled to the custody of a child has a right to change the residence of the child," and that is not disputed. This is no different from a custodial parent having the presumptive right to determine where a

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[85] Id. at p. 62.

[86] Fam. Code §3011.

child will attend school. However, saying that a choice is presumptively valid is not the same thing as saying that it is non-reviewable. Of course, the second half of the statute, i.e., "subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child," provides for exactly that review.

It is well known that moves may be stressful to children, even in intact families. They may not be in their best interests in divorced families. When both parents have been involved in the children's lives, moving them away from one parent may also be stressful on the children, as well as the parent being left behind. This decision by the moving parent exacts a cost on the child. Of course, the move may provide benefits that outweigh the detriments and these are the pros and cons that intact families weigh when evaluating moves and which trial courts should be able to weigh when divorced families consider moves. If this concept is accepted, then the only question becomes the quantum of proof necessary to overcome the presumption.

If a move is accepted for what we know it is – a stressful event in a child's life, then any test that is child-focused must consider the overall effect of the move on the child's "rights or welfare." This includes the effect of changing residences, changing schools, changing health care providers, leaving friends, leaving familiar surroundings, and reducing contact with the parent left behind.

Against these negatives the pluses should be weighed. The move may mean a better school, a nicer home, a higher standard of living, and the continuity of the same primary caregiver.

All of these and more are impacted by a move and all should be considered. Key factors should not be excised from the analysis because they impact a parent's rights.

As all circumstances are different and all families unique, no inflexible set of rules can be apply to every case. The "loss of the primary caregiver" presumption created by the Court of Appeal below,[87] may make for judicial economy and predictability of result. It also may fit nicely into the women's rights paradigm. But it is poor public policy.

Courts need to be able to make individualized decisions tailored to the needs of the family in front of them based on complex and countervailing factors. They are the ones that hear the evidence, that look the witnesses in the eye, that weigh credibility and that assign relative weights to the competing factors. Their decisions should be entitled to great deference and never overturned based upon a court-created stereotype, as occurred here.

The question many ask is: "how can the best interests of children not be considered when determining their "the rights or welfare?"[88] Yet, every time a court orders that the child's best interests be considered and denies an immediate move-away request, Amici slap it with the "rubric" of "anti-

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87 *LaMusga*, slip opinion, pp. 13-14.

88 Fam. Code §7501.

relocation" and cite it as evidence that *Burgess* needs to be defended and strengthened.[89] It does not. However, it needs to be clarified.

2. The child's best interests should trump the parent's right to move away.

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."

Father believes that the appellate cases since *Burgess*, with the few exceptions discussed herein, have made it clear that once it is established that the custodial parent is not moving in bad faith, no further inquiry is permitted. *Burgess* is viewed as a "bright line" test. Trial judges do not believe that they have the power to make an order that is in the best interests of the children. Recent cases include:

In *In re Marriage of Abargil* (2003) 106 Cal.App.4th 1294, 131 Cal.Rptr.2d 429, a move-away to Israel was approved despite the father's fears that his child was being moved to a war zone. Moreover, the move effectively terminated the father-child relationship.

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[89] Bruch Brief, pp. 6-7, Appendix A.

In *In re Marriage of Abrams* (2003) 105 Cal.App.4th 979, 130 Cal.Rptr.2d 16, the children's wishes to stay in the Sacramento area with their father were overruled.

Amici, *Burgess*, and most cases that have examined this issue assume that the custodial parent's right to travel is the primary focus rather than the child's best interests. Nothing in Fam. Code §7501's right to restrain a move-away provision requires this. This focus was grafted onto the statute by *Burgess*.[90] To this extent, Amici are correct when they argue that Father contends that *Burgess* is a common law pronouncement.[91] While §7501 is not, the analysis that *Burgess* engrafts onto it is purely a creature of common law.

3. One case that got it right.

One notable exception to the almost unbroken line of cases holding that trial judges must essentially rubber-stamp move-away requests is *In re Marriage of Brown & Campos*.[92] There, the parties had joint legal custody of their sons, ages 15 and 12, with mother having sole physical custody. Father had the boys on alternate weekends, three hours twice a week and three weeks in the summer. In August 2002, mother announced she was moving to Moorpark, which was two hours away. Father sought to modify custody so the boys could stay in Santa Barbara. He alleged that the boys did not want to

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90 See comprehensive discussion of the historical development of this issue in the Shear Amicus Brief.

91 Bruch Brief, p. 12.

92 *In re Marriage of Brown & Campos*, *supra*, 108 Cal.App.4th 839.

move from Santa Barbara and leave behind extended family, life-long friends, and classmates. He alleged the boys wanted to start new schools with old friends rather than strangers. The children told a psychologist they did not want to move.

The trial court, finding no bad-faith motive, denied father's request for an evidentiary hearing. It stated: "[T]he law is clear. *Burgess* is the law. And *Burgess* requires nothing further than a look into whether there's an allegation of bad faith in the move.... [T]he Court really doesn't have to look much beyond *Burgess*."[93]

Father appealed, arguing he was entitled to an evidentiary hearing on the question whether the move would be so detrimental that a change in the custody arrangement was essential for the boys' welfare. The Court of Appeal agreed and reversed, holding that the trial court adopted too narrow an interpretation of *Burgess* and erroneously denied father the opportunity to present evidence on whether the move would cause detriment to the children.

> "This [*Burgess*] standard of proof is admittedly very high. Nevertheless, a non-custodial parent opposing a 'move away' order has the right to present evidence on both of the relevant issues: bad faith and detriment to the child. Here, the trial court erred because it refused to consider the second issue, concluding instead that wife's good faith was the only relevant consideration. It is not. As *Burgess* expressly holds, a change of custody may be ordered in a 'move away' case where, as a result of the move, the children will suffer detriment rendering a change of custody essential or expedient for their welfare. [Citations.] Husband proffered evidence that the move would

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93 Id, at p. 841.

> cause detriment to the children because they were opposed to the move and because it would separate them from their extended family, friends and classmates. Before the trial court ruled on this order to show cause, it should have heard evidence on this issue."[94]

The Court reiterated its holding in *In re Marriage of Bryant*[95] that, in the absence of bad faith, a trial court should not inquire into or evaluate the custodial parent's reasons for moving, and the trial court did not do so. However, it erred when it refused to consider the second half of the *Burgess* analysis: whether the move will cause detriment to the children rendering a change in custody essential for their welfare.

> "Nothing in *Bryant* gives the trial court license to ignore that question. To the contrary, *Bryant* counsels trial courts to shift their focus away from evaluating a custodial parent's reasons for moving and toward evaluating the effect moving will have on the children. We reiterate that advice here."[96]

4. Moving first and litigating later is poor public policy and terrible for children.

Amici argue that whichever parent has "most of the caretaking responsibilities," read to mean 51%, regardless of the custody label used, has an absolute right to move anywhere without court permission, and that "litigation to adjust visitation schedules can be conducted following

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94 Id. at p. 843.

95 *In re Marriage of Bryant* (2001) 91 Cal.App.4th 789, 793-794, 110 Cal.Rptr.2d 791.

96 *In re Marriage of Brown and Campos, supra*, 108 Cal.App.4th at p. 844.

relocation."[97] They would apply this rule to Ms. Navarro, who they say should be free to move and examine the consequences to the children later.[98] In fact, this is exactly what she has done,[99] despite a court order to the contrary.[100]

Fam. Code §7501 cannot be read to support this position. It states, in part, "subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child." "Restrain a removal" means "prevent," not "order the child returned."

What is even more disconcerting about the radical position Amici ask this Court to adopt is that this rule would apply even in a true joint custody arrangement wherein one parent has custody slightly more than the other. They characterize a 59% timeshare as a "lop-sided joint custody order."[101] This amounts to one parent having the children roughly three days per month more than the other. The notion that the parent with joint physical custody and only slightly less timeshare could wake up and find that their children have moved to Korea is simply too radical. You don't move the children first and

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[97] Bruch Brief, p. 51; see also, pp, 50; 18, n. 52.

[98] Bruch Brief, p. 60, nn. 166, 167.

[99] See Attorney Robinson's letter of July 8, 2003, copied to the Chief Justice.

[100] AA, p. 375, trial court order of June 18, 2003 provided: "Mother is permitted to move-away, however the children shall not be allowed to move their place of residence at his time."

[101] Bruch Brief, p. 62, n. 169, discussing *Thacker v. Superior Court of Placer County*, 2002 Cal.App. Unpub. LEXIS 11105, wherein the move-away request by the parent with 41% timeshare was to Korea.

then litigate the requested custody modification action.[102] Although that strategy fits neatly into Amici's paradigm of mothers' rights, it is horrible policy. It encourages self-serve justice and harms children.

Relocation is stressful on children even in an intact family. Continuity and stability are necessary for positive development in children and moving disrupts that continuity and stability.[103] Amici ask this Court to adopt a rule whereby the move takes place first and then the effect on the children is ascertained. If the move is found to be prejudicial, the children are then ordered back home. You don't need a Ph.D. to understand that this would make an inherently stressful situation far worse. The time to determine if there is substance to a claim that the move will be prejudicial to the welfare of the children is *before* they are uprooted and moved across the country or across the globe. The fact that this determination may take some time to get right is unfortunate, but certainly better than the alternative.

Again, this position shows the dichotomy of focus: mother's rights versus children's rights.

E. The effect of the trial court's oral statement and the doctrine of implied findings.

1. The doctrine of implied findings applies to this case.

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[102] Bruch Brief, p. 60, n. 167.

[103] Marion Gindes, Ph.D., "The Psychological Effects of Relocation for Children of Divorce," Vol. 15, 1998, Journal of the American Academy of Matrimonial Lawyers, p. 125.

Amici concede that since Mother failed to request a statement of decision despite her right to do so,[104] the implied findings doctrine presumptively applies to any finding necessary to affirm the order for which there is substantial evidence.[105] Realizing that the application of this doctrine is virtually fatal to their position, Amici search for exceptions to try to save it. They do so by a clever artifice, namely treating the court's oral remarks when rendering its tentative decision from the bench as the equivalent of a formal statement of decision and then attacking it as insufficient.

Relying solely on some oral comments taken out of context, Amici argue that the trial judge used the incorrect legal standard. In other words, they are taking the Court's incomplete thoughts expressed orally, elevating them to the level of a statement of decision, and then asserting that the judge must be reversed because the statement of decision is incorrect as a matter of law. This is reverse bootstrapping.

There was no request for a statement of decision. The trial court intended to prepare a written order[106] but Mother appealed before it could do so.[107] Since the Minute Order erroneously failed to state that a formal order was anticipated, the Court of Appeal determined that the minute order was

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104 *In re Rose G.* (1976) 57 Cal.App.3d 406, 418, 129 Cal.Rptr. 338
105 Bruch Brief, p. 35.
106 RT, p. 115/22-24.
107 AA, p. 376.

appealable.[108] Although Father felt that was error, he did not specify that as a basis for review. When Mother declined to request a statement of decision and then appealed before a formal order could be prepared, she accepted certain adverse consequences on appeal.

Had Mother requested a statement of decision, she could have specified the contested issues at trial on which she wanted explained "the factual and legal basis for its decision . . . ."[109] She neither requested a statement of decision nor objected to the court's oral remarks. She requested no clarification or further explanation. She did not give the court an opportunity to expound on its reasoning. She did not bring to the trial court's attention any claimed deficiencies in the oral remarks. Having failed to do so, she cannot avoid the doctrine of implied findings.[110]

Amici allege that the Court's failure to make certain findings and demonstrate that it engaged in the tortured analysis they believe is required mandates reversal. This would unfairly result in a situation that puts Mother in a superior position than had she requested a statement of decision. Rather than confront a formal statement of decision, wherein the trial court could have carefully set forth all of its reasons and which might have rendered this appeal frivolous, Amici characterize the oral remarks as the functional equivalent to a

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[108] LaMusga, slip opinion, pp. 4-5.

[109] Code Civ. Proc. §632.

[110] *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1138, 275 Cal.Rptr. 797, 800 P.2d 1127.

statement of decision, take a few oral remarks out of context and then argue that reversal is required. This is not the law.

In re Marriage of Arceneaux is very clear on the statement of decision process and the effect of the failure to comply with it:

> When the court announces its tentative decision, a party may, under [Code Civ. Proc. §632], request the court to issue a statement of decision explaining the basis of its determination, and shall specify the issues on which he is requesting the statement; following such a request, the party may make proposals relating to the contents of the statement. [Footnote omitted.] Thereafter, under [Code Civ. Proc. §634], the party must state any objection he may have to the statement in order to avoid an implied finding on appeal in favor of the prevailing party. [Footnote omitted.] The section declares that if omissions or ambiguities in the statement are timely brought to the trial court's attention, the appellate court will not imply findings in favor of the prevailing party. *The clear implication of this provision, of course, is that if a party does not bring such deficiencies to the trial court's attention, he waives his right to claim on appeal that the statement was deficient in these regards, and hence the appellate court will imply findings to support the judgment....*[111]
>
> "[Code Civ. Proc. §632 and Code Civ. Proc. §634] thus describe a two-step process: first, a party must request a statement of decision as to specific issues to obtain an explanation of the trial court's tentative decision [Code Civ. Proc. §632]; second, if the court issues such a statement, a party claiming deficiencies therein must bring such defects to the trial court's attention to avoid implied findings on appeal favorable to the judgment [Code Civ. Proc. §634]."[112]

Then, with particular relevance to this case, *Arceneaux* held:

> "Our conclusion is not only compelled by the language of [Code Civ. Proc. §634], it also represents sound policy. [I]t would be

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111 Id. at pp. 1133-1134, emphasis added.

112 Id. at p. 1134.

> unfair to allow counsel to lull the trial court and opposing counsel into believing the statement of decision was acceptable, and thereafter to take advantage of an error on appeal although it could have been corrected at trial."[113]

That is exactly what happened here. Mother's attorney made no comment to the judge's proposed order except to state that her client would not agree to the appointment of a special master to assist with scheduling problems.[114] Instead, before the Court could even "final[ize] the terminology of the order,"[115] Mother filed a Notice of Appeal. If she thought the judge's reasons were incorrect as a matter of law, she was obliged to say so, at the trial court level.

Arceneaux is especially applicable here. The procedures for requesting and preparing statements of decision are in place for a number of reasons.[116] One is to bring fairness to the process. A proper request informs everyone that an appeal is being contemplated and certain specific findings must be made. It permits the court to set forth its complete reasoning in some detail and correct any deficiencies.[117] It ensures that findings are made on all relevant issues and gives the attorneys the opportunity to have input into the process. It narrows the appealable issues, thereby preventing needless appeals and benefiting the parties, the courts and the public by reducing court congestion. It also permits

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113 Id. at p. 1138.
114 RT, p. 110/3-4.
115 RT, p. 115/22-24.
116 *Miramar Hotel Corp. v. Frank B. Hall & Co.* (1985) 163 Cal.App.3d 1126, 1128-1129, 210 Cal.Rptr. 114.
117 *Arceneaux* at p. 1138.

meaningful appellate review.[118] All of these benefits would be vitiated by the acceptance of Amici's argument.

2. The trial court's brief findings made orally with the intended decision do not constitute a statement of decision and it is unfair to treat them as such.

This issue usually comes up in the reverse situation, namely where a respondent is trying to avoid reversal for the failure to issue a statement of decision by bootstrapping oral statements made by a trial court. Here, it is the appellant that seeks to characterize oral statements on the record as a formal statement of decision so she can attack them as insufficient. However, in this type of situation, the judge's oral statement is simply not a statement of decision.[119]

In re Marriage of Jones[120] is a case very similar to this one. There, in making an oral tentative decision modifying and extending spousal support beyond a termination date, the trial court gave various reasons, which were included in its written order. Neither party requested nor prepared further oral or written statements of decision. The husband appealed, arguing that the trial court's statements on record constituted its statement of decision. The Court of Appeal rejected the argument, pointing out that among the purposes of a

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118 *Miramar Hotel Corp., supra,* at pp. 1128-1129; *In re Marriage of Jones* (1990) 222 Cal.App.3d 505, 271 Cal.Rptr. 761.

119 *Whittington v. McKinney* (1991) 234 Cal.App.3d 123, 129, 285 Cal.Rptr. 586.

120 *In re Marriage of Jones*, *supra*, 222 Cal.App.3d 505.

written statement of decision was gaining input of attorneys and ensuring that the statement covered all pertinent issues. Written statements also add fairness to the process:

> "Where no statement has been requested or prepared it would be unfair to the trial court to criticize the fragmentary factual statements included in an oral tentative decision as an incomplete statement."[121]

The *Jones* Court then restated the familiar rules that Amici are trying desperately to avoid having applied to them:

> "Upon waiver of the statement of decision, it is required of the court only that it issue its written order or judgment. (7 Witkin, Cal. Procedure (3d ed. 1985) Trial, § 398, pp. 404-405.) In reviewing a judgment without a statement of decision the appellate court indulges every intendment in favor of the judgment, and assumes the trial court found every essential fact to support the judgment. The task of the appellate court is limited to searching the record for any substantial evidence which will support the judgment."[122]

With the failure to request a statement of decision comes certain consequences, including the doctrine of implied findings. Because Amici do not see in the Court's remarks a full and complete explanation of the "factual and legal basis for its decision as to each of the principal controverted issues at trial,"[123] namely its complete reasoning and detailed findings, they assert that the Order is not entitled to the protections of implied findings. This assertion is circular reasoning and gives Mother exactly the advantage that *Arceneaux*

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121 Id. at p. 515.

122 Ibid.

123 Code Civ. Proc. §632.

found unfair, namely "tak[ing] advantage of an error on appeal although it could have been corrected at trial."[124]

3. Mother's arguments that the doctrine of implied findings is unavailable are unsupported by authority or logic.

Amici's Brief does not support a conclusion contrary to that mandated by *Arceneaux*. They allege that implied findings are unavailable because:

(a) "[T]he trial court did not engage in the analysis required under the controlling law."[125]

(b) "[T]he doctrine does not apply in cases of exceptional circumstances."[126]

(c) "[I]mplied findings cannot be used … to ignore, avoid or override express findings that the trial court actually made."[127]

Father will discuss each allegation in turn.

Argument (a), namely that implied findings are unavailable where the law requires the analysis, relies upon *Clothesrigger, Inc. v. GTE.*[128] This case does not support this proposition; in fact it proves the opposite. *Clothesrigger* involves the requirement that a party seeking certification as a class representative in class action litigation must establish certain characteristics

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[124] *Arceneaux, supra,* at p. 1138. Father does not concede that there were any legal errors below.

[125] Bruch Brief, p. 35.

[126] Ibid.

[127] Id. at. p. 36.

[128] *Clothesrigger, Inc. v. GTE* (1987) 191 Cal. App. 3d 605, 611, 236 Cal. Rptr. 605.

required by federal law. Since these characteristics are required to be set forth explicitly, they could not be supplied by an analysis of the record. This case is recognized as "an exception to the general rule that a reviewing court will look to the trial court's result, not its rationale."[129] In all of the published opinions citing *Clothesrigger*, only one cited it for this proposition in a non-class action certification case, and the argument was rejected.[130] Thus, if anything, this is the exception that proves the rule.

Argument (b) argues that implied findings are unavailable in "exceptional cases," citing *In re Marriage of Ramer.*[131] That case holds no such thing. In *Ramer*, the wife made a timely request for a statement of decision but failed to specify the controverted issues until several days later. The trial court failed to issue a statement of decision and simply adopted its deficient notice of intended decision. Under these facts, the Court of Appeal simply declined to imply findings against the wife. There were no "exceptional circumstances."

Here, in contrast, Mother failed to request a statement of decision and made no objection to the judge's oral comments. Even if there were an "exceptional circumstances" exception, what would those exceptional circumstances be? This issue was neither an emergency nor a surprise; it had been going on for months and years.

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129 *Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 97 Cal.Rptr.2d 226.

130 *Kidd v. Kopald* (1994) 31 Cal.App.4th 132, 139, 36 Cal.Rptr. 2d 875.

131 *In re Marriage of Ramer* (1986) 187 Cal.App.3d 263, 271-272, 231 Cal.Rptr. 647.

Amici request that this Court retroactively legislate a *sua sponte* duty, akin to Fam. Code §3048, requiring comprehensive findings in all move-away cases. The answers to this are three-fold: First, this is a type of legislation better left to another branch of government. It is not even required for child support, the most heavily regulated area of family law.[132] There, too, findings are required only when requested,[133] unless the support order deviates from guideline.[134] Second, the last thing busy trial judges need is another issue where detailed findings are mandatory. Third, no such requirement should be imposed in this case, where all parties were operating under Code Civ. Proc. §632.

Argument (c) is that implied findings cannot override express findings, citing *USAA v. Dalrymple.*[135] Again, Amici have selected a case that is easily distinguishable and does not support the broad legal holding for which it is cited. In that case, the issue was whether attorney fees could be awarded to Dalrymple in a dispute with her insurance carrier. At the close of USAA's case, Dalrymple's motion for nonsuit was granted, and she was ordered to prepare a statement of decision. She did so, but mislabeled it "Order for Judgment." In it she recited that she was entitled to attorney fees. USAA

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[132] *County of San Diego v. Guy C.* (1994) 30 Cal.App.4th 1325, 1336, 36 Cal.Rptr.2d 222

[133] Fam. Code §4005.

[134] Fam. Code §4056.

[135] *USAA v. Dalrymple* (1991) 232 Cal.App.3d 182, 186, 283 Cal. Rptr. 330.

refused to approve the order as to form and the trial court signed it, followed by a conforming judgment. USAA appealed the attorney fee award, correctly arguing that attorney fees could not be awarded without a trial on the issue of bad faith. Relying on *In re Marriage of Arceneaux,*[136] the Court of Appeal reversed the judgment, holding that USAA's failure to object to the incorrectly labeled statement of decision did not make those findings binding on appeal, as there was "no omission or ambiguity in the trial court's statement." The statement clearly expressed the legal conclusion that Dalrymple was entitled to her attorney fees, but that conclusion was wrong. No statement of decision could have saved the judgment.

USAA does not support Amici's broad proposition of law. The trial judge awarded attorney fees that were not authorized as a matter of law. There was nothing that could have been said in the statement of decision, even if properly prepared, which could have saved the order. The same is not true here. As seen from the recitation of the facts favorable to the judgment, as provided in Father's earlier briefs, the evidence is overwhelmingly supportive of the trial court's decision.

All of Amici's attempts to label the court's oral remarks a statement of decision and then attack them as deficient fail. Mother gambled when she did not request a statement of decision. Had the court decided to the contrary, Mr. LaMusga would be facing the doctrine of implied findings and the substantial

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136 *In re Marriage of Arceneaux*, *supra*, 51 Cal.3d at 1133.

evidence rule. The Court's order is entitled to the benefit of the implied findings doctrine and, in this case, that is fatal to Ms. Navarro's arguments.

F. Substantial evidence supported the trial court's orders.

1. Substantial evidence rule restated.

Here, Amici make a host of arguments, primarily based upon reading the evidence as they wished the trial court had. Whether Amici disagree with the trial court's interpretation is not the test. The leading case on substantial evidence is still *Crawford v. Southern Pacific Co.*,[137] which states:

> "In reviewing the evidence on such an appeal all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court."

2. Danger of loss of the parent-child relationship. Among the contentions Amici claim are unsupported by the evidence is that there was a danger, if Mother moved away with the child, that the father-child relationship could be lost. The Judge stated as follows:

> "I think the concerns about the relationship being lost if the children are relocated at this time are realistic. Certainly I would

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137 *Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429 , 45 P.2d 183.

> find that the preponderance of the evidence would indicate that would likely result at this time of a relocation."

Here, Amici ask the Court to reweigh the evidence to determine whether there was substantial evidence to support this finding.[138] Putting aside the aversion appellate courts have to doing so, there was a plethora of evidence from which such a finding could be made, starting with Mother's five-year pattern of "aligning" the children with her against Father. 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.) 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 Father he was taking karate (AA, p. 409/¶2); and not permitting him to participate in his son's First Holy Communion. (AA, pp. 163.) To this must be added Dr. Stahl's opinion, quoted above.

The Judge made a specific statement on the record supporting this finding:

138 Bruch Brief, p.36.

> 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.[139]

He opined that while she might not be consciously alienating the children, she was "aligning" them such that the result was "a strained or hostile relationship" with their father.[140]

Dr. Stahl testified that should the children move away, "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.) Lastly, a move could potentially reinforce the idea, evidenced by the genealogy report in which Garrett listed Mr. Navarro as his natural father, that Mr. Navarro was their father, not "this guy back in California." (RT, p. 55/17-21.)

These facts certainly support the trial court's explicit finding "by a preponderance of the evidence" that there were realistic concerns that the children's relationship with their father would be lost if they were relocated at that time. Amici apparently contend that absent a specific prediction that this

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139 RT, p. 107/14-20.
140 RT, p. 106/17-19.

would occur, presumably by Dr. Stahl, such a finding is unsupported by the evidence.

Dr. Stahl was asked to assess the impact of the proposed move and did so in a balanced report. Understanding that he could not see into the future and that this was a legal rather than a psychological question, he looked at all sides of the issue. He did opine that if the children left, the loss of their relationship with their father would be "significant." He also discussed the loss they would feel if Mother moved away. Simply quoting the parts of the report favoring one side and ignoring the trial testimony wherein the report was further examined by counsel does not give one the full picture.

Nevertheless, the Court of Appeal did just that. It ignored most of the evidence that favored the trial court's order and found that as a matter of law, "the detriment to the children of losing their primary caregiver and their established pattern of care and emotional bonds with her outweighs the detriment of possibly jeopardizing a relationship with the noncustodial parent."[141] As there was no evidence to support this conclusion, and given it was diametrically opposed to the trial court's findings, the Court of Appeal was stating this as a matter of law. Putting aside for the moment that recent social science research has shown this not to be the case,[142] the implications of

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[141] Slip opinion, pp. 13-14.

[142] See comprehensive discussion in Warshak Amicus Brief.

such a blanket proposition as to the value of fathers to their children are extremely disturbing.

As shown in recent psychological studies on the effect of custodial parent move-aways on children,[143] these moves often have significant negative impacts on children.

Braver, Ellman, and Fabricius[144] looked at college students with divorced parents, comparing those who at some point lived more than an hour's drive from the noncustodial parent, with those whose divorced parents remained within an hour's drive of one another. They found that those with more distant noncustodial parents fared less well on a variety of measures, with particularly large differences in the students' evaluation of the distant parent as a source of emotional support, and in the amount of voluntary financial support received by the students for their college education. Statistically significant, although smaller differences, were also found on other measures, including the students' report of the emotional distress they suffered in consequence of their parents' divorce, and their report of their general overall health. As the researchers themselves were careful to point out, their

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143 Sanford L. Braver, Ira M. Ellman, & William V. Fabricius, *Relocation of Children After Divorce and Children's Best Interests: New Evidence and Legal Considerations*, Journal of Family Psychology, Vol. 17, No. 2, pp. 206–219 (2003).

144 Sanford L. Braver, Ira M. Ellman, & William V. Fabricius, (2003). Relocation of Children after Divorce and Children's Best Interests: New Evidence and Legal Considerations. Journal of Family Psychology, Vol. 17, No. 2, pp. 206–219.

correlational measures cannot alone establish causation. It is logically possible, as the researchers noted, that divorces involving distant moves had other attributes as well which contributed to the less favorable outcomes for the students whose divorced parents had moved. Nonetheless, the authors concluded that it was unlikely that such selection effects accounted for ***all*** of the differences between the groups. Especially in light of data from other studies associating more favorable outcomes for divorced children with close relationships with their noncustodial fathers, and showing that children of divorce who live primarily with their mothers generally report that they and their fathers both wanted more time with one another than they in fact had, the researchers concluded that the moves themselves were likely to have been a contributing cause of the less favorable outcomes reported by the affected students. Certainly, the social science data does not support a presumption that moves which leave children more than an hour's drive from one of their parents will have no negative effect on them. Indeed, in light of the social science data, the contrary presumption would seem more plausible.[145]

Thus, there is no basis for a finding as a matter of law that children are always better off moving away with a custodial parent as opposed to remaining in the custody of the noncustodial parent. Yet this is what Amici contend and what the Court of Appeal below found as a matter of law.

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[145] This and other related recent research is more fully discussed in the Warshak Amici Brief.

G. **Father objects to the "*Burgess* Boxscores" in Amici's Brief.**

1. The "anti-relocation" tables in Amici's Brief should be disregarded.

On page 6 of Amici's brief, they present a table they created which purports to show that 44% of all post-*Burgess* appellate cases, which they allege to be 100 reported and unreported opinions, are "anti-relocation." They allege that this proves that "trial and appellate courts may be too quick to restrain moves."[146] We are not told where this information came from or given the citations for the cases making up each category so that they can be verified. We are not told the criteria by which decisions are characterized as "pro" or "anti-relocation." Father requests that the Court disregard this table.

When compared to the similar table in Appendix A, for which we are given a total of 24 citations, we can see that the way Amici score the results, at least on this table, demonstrates their bias: *any* restriction to an *immediate* move by the mother constitutes an "anti-relocation" decision. For example, they score the following as "anti-relocation" decisions:

Brody v. Kroll:[147] Parties had a de facto joint custody arrangement with father seeing child four to five days a week, but the trial court refused to consider father's request for custody in response to mother's move-away request because he had not filed his own OSC, but instead had done so in his

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146 Bruch Brief, p. 7.

147 *Brody v. Kroll* (1996) 45 Cal.App.4th 1732, 53 Cal.Rptr.2d 280.

Responsive Declaration. The trial court was ordered to hold a hearing to determine whether it was in the child's best interest that physical custody be awarded to father.

In re Marriage of Rose & Richardson[148] simply affirmed that where there has never been a final custody order, the father resisting the move-away was entitled to a *de novo* review to determine the best interests of the child.

In neither case was the move-away denied. All that occurred was that the trial court looked at what was best for the child instead of "rubber-stamping" the mother's desire. Anti-relocation or pro-child? It depends on your perspective.

Likewise, Amici score *Rice v. Reiland*[149] as an "anti-relocation" opinion. Here, the mother announced that she was moving to Massachusetts immediately upon separating from father. No pattern of custodial care had yet been established, and father had taken an active role in parenting. Father filed an immediate action seeking custody of the child. The trial court found that mother wished to move to frustrate the father's contact, and substantial evidence supported that finding. Father was awarded six hours *per day* with their one-year old son, which was not a problem as he worked from home. A conditional custody order was made whereby father would have sole physical custody if mother moved. Thus, according to Amici, even an order that denies

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[148] *In re Marriage of Rose & Richardson* (2002) 102 Cal.App.4th 941, 126 Cal.Rptr.2d 45.

[149] *Rice v. Reiland*, 2001 Cal.App.Unpub LEXIS 1535.

a mother the right to move away when there is no established custody pattern is scored as "anti-relocation." In fact, this is an excellent example of a case that was properly decided.

Father does not consider a case "anti-relocation" where the trial court wants to consider the child's best interests when ruling on a custody move-away request; Amici do. That is the essential difference between the sides.

2. Amici's allegations that lower courts are not following *Burgess* should likewise be disregarded.

Amici's assertions that trial courts are not following *Burgess* are based on a few unpublished appellate opinions and generally not on real world experience. Those practicing family law know that it is nearly impossible to prevent a custodial parent from moving away absent extraordinary facts, such as those that were present in *Cassady v. Signorelli.*[150]

Amici discuss *Cassady v. Signorelli* repeatedly throughout their brief as an example of an anti-move-away bias in the lower courts. However, based upon the facts in the published opinion, this is not a case to hold up as showing that the trial courts are frivolously denying custodial parents' move-away requests. The facts of that case were that the trial judge had to order that the child attend school instead of being home schooled by Mother because of her "flaky and somewhat delusional quality in her thinking." Mother had been a jeweler but wanted to move to Florida to build a career as a

150 *Cassady v. Signorelli*, supra, 49 Cal.App.4th 55.

"parapsychologist." The trial court found that there were no jobs available in this field anywhere in world and that she had no realistic employment options in Florida. It made specific findings that she wished to move to frustrate father's visitation. The decision was the first published post-*Burgess* move-away opinion.[151] Since then, all published opinions, until very recently, have come down in favor of the mother's right to move away, regardless of whether it was viewed as the best alternative for the child, based upon *Burgess*. Not a single published opinion since *Cassady v. Signorelli* has actually denied a move-away request.

Even Amici's review of the unpublished opinions shows gender bias and a tendency to view as "anti-relocation" any delay approving the move pending the consideration of the child's best interests. Any time a Court of Appeal says that the best interests of the children should be examined, Amici score it as "anti-relocation." Father scores it as "pro-child."

Three opinions that amici have or would score as "anti-relocation" have simply required that the best interests of the children be considered. This would include *Brown v. Campos*.[152]

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[151] The opinion was initially unpublished. Ironically, it was ordered published at the request of the undersigned in his capacity as the Publisher of Attorney's BriefCase Legal Research Software because it was the first post-*Burgess* move-away opinion. Writing letters requesting depublication and/or Review were Amica Wallerstein, Attorney Tanke, and other amica curiae, who are undoubtedly among those filing Amici briefs in this case.

[152] *In re Marriage of Brown & Campos, supra,* 108 Cal.App.4th 839.

Contrary to Amici's statement that judges are not honoring *Burgess*, it is interesting to review a Statement of Decision dated May 21, 2003, from the same judge that decided *Cassady v. Signorelli*:

> "Most of the uncomplimentary things that each party attempted to prove about the other were in fact clearly proven but they are not determinative under the current state of the law. As has been stated in a couple of post-*Burgess* decisions, the *Burgess* decision (together with the U.S. Constitution) prevents the court from ordering the best custody alternative for minor children in cases such as this. What petitioner is doing to the minor is likely to do great damage to the minor (to the extent that such can be predicted). However, the thesis of *Burgess* is that the primary custodial parent in the non-shared custody situation is granted the power to make decisions such as these without intrusion by the trial court. The Burgess court has told us that the importance of the primary custodian/child relationship is so important that as long as it is left undisturbed a cross-country move should not even be considered a substantial change in the child's circumstances. That the undersigned believes that *Burgess* is (1) based on psychological data that is fifty years old and was disproven and displaced by better psychological theory thirty-five years ago, (2) is likely to produce damage to this minor child and (3) it simply permits petitioner herein to fully implement her own selfish impulses is all irrelevant to this decision. The pre-requisites of *Burgess* have been proven and the court has made the order required by the law."[153]

Perhaps this proves Amici's allegation that many trial judges are frustrated because they view their options to act in the best interests of the children as hamstrung by *Burgess*. However, it also shows that they are honoring it, even when every fiber in their bodies tells them it is not what is best for the children. The trial judge's statement of decision in *In re Marriage*

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[153] *In re Marriage of Lam*, Contra Costa County Case Number D99-04796, Commissioner James H. Libbey.

of Bryant is similar. There, the trial judge "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 *Burgess* as a bright line rule, it awarded joint legal custody with primary physical custody to mother and awarded visitation to father. The children moved away.

H. The bad faith exception to *Burgess*.

Burgess acknowledged that parents do try to interfere with their children's relationship with the other parent when it recognized the "bad faith" exception to the presumptive right to move away.[154] Here, Father agrees with Amici that bad faith is not a helpful standard by which to evaluate move-aways. It is inherently subjective and diverts attention from what is in the best interests of the child. Some moves made for improper motives may be less detrimental than others made for good faith reasons. A move that is detrimental for the child should not be approved simply because a parent is guilty of bad judgment rather than bad faith.

Assuming that bad faith is an exception to the 7501 presumption, how might we assess its existence? One way is an examination into the purpose for the move. Although no one is suggesting a return to the excesses of the cases disapproved in

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154 *Burgess*, p. 36, n.6.

Burgess where significant hurdles were placed on parents seeking to relocate,[155] on the other hand, the lack of a good faith reason justifying the move-away may also show that parent places little value on the child's relationship with the noncustodial parent. Has the custodial parent made an effort to achieve the purpose of the move locally? What efforts has the parent made to find work locally? When the move is being made allegedly to care for an aged parent, has consideration been given to moving the parent here, rather than moving the child there? In the instant case, for example, Ms. Navarro *never* explained why her husband could get good job offers in other states, but not locally. She said that she moved to Arizona to care for an aged parent, who she was *importing* from another state. In 1996 she said that she had been admitted to law school in Ohio, but never said whether she had applied to any in California.

Of course, according to the CWLC and Gannon Amici Briefs, every divorced woman in California has a ready-made excuse, the need to move to an area of

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155 *In re Marriage of McGinnis* (1992) 7 Cal.App.4th 473, 479, 9 Cal.Rptr.2d 182 ["the burden of proof is upon the 'move away' parent to demonstrate that the move is in the best interests of the children, i.e., that it is 'essential and expedient' and for an 'imperative reason.'"]; *In re Marriage of Selzer* (1994) 29 Cal.App.4th 637, 644-645, 34 Cal.Rptr.2d 824, [rejecting "'expedient, essential or imperative'" rule but concluding that "'the moving parent does in fact bear a burden of proof . . . to show that the move was not only necessary to the custodial parent but would also be in the best interests of the child."]; *In re Marriage of Roe* (1993) 18 Cal.App.4th 1483, 1489-1490, [custodial parent seeking to relocate with a minor child must establish that move is "necessary" and in child's "best interest"]; and *In re Marriage of Rosson* (1986) 178 Cal.App.3d 1094, 1102, 224 Cal.Rptr. 250 [custodial parent seeking to relocate bears "the burden of showing a change sufficient to warrant modification"].)

reduced cost of living and better schools. According to the Bruch Brief, parents should be able to move first, and then seek work later – even if the intended job search will be in the field of parapsychology.[156]

Although *Burgess* properly overruled cases that held that moves must be rejected if the custodial parent could not show they were necessary, those cases were also not focusing on the correct issue – the child's best interests. However, if custodial parents can offer no substantial reason for the move, perhaps it would appropriate to deny them the presumption that the move is in their children's best interests. In that case, the burden should be on the custodial parent to show that the move is in the child's best interests.

Under this analysis, the burden would be on the parent objecting to the move to show that it will "prejudice the rights or welfare of the child." Where the moving parent has no substantial reason justifying the move, or has made no effort to satisfy the move's purpose without moving, then the burden would shift to the moving parent to show that the move will not prejudice the rights or welfare of the child. In connection with this assessment, weight should be given to social science research that suggests that maintaining a relationship with both parents is beneficial to the child and that doing so at distances often precludes regular interaction.

Regardless of whom the burden is placed, the touchstone should be on the child's best interests, not a women's rights agenda item.

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[156] Bruch Brief, p. 51; see also, pp. 50; 18, n. 52; *Cassady v. Signorelli, supra,* 49 Cal.App. 4th at p. 60,.

I. Conditional change of custody orders must be permitted.

If a court concludes that a proposed move is not in the child's best interests, then it should follow this analysis: Since it cannot order the custodial parent not to move, it must either immediately change custody or make a conditional change of custody order. An immediate change of custody is ordinarily not made from one satisfactory household to another, absent a change of circumstances. Until the mother actually moves, there is no change of circumstances. Thus, the only alternative is a conditional change of custody order.

If the objecting parent desires and is able to provide a good home for the child, then a conditional change of custody order may be in the child's best interests, even though no change of custody would be ordered absent the move. Such an order would be appropriate if the best result for the child would be to maintain the current custodial arrangement at the current location but changing custody in the event of a move would be at least as good as for the child as not changing it. Under these circumstances, the conditional change of custody order is appropriate because it may help bring about the result that is best for the child (no move) and will, in any event, yield a result that is no worse for the child than maintaining the current physical custodian. Thus, this is the approach to use if the child's best interests rather than parental rights are the court's focus. It permits the court to weigh in, albeit moderately, in favor of having separated parents, like the parents in an intact family, consider the children's interests as well as their own in deciding whether to move.

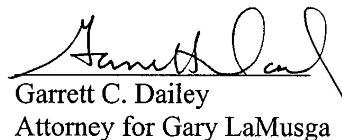
The conditional change of custody order would not be appropriate where the child would be better off moving with the custodial parent, rather than remaining in the same city with other parent, or where the current primary custodian has compelling reasons so that the conditional order is unlikely to affect the parent's decision and the child would be no worse off moving with that parent than changing custody.

Burgess' disapproval of these orders is the one holding that Father challenges.

J. Conclusion. The weighty issue before this Court boils down to one key question: whose rights and welfare are paramount? Although the trial court must consider the custodial parent's presumptive right to change the residence of the child, should that presumption trump the rights or welfare of the child? When, as here, a trial judge has heard the evidence from both sides and made a carefully crafted, individualized order believed to be in the best interests of the children, should it be reversed because it interfered with the wishes of one of the parents? Amici believe that it should. Father hopes that this Court does not agree.

Dated: July 25, 2003

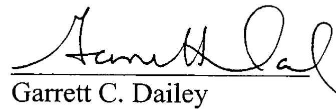
Respectfully submitted,



Garrett C. Dailey
Attorney for 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 Brief to Amici contains 15,476 words, as computed by the Microsoft Word 2000 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 July 25, 2003, I served a copy of the following document(s): **RESPONDENT'S REPLY TO AMICI BRIEF SUBMITTED BY AMICA HILL, AMICA BLUMBERG, AMIA BRUCH, ET AL**

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 July 25, 2003, at Oakland, California.

BRENDA K. BUTLER