IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

In Re the Marriage of	)	Supreme Court
	)	Case No. S107355
SUSAN POSTON NAVARRO,	)	
	)	Court of Appeal
Appellant,	)	Case No. A096012
	)	
and	)	Contra Costa County
	)	Superior Court
GARY LaMUSGA,	)	Case No. D95-01136
	)	
Respondent.	)	

Appeal From the Unpublished Decision of the Court of Appeal, First Appellate District, Division 5, Reversing the Order of the Superior Court of the State of California, Honorable Terence L. Bruiniers, Judge Presiding

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APPLICATION OF MARGARET A. GANNON, CHERYL SENA, CAROLE CULLUM, JOANNE SCHULMAN, DEBORAH APPEL, PATRICIA WAGNER, LESLIE KNIGHT, GLORIA SANDOVAL, STAND! AGAINST DOMESTIC VIOLENCE, ROY F. MALAHOWSKI, BARBARA HART, LYNNE ARROWSMITH, NINA BALSAM, ANDREA FARNEY, DIANNE POST, ANNE THORKELSON FOR LEAVE TO FILE AMICI CURIAE BRIEF; BRIEF OF AMICI CURIAE IN SUPPORT OF SUSAN POSTON NAVARRO

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE

BRIEF IN SUPPORT OF APPELLANT SUSAN POSTON NAVARRO

TO THE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Amici curiae respectfully request permission to file the attached brief in support of Appellant Susan Poston Navarro ("Navarro") in the above-entitled matter. Amici are attorneys and advocates who work for legal aid and/or provide pro bono representation for indigent clients in family law cases. The individual statements of interests of Amici are contained in the Appendix of the attached brief. Amici statements of interest explain their experiences in representing poor people in relocation cases, including before and after Burgess, see, e.g., Statement of Interest of Margaret A. Gannon (Appendix p. A-1).

Amici have a compelling interest in this case because Respondent is requesting this court to revisit and essentially overturn its decision in In re Marriage of Burgess (1996) 13 Cal.4th 25, which will have devastating consequences and a disproportionate negative effect on poor parents and their children. The attached brief addresses the consequences to poor (legal aid and pro bono) clients were this Court to weakening the custodial parents' statutory presumptive right to relocate.

Amici believe that it is critical for the Court to consider the additional information, data, "real life" cases provided in the attached brief. The brief illustrates the

negative effects on poor families should this Court overrule or weaken the Burgess decision interpreting Family Code section 7501.

Every year legal aid groups in California provide free help to thousands of low-income family law litigants. More importantly, they turn away thousands more because of extremely limited resources. California lags far behind other states in funding legal services for the poor (see attached brief, fn 3), leaving many, if not most, poor family law litigants in pro per or relying upon pro bono representation.

California's child poverty rate has increased by more than 10 percent since 1979, and most of these children live in households headed by single mothers. These women cannot afford private attorneys; they are unlikely to obtain legal aid representation; and they cannot afford the costs associated with complicated or prolonged custody litigation, including evaluations, expert witnesses, subpena and deposition costs, lost wages, babysitters.

These poor single mother households are the most likely to need to relocate to improve their children's situations, both economic and psychological. Because of the decline in California's economy and job market in the 1990s, it has become a place too expensive for many to remain. As discussed in the attached brief, poor people were over-represented among those moving out of California, newly-

divorced women move frequently and low-income women move more than high-income ones. Those who leave California, including poor single mothers, do so primarily to improve their economic situation and, in the case of domestic violence victims, to provide security and safety for their families.

As discussed in the attached brief and appendix, Amici who practiced family law before Burgess remember how little help we could provide when asked about move-away issues. Litigation was expensive and time-consuming and the ultimate decision was unpredictable. For poor custodial parents, the mere threat of litigation often resulted in abandonment of relocation plans, loss of job opportunities, and relegation to remaining on some form of public assistance.

Amici request that this Court address the following public policy issues raised by Respondent's request to undermine the presumptive right of custodial parents to relocate, to wit:

1. Weakening Burgess would create unfair barriers to mobility and opportunity for poor families;

2. Weakening or retreating from Burgess will increase the burden on poor single parents trying to improve their families' living standards; and

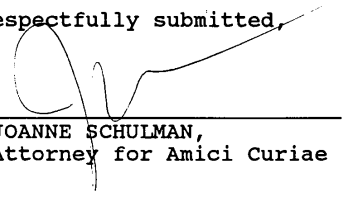
3. Shifting the burden back to the custodial parent poses great disruption to children's lives, and further drains the resources of the state (e.g., public assistance),

courts and legal services community - with little or no corresponding benefit to children's welfare.

Because resolution of these issues will have a statewide, if not national, impact on the rights and safety of poor families and children in California and a significant impact on the individuals that Amici serves, we respectfully request that the Court permit filing of the accompanying brief in support of Appellant Susan Poston Navarro.

Dated: April 14, 2003

Respectfully submitted,



JOANNE SCHULMAN,
Attorney for Amici Curiae

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I. INTRODUCTION

This brief addresses the devastating consequences to poor and legal aid clients in family law cases were this Court to overturn *In re Marriage of LaMusga*, 2002 Cal. App. Unpub. Lexis 1027 (May 10, 2002) or overturn or weaken *In re Marriage of Burgess* (1996) 13 Cal.4th 25.

A. Poor Families Suffer Disproportionately in Litigation.

Every year legal aid groups in California provide free help to thousands of low-income family law litigants. They turn away thousands more.[1] Because of extremely limited resources, many legal aid groups only help family law clients who are domestic violence victims and many others help with preparation of clients' legal pleadings only; after that, the clients are on their own. The ratio of poor people to legal aid attorneys in California is 10,000 to 1, and most legal aid attorneys do not practice family law.[2] California lags far behind other states in funding legal services for the poor.[3] Most legal aid clients make less then $1885 per month for a family

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[1] Legal Aid Foundation of Los Angeles (LAFLA) reports that it in 2002 it helped over 5540 people with family law problems and that thousands more were turned away. Telephone interview with Jane Preece, LAFLA Directing Attorney for Family Law (March 22, 2003).

[2] LAFLA reported that only nine of its approximately 54 attorneys provide family law services, and several of them do so only part-time. Id. Neighborhood Legal Services (NLS, based in the San Fernando Valley), reported that only four of approximately 40 attorneys practice family law. Telephone interview with Harvey Silberman, NLS family law attorney (March 25, 2003).

[3] California Commission on Access to Justice, The Path to Equal Justice: A Five-Year Status Report on Access to Justice in California, (October 2002).

of four.[4] All legal aid clients are low-income, and most live well below the poverty line. Poor families are not "rare" in California. Over the last 20 years, the number of low income children has increased by almost 1.6 million, from 2.77 to 4.36 million children.[5] California's child poverty rate has increased by more than 10 percent since 1979.

Children living in households headed by single mothers comprise the largest group of those living in poverty.[6]

Given the high poverty rates for California children, low-income litigants are common in family law court. These parents cannot afford private attorneys. Indeed, most people in family law court cannot or do not hire counsel. In Los Angeles County, for example, in 85% of family law cases at least one party was unrepresented.[7] Other counties also report high rates of unrepresented litigants. Not only can they not afford counsel, most

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[4] Families of four with higher incomes must have special expenses or circumstances. Regulations of the Legal Services Corporation 45 C.F.R. Part 1611.4 –1611.5 (2002)

[5] "The Changing Face of Child Poverty in California" (August 2002) by The National Center for Children in Poverty (Report available at www.nccp.org). A "low-income child or family" is defined as living in a household with annual income below 200 percent of the official poverty line ($35,048 in 2000 for a family of four). In looking at the larger population of low-income families, it also includes demographic analyses of poor children and families using the poverty line ($17,524 in 2000 for a family of four)."

[6] *Id.* n.5. The report found that 37% of female-headed households live in poverty.

[7] *See www.courtinfo.ca.gov/programs/cfcc/programs/description/flic.htm*

legal aid clients cannot afford the other costs of custody litigation: filing fees, custody evaluators, expert witnesses, subpoena and deposition costs, babysitters, parking, transportation and lost wages.

Moreover, because California changed during the 1990s from a "land of opportunity" to a place too expensive to live for many, "as many as two million more people left California to live in other states than came to California from those states."[8] Poor people were over-represented among those moving out of California. Those who leave California are more likely than those who stay (or come) to be unemployed, poorly educated, living in poverty and receiving public assistance.[9] Newly divorced women move very frequently, and low-income women move more then high-income ones.[10]

Thus, the people who leave California -- including poor single mothers -- do so primarily to improve their economic situation.[11] For those mothers, another reason to leave California is to have the support of extended

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[8] Hans P. Johnson, Movin'Out: Domestic Migration to and from California in the 1990's, Public Policy Institute of California (August 2000), *at* http://www.ppic.org. *See also* Hans P. Johnson, A State of Diversity, Demographic Trends in C··1ifornia's Regions, Public Policy Institute of California (May 2002), at http://www.ppic.org.

[9]. *Id.*.

[10] J. Mavis Hetherington and John Kelly, For Better or Worse, 88 (2002). "On average, [study participant] divorced women moved four times in the first six years, but poor women moved seven times. In the best of circumstances residential instability is distressing and disorientating; but among poor women, it often produced a dangerous ripple effect. In search of cheaper rents, divorced women would move their families in to progressively poorer neighborhoods with higher rates of crime and unemployment, with more inadequate day care facilities and schools..." *Id.*

[11] *Supra* note 8.

family members, particularly when the mothers cannot afford childcare and receive little or no child support.[12] After separation, many women -- especially battered women -- are left far from their families in states and cities chosen by their husbands. They need to move to get the help of extended family members.

Amici who practiced family law before *Burgess* was decided remember how little help we could provide when asked about the move-away issue. Regardless of whether the questioner wanted to move or to prevent a move, the advice was essentially the same: that litigation could be expensive and time-consuming, and that the ultimate decision was unpredictable. The only certainty was that everyone would lose, as the litigation would further impoverish the families and create extreme animosity between parents.

Amicus curiae believe that if the Court were to undermine *Burgess'* interpretation of Family Code § 7501 in any way, the result will be a de facto denial of the right to move for poor people. They will not be able to obtain adequate legal help and cannot pay the costs of litigation. This reality will not be lost on either parent; under pre-Burgess standards the mere threat

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[12] California has a low rate of collecting child support compared to the nation. In fiscal year 2000, the average monthly collection in California cases with court orders was $122.50, while the national monthly average was $139. Policy Studies, Inc., Performance Analysis of the Los Angeles County Child Support Program, Final Report chapter 2 page 12, Exhibit 2-5 (February 6, 2002)(unpublished report on file with author)(giving nformation for annual collections).

of the litigation coerced many custodial parents to abandon their plans to move.

II. WEAKENING *BURGESS* WOULD CREATE UNFAIR BARRIERS TO MOBILITY AND OPPORTUNITY FOR POOR FAMILIES

Family Code § 7501 and *Burgess* stand for the proposition that a poor custodial parent who finds it necessary to move to improve her economic or other circumstances must be allowed to do so, unless the noncustodial parent can show either detriment to the children or bad motive on the part of the custodial parent. Petitioner appears to be arguing that no move should be allowed unless the custodial parent shows *both* that a move to the proposed location is in the children's best interests *and* that the children should remain with the custodial parent.

Because the success or failure of a proposed move cannot easily be measured in advance of the move, petitioner's proposed standard would be extremely difficult to meet. Even represented litigants who can afford to locate and transport witnesses, prepare evidence of improved standard of living, and convincingly demonstrate "better interests" of the child will result from the move will find the burden daunting. Low-income litigants will find it nearly impossible. Unlike many higher income people, low-income parents rarely have the advantage of a pre-move job offer in the desired location. Instead, the location may be preferred because there is a relative who will let them stay rent-free in their house or help with

babysitting. These advantages can be extremely valuable to a single poor parent, but may not appear to a judge as important as visitation rights.

Not only do low-income litigants have an uphill battle obtaining evidence to support the conclusion that a move is in their children's best interests (as opposed to their own interests as it may affect the children), the difficulty in actually navigating the court system can be insurmountable for some. Many think they merely need to get a court date and the court will gather the necessary evidence, or tell them what evidence to bring. If they understand they need properly prepared legal pleadings, free legal help is unavailable for them in many counties, unless they are a domestic violence victim. Working low-income people have little job flexibility and cannot afford the risk of losing a job for court appearances or to seek legal help. "Pro per packets" and information centers are unhelpful to low income people, many of whom will not fully understand these materials.[13] Poor litigants who don't speak English face additional burdens, including difficulties finding and paying for an interpreter in court.[14]

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13 U.S. Department of Education, National Adult Literacy Survey, at http://nces.ed.gov/pubs99 (1999) The study found that 45% of adults score at the bottom two out of five levels in literacy (i.e. having low or very low levels). Twenty-one percent of adults scored at the lowest levels (i.e. very low level of literacy). Poverty was closely related to poor education levels. 49% of children with parents who did not complete high school live in poverty. *See supra* n.5.

14 Fourteen percent of California adults ages 18-64 said they speak English "not well" or "not at all." Census bureau data available at *http://factfinder.census.gov*. Based on Evidence Code § 755, many courts provide free interpreters only at domestic violence hearings.

If a parent surmounts these preliminary obstacles and gets her papers filed, he or she will then face a long delay before a court hearing, usually at least five weeks or more. On that first court day -- if custody issues are seriously disputed -- many judges will enter only temporary orders and a custody evaluation. Custody evaluations provided by the court take a minimum of four months to complete, and usually take much longer.

Although court-provided evaluations are often competent and sufficient to resolve basic custody disputes, they were rarely sufficient to meet the legal needs of pre-*Burgess* litigants in move-away cases. These court evaluations rarely delved into the speculative area of what area of the country would be better for the children. This left low-income litigants, usually acting in *propria persona,* to try to convince the court why the move would be better for their children. Again, the poorer the litigant, the more difficult it was for them to present critical evidence, such as showing that housing was cheaper, the schools were better, or that employers were hiring. Inarticulate explanations and justifications for the move often sounded extremely speculative to judges. In fact, the alleged advantages of the move—of any move—are often speculative and uncertain. But for low-income people, the move may provide a real opportunity to escape poverty. Given the overwhelming evidence of the harmful impact poverty has on children, any effort by a custodial parent to improve circumstances should be lauded, not frustrated.

The reality is that before *Burgess,* most custodial parents seeking to move relied on inadequate declarations, the opinions of an evaluator, and no independent evidence.[15] This left the decision to an overworked judge who was required to rule without adequate evidence or guidelines.

A. *Burgess* Has Helped Reduce Litigation for Poor People.

Before *Burgess,* the outcome of all move-away litigation was "up for grabs." This standard obviously encouraged litigation, especially by non-custodial parents who had no legitimate claims for primary physical custody and little involvement with their children.

An example of how non-custodial parents would fight to prevent moves, despite their minimal involvement with their children, was seen in the Paluch divorce tried by a legal aid attorney in 1993.[16] Zofia Paluch, who spoke only Polish, came from Poland with her two children to reunite with her husband. He had moved to the United States seven years earlier, and had only returned once to visit his children. Their son first met his father when he was seven years old, shortly before coming to the United States. Seven weeks after arriving from Poland, the parties separated, and Zofia was

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[15] In Los Angeles County most evaluations are the so-called "fast track" evaluations where the evaluators meets the parties in the morning, and gives his or her opinion to the court that afternoon. The current wait to see the evaluator is four months. Many counties offer only offer the standard evaluations, which take a minimum of six months to complete.

[16] *In re Paluch*, Case No. BD 112043 (Los Angeles Superior Court, April 27, 1993).

destitute. She filed for support and dissolution. The court ordered visitation, but the thirteen-year-old girl soon refused to visit her father. The boy continued to have regular but short visits with his father. He rarely spent the night. Mother and daughter were miserable in Los Angeles. There found no Polish community in Los Angeles, and they could not communicate with their Spanish- and English- speaking neighbors. They had no friends, no family and no resources. Shortly after filing for dissolution, Mother decided to move to Chicago where there is a large Polish-speaking population and where she had relatives. She already had sole custody so she moved to lift the restraining order preventing the children's removal from California.[17] At the hearing the court lifted the automatic stay only for the girl, reasoning that since she was refusing to visit her father the move-away could not damage her relationship with him. Ironically, Mr. LaMusga is asking this Court to require his children to remain in California because of the difficulties in his relationship with them!

Mother, who could not leave her young son behind, declined to send the thirteen-year-old girl to fend for herself in Chicago. Most of the two-day trial was devoted to mother's move-away request. Although the father, who barely knew his children, had no credible claim to custody, he hired a lawyer and vigorously litigated the move-away request, claiming it would interfere with his budding relationship with his son.

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[17] Family Code § 2040(a)(1).

Zofia's counsel had to do a great deal of research to develop evidence showing the advantages of a move to Chicago. The girl testified about her desires to move to Chicago, her reasons for not wanting to visit her father, and the abysmal schooling she was receiving in a school where most of the children spoke Spanish.[18] Requiring the daughter to testify could not have been good for her or for her relationship with her father, but it was necessary if mother was to meet her heavy burden of showing that a move to Chicago would be better for the family.

The *Paluch* case shows how easy it is for noncustodial parents to use litigation to control and burden the lives of ex-spouses and their children. Zofia's ex-husband had freely chosen to leave his family and move from Poland to the United States. He stayed away from them for seven years. Yet the heavy burden and unclear standards of pre-*Burgess* case law enabled him to litigate to stop his ex from doing what he had done to her years before, i.e, to stop her from moving to improve her circumstances. One wonders if he saw the contradiction in forcing his ex-wife to live in his neighborhood so he could attempt to establish a relationship with a son he had left seven years earlier. Clearly the children and their mother, who had been the exclusive and only caregiver for the previous seven years, would have fared much better in a community where they could communicate with others and ease their transition into American life. And Mr. Paluch could have visited in

[18] Telephone interview with Jane Preece, *supra*, note 1.

Chicago or brought his son to Los Angeles for visits far more readily than when his son lived in Poland.

B. Retreat from *Burgess* Will Increase the Burden On Poor Single Parents Trying to Improve Their Living Standards.

Pre-*Burgess*, few custodial parents could relocate without some type of custody evaluation and/or lengthy litigation. This was true even if the party seeking to move had already been given primary custody in a final judgment. Contested move-away cases generally took a minimum of five months to resolve (usually longer) even for a parent already awarded custody.[19]

An example of the lengthy delays commonly seen in move-away cases is the 1994 trial in *In re Marriage of Peltz* (L.A. Superior Court filed June 18, 1993). Sally Peltz, represented by legal aid, sought to move to Tennessee with the parties' four minor children, including a seventeen year-old son at boarding school out of state, and a fourteen year-old daughter estranged from her father.

Mother wanted to move to Tennessee to be near her sister and parents,; because housing was cheaper; and because she was qualified to be a court reporter in Tennessee, but not in California, which would enable her to get off welfare. From the time Sally filed her motion to lift the restraining order

[19] A minimum of five weeks to get a hearing and an additional minimum of four months for an evaluation.

until the conclusion of the trial took eight months. .[20] The trial consisted of eight days of testimony spread over six months. This is common practice in family courts in urban areas.

The eight days of testimony in Sally's divorce trial was required in order to meet the difficult standards imposed by pre-*Burgess* cases. Sally needed to show the substantial advantages of a move to Tennessee and also show that the children would not be harmed by seeing their father less often. This led to testimony concerning father's troubled relationship with his older children, testimony by the 14-year-old daughter, the children's therapist, and other witnesses. This type of hurtful testimony is unnecessary since *Burgess* was decided.

During the trial Sally and her three youngest children continued to survive on welfare while crammed into a one-bedroom apartment. After the trial Sally was able to move to Tennessee, get a job, and get off welfare. Sally and her children were trapped on welfare for six months longer then necessary because the court had no time to hear her case.

III. UNDERMINING *BURGESS* WILL FURTHER DRAIN THE RESOURCES OF THE PARTIES, THE COURTS AND LEGAL SERVICES WITH NO CORRESPONDING BENEFIT TO CHILDREN'S WELFARE

Before *Burgess*, move-away cases were the most complicated, time-consuming and expensive cases handled by legal aid and pro bono family

[20] The trial started on June 9, 1994 and was not completed until December 16, 1994. *Id.*

law attorneys. As evidenced by the Peltz and Paluch case discussed above, many of these cases were frivolous, as the moves were clearly good faith and sensible attempts by the custodial parents to improve the children's living situations. Since *Burgess*, amici legal aid and pro bono advocates note that they have litigated far fewer of these frivolous cases. And when they are litigated, the litigation is less expensive or complicated, since courts do not feel compelled to order custody evaluations unless they are truly warranted. Amici California advocates see the benefits in *Burgess*, in that they can better advise custodial parents as to the likelihood that a proposed move will be allowed and regarding advice to the non-custodial parent as to what information might block a move. With fewer frivolous move-away cases, they can provide more family law services to more clients. Burgess also ended a substantial demand on the time and resources of courts and custody evaluators devoted to unnecessary evaluations and frivolous litigation.

The uncertainly inspired by pre-*Burgess* case law harmed children by increasing the conflict between their parents. It encouraged the non-custodial parent to litigate the move rather than to work toward constructive ways to adjust to the new situation and a new visitation schedule. Pre-*Burgess* experiences convinced amici that the delays, unnecessary custody evaluations, expense and conflict, were more harmful to the children then were any hardships created by a move.

Pre-*Burgess* move-away litigation was extremely costly, enriching only the attorneys and experts, and unduly burdening the courts with lengthy litigation. It also put judges in the unseemly position of micromanaging families' decisions. Courts' and families' resources are sorely needed elsewhere, especially in the current climate of severe budget deficit.

If *Burgess* is to be modified with new standards, the Court must consider the public benefit conferred with the *Burgess* decision, including reduced costs to families, reduced litigation, more new opportunities for children and their custodians, and reduced family conflict. *Burgess* protects children by allowing their low-income single mothers, a large and disproportionately impoverished group in our society, to pursue better living conditions and to obtain the needed support of family members. For all these reasons, amici believes that the *Burgess* decision has benefited children and poor parents.

A. Shifting the Burden Back to the Custodial Parent Poses Greater Disruption in Children's Lives and Greater Danger to Domestic Violence Victims.

Upon the break up of a relationship, many low-income women take their children and return to their families. This is especially true for domestic violence victims who have often been removed and isolated from their families, a common aspect of the violence. When no action has been filed, they are breaking no law or order by doing so. Such women would find it difficult to imagine a judge could force them to live in the state

chosen by the batterer or ex-spouse. Amici find that we hear about the case only after the left-behind parent sues in hopes of forcing the family to return. Some of the cases are referred only after the left-behind parent has obtained an ex parte custody order and/or taken the child from the other parent's new home in another state.

Before the *Burgess* decision, these cases put judges in an awkward position. Judges knew that by allowing the child to remain in the other state pending the resolution of the custody dispute, the parent had an advantage in being able to live in the desired location. This seemed unfair to the other parent, and to those parents who did not move until the resolution of litigation. Pre-Burgess, it was common for the court to force the parent to move back to California with the children pending the completion of the case. This meant children were moved back and forth, and sometimes rendered homeless, by the court's desire to keep an even playing field in the litigation. It also meant that domestic violence victims were forced to return to proximity to their batterers. Frequently, battered women will move back in with their abusers only because they have no place else to go.

This trend was exemplified by *Marriage of Poulin.*[21] Mother alleged her husband was abusive to her and their two daughters, ages 2 and 3. She took the girls and moved to Buffalo, New York, where she had grown up, graduated from college and had friends and relatives. Mother and girls

[21] Case No. BD043229 (L.A. Superior Court, filed 7/19/91).

stayed with a college friend while Mother looked for an apartment. Father had consented to Mother and girls going to New York, but later claimed he only agreed to a vacation. Mother obtained welfare in Buffalo, but just before six months of residency was completed (required to file for custody in New York), Father filed for custody in California .

Father claimed Mother was hiding the children, and Mother claimed that Father should have only supervised visits with the girls. The court ordered Mother to bring the girls back to California for a quick evaluation, which she did. Because she was homeless and broke, mother and girls stayed at a battered women's shelter so the evaluation could take place, and then returned to Buffalo. After the evaluation, Father was given only short monitored visitation. Later, rather then sending Father to Buffalo for additional evaluations, the court ordered Mother to return to California with the girls so that a second, more extensive evaluation could be done. Thus, after living nearly a year in Buffalo, mother and children were forced to abandon their home. Despite evidence of abuse, the court imposed on Mother the burden of driving cross-country with two little girls in a small old car stuffed with their belongings. After she arrived, Husband stopped paying support, forcing Mother back on welfare. The second evaluation had results much like the first. Ultimately, Mother could not afford to move again, and was exhausted by the litigation. Last heard from, Mother and the

girls were living on welfare in a trailer park on the outskirts of Los Angeles County, and Father had only minimal visitation rights.

Burgess required the courts to question the assumption that parents who moved should bear a greater burden than those who stayed. Since *Burgess* was decided judges' tendency to require custodial parents to return to California has been curtailed; now, move-away cases are treated like all other custody cases. Thus, domestic violence victims are better protected because they are not forced to live in the same geographical area as their batterer. It also protects children from moving repeatedly from place to place to satisfy the court's urge to be "fair" to the left-behind parent.

B. Respondent's Proposed Standards Are Unworkable and Against Public Policy

Respondent suggests that a higher standard should be applied to custodial parents who will not move without their children than to those who would move either way.[22] This is untenable. First, amici family law attorneys *never* see a case in which a parent, especially a battered woman, is willing to abandon the children to make a move. Second, custodial parents may try to have the lower standard applied to them by claiming insincerely they intend to move with or without their children. Thus this test would put the court in the unseemly position of "playing chicken" with the custodial parent.

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[22] Respondent's Reply Brief, 24.

The *Burgess* Court held that "[t]he Family Code provides no ground for permitting the trial court to test parental attachments or to risk detriment to the 'best interest' of the minor children" in this fashion. . . . Parents should not "be confronted with Solomonic choices over custody of minor children." (*Marriage of Burgess, supra*, 13 Cal.4th at 36, fn. 7; *see also In re Marriage of Bryant* (2001) 91 Cal.App.4th 789, 795-796.

For the same reasons, this Court should not adopt any standards that place such an impossible burden on trial judges. It will not advance the interests of children, and authorizes coercion rather than respect for the custodial parent and her or his right to freedoms comparable to those enjoyed by non-custodial parents—the right to choose where she or he will live and work, the opportunity to create new relationships, the right to give and receive assistance from an extended family, and the opportunity to pursue the right to happiness.

Respondent also appears to propose that a custodial parent should only be able to move when "the children have a strong relationship with the noncustodial parent."[23] This idea – that if the left-behind parent's relationship with the children is difficult or tenuous, the children must be ordered to stay nearby to work it out – directly contradicts one of the primary motives for moving. For battered families in particular, moving is necessary to end disruptive and violent interactions and try to stop the cycle

[23] Respondent's Reply Brief, page 19.

of violence. Moreover, the idea is illogical. Under this standard neither Sally Peltz nor Zofia Paluch would have been allowed to move since neither of their teenage daughters would visit their fathers. It is very odd to penalize the custodial parent, and reward the non-custodial parent because the children have a poor relationship with the non-custodial parent. Such a rule would in effect give greater weight to the estranged or hostile parent's interests than to the children's. While it is not inconceivable that this rule could promote cooperation between parents in some rare cases, it is far more likely to promote continuing conflict and stress. As a policy, it would also discourage noncustodial parents from developing better relationships with their children, since doing so might enable an ex-spouse to move more easily.

Respondent would also have this Court condone the tendency of trial courts to punish custodial parents for "bad" behavior by not allowing her to move. This was soundly rejected by this Court in *Burgess,* and should be more soundly rejected again today. It is well-established that when move-away decisions might turn on proof of the other parent's "bad" conduct, the parties will be compelled to litigate each missed dental appointment, each child's complaint about the other parent, and each instance of negative speech. Indeed, even the very fact that the custodial parent chose to litigate the right to move rather than capitulate to the left-behind parent's preferences, could be used as evidence of "bad" behavior. Respondent

LaMusga in fact used this strategy: he complained that Ms. Navarro "made him" go to court each time he wanted to change his visitation.

In *Burgess,* and under Family Code § 7501, there is already an exception to the presumptive right of a custodial parent to right to relocate. That exception permits the trial court to inquire as to whether a move "would prejudice the rights or welfare of the child," and permits the courts to insure that the move will not in fact be detrimental *to the children.*

No additional exceptions to Family Code § 7501 should be created. Respondent's proposed exception that would enable a court to deny a custodial parent's freedom to move where the noncustodial parent can assert a possibility of harm to his or her relationship with the children, then no separated family will ever be truly free to put the children's best interests ahead of all else.

CONCLUSION

Permitting noncustodial parents to prevent a custodial parent from moving on the grounds suggested by Respondent will substantially increase the costs, delays and uncertainty of litigation, and will likely deepen family conflict. It will place ever greater obstacles in the path of those poor single

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parents seeking to improve the standard of living for themselves and for their children, leaving more and more California children in poverty.

Families headed by single women are the poorest group of Californians. When in a crisis, the law should promote – not impede – their efforts to take advantage of whatever family support, job offers, cheaper housing, and better living standards that might be available elsewhere.

Dated: April 14, 2003

Respectfully Submitted,

LAW OFFICES OF JOANNE SCHULMAN

By: _____

Joanne Schulman
Attorney for Amicus Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14 of the California Rules of Court, I certify that the attached amici curiae brief is proportionally spaced, has a New Times Roman 13-point typeface and contains 5,509 words, including footnotes. Counsel relies on the word count of the computer program, Microsoft WORD 2000, used to prepare the brief.

Joanne Schulman,
Attorney for Amici Curiae

APPENDIX

APPENDIX:

STATEMENTS OF INTEREST OF AMICI CURIAE

MARGARET A. GANNON

Margaret A. Gannon is a California attorney with offices in Oakland, California. She was admitted to the bar in 1975 and has limited her practice to family law in Alameda and Contra Costa Counties since 1980. Her clients are primarily from the middle andy lower-middle class. At least half of her cases involve contested custody issues.

Before Burgess, Ms. Gannon had stopped representing custodial parents in move-away cases because she could not provide proper representation -- her clients could not afford the necessary attorney and expert fees.

In one case, for example, the custodial mother lost her motion to relocate with her infant child. The mother's older child (from a different father) had a life-threatening illness that the child's doctor said required a move to a different locale. The Alameda County trial court denied the mother's request to move with the infant; no change of custody was ordered unless the mother moved. The mother was torn between her breast-feeding infant and her very sick older child. She chose to move to save her child's life. At the airport as she was leaving with the older child, the father delivered the infant to her.

Since the Burgess decision was announced, Gannon has

resumed providing representation in move-away cases. She currently represents two custodial mothers; one is unemployed and the other is a preschool teacher's aide. Neither can afford to provide a decent lifestyle for her children in the Bay Area. Both want to relocate with their children to areas where they have better job offers and/or family to provide free childcare and other support systems (e.g., free housing). No experts are required, as both are custodial parents with primary physical custody and are moving to obtain jobs and better lives for their children. But for Burgess, neither of these clients could afford Margaret Gannon's services.

JOANNE SCHULMAN

Joanne Schulman is a California family law attorney who has practiced family law exclusively for 25 years. She was a legal aid attorney for more than 15 years, first as a staff attorney in the Family Law Unit of Alameda County Legal Aid Society, and then as the staff attorney at the National Center for Women in Family Law (a Legal Services Corporation "back up" center). At the National Center, Schulman provided litigation and research services to legal aid offices across the country on their family law cases. She wrote several books and articles on the impact of family law on poor people.

Before Burgess, most California legal aid offices could not adequately represent their poverty clients in move-away cases. Underfunded and overburdened legal aid offices did not have funds to retain experts, and could not permit one attorney to spend the enormous amount of time needed for a move-away case. Those custodial parents turned away from Legal Aid often resorted to self-help or violation of custody orders by moving out of the area for a job or to live with family.

Since Burgess, legal aid offices that still handle family law cases give priority to domestic violence custody cases, most of which involve relocations. In Schulman's experience as a legal aid attorney and in private practice, she has never seen a battered woman willing to move without her children.

CHERYL SENA AND CAROLE CULLUM, CULLUM AND SENA

Cheryl Sena and Carole Cullum are certified family law specialists with offices in San Francisco, California. Each has practiced law for more than 20 years. They represent family law litigants pro bono through the Volunteer Legal Services Program (VLSP) of the Bar Association of San Francisco. The firm handles 20-25 VLSP pro bono cases per year, and 95% involve child custody disputes. Many of the custody disputes are over relocation and/or interstate

custody issues (many of the interstate custody cases are in fact relocation cases).

Before Burgess, the firm could not afford the attorney time to represent custodial parents in relocation cases. Since Burgess, Cullum and Sena now accept these cases from VLSP on a pro bono basis. They currently are representing two VLSP clients in move-away custody cases.

DEBORAH APPEL

Deborah Appel is a California family law attorney licensed in 1998. She practices in San Mateo and Santa Clara counties. She is the director of the Center for Domestic Violence Prevention in Burlingame, California. Most of her clients are low-income; many are immigrants who speak little or no English and are unfamiliar with U.S. legal procedures. She has had several cases in which the clients are seeking to relocate. Even with outstanding facts, the move-away legal process has often been drawn out, with many continuances, resource-intensive, and draining for the clients and children who have had to continue living in dire circumstances while the case dragged on.

Lack of housing, medical care, child support, and inability of the client to find work, has attendant consequences for the children who remain exposed to poor living circumstances and uncertainty. Especially in areas where the cost of living is high, such as the Bay Area,

being forced to remain and provide their children with a decent standard of living is impossible for Ms. Appel's clients.

PATRICIA WAGNER

Patricia Wagner is a retired partner at Heller, Ehrman ("Of Counsel"). She has been licensed to practice law since 1974. She coordinates a pro bono program for domestic violence survivors for Heller Ehrman, which has offices in Palo Alto, Los Angeles, San Diego, San Francisco and Seattle. Although the pro bono program takes only cases that involve domestic violence and children, they still cannot represent more than one in five of the women that need help. Ms. Wagner supports the effort to maintain custodial parents right to relocate quickly. When there is domestic violence, it is often critical that the victim and the children be able to move away from the abuser and back to the supportive environment of family and friends.

LESLIE KNIGHT

Leslie Knight was admitted to the bar in 1993. She has practiced in Yolo County since 1999 as the supervising attorney for University of California, Davis, Family Protection Clinic. The Clinic provides family law services to low income clients. The LaMusga case is of crucial importance to the Clinic and its clients. Changing the

relocation standard articulated in Burgess to make it more difficult for custodial parents to relocate will create insurmountable burdens for most poor domestic violence victims seeking to escape abusive situations. Service providers such as the Clinic will be forced to expend already scarce resources litigating move-away cases, and therefore will have to cut back on the number of clients they can represent.

GLORIA SANDOVAL and STAND! AGAINST DOMESTIC VIOLENCE

Gloria Sandoval is the Executive Director of STAND!, an agency that has been in operation for 25 years providing services to families in Contra Costa County, California. STAND! provides both civil and criminal legal services for poor victims of domestic violence. Ms. Sandoval and STAND! oppose any retreat from the Burgess decision which has served as an important mechanism for poor battered women to obtain safety for themselves and their children.

ROY F. MALAHOWSKI

Roy Malahowski is a legal aid attorney for Greater Boston Legal Aid (GBLA). For the past several years, Mr. Malahowski's caseload has included a considerable amount of family law litigation in custody matters, domestic violence prevention and guardianships. As with most legal aid offices, GBLA's interest primarily pertains to the needs of

clients who seek assistance when there is domestic violence or the need to prevent child abuse or neglect. Mr. Malahowski joins amici in opposing Respondent's request for what appears to be a judicial creation of a presumption that a move-away is detrimental. For legal aid clients, relocations are generally moves to a better life and better opportunities.

BARBARA HART

Barbara Hart, licensed to practice law in Pennsylvania since 1975, was first a legal services attorney, then in private practice for 15 years, mostly representing people marginally above poverty, and many cases resulted in pro bono representation. Ms. Hart has served as Legal Director for the Pennsylvania Coalition Against Domestic Violence (PCADV) for the last 20 years. She supervises a staff of 40 attorneys and advocates who provide training, technical assistance and litigation support to attorneys, advocates, court personnel and the judiciary across the country.

The PCADV Legal Department has several divisions. One division oversees family and civil law litigation for battered women in Pennsylvania. This includes working with legal aid offices and 15 domestic violence programs' legal departments.

Another division has a grant from the U.S. Department of Justice (DOJ) to provide litigation support to civil

attorneys across the country who are grantees of the Legal Assistance to Victims program. A third division assists State Administrators in the 50 states, territories and the District of Columbia in strategic planning for distribution of formula grants from the DOJ to state and local organizations.

Another division works closely with the National Council of Juvenile and Family Court Judges, the National Center for State Courts, the American Bar Association, the National Legal Aid and Defender Association and several other national organizations concerned with the promotion of civil justice for poor people and battered women.

Another division collaborates with major law firms such as Piper-Rudnick, Mintz-Leven, Greenburg-Traurig and Arent Fox to establish the Appellate Advocacy Network to provide pro bono representation to battered women in impact litigation.

Overwhelmingly, requests from the field are for assistance in custody litigation, with a significant number involving relocation issues. Most battered women who contact PCADV offices are unrepresented or are no longer represented because they are without resources. PCADV Legal Department is sometimes able to provide enough assistance to counsel of record that they continue to represent the clients. Although PCADV does not promise to find pro bono attorneys, they have been successful in facilitating

representation in many instances because of its litigation support services and expertise.

Battered women who seek legal assistance are desperate to protect and nurture their children. Frequently, this means they need to relocate to achieve safe housing, community support, law enforcement protection, employment, education. Research conducted by or under the auspices of the DOJ revealed that battered women and their children are at elevated risk of retaliatory violence at and after separation. Thus, relocation is often critical to preventing this increasingly severe violence. Ms. Hart joins with other attorneys who represent poor people and battered women in support of the continuation of relocation standards that enable custodial parents to relocate quickly and cheaply to escape poverty and violence.

LYNNE ARROWSMITH

Lynne Arrowsmith is the staff attorney for the Indiana Coalition Against Domestic Violence (ICADV), a not-for-profit corporation that provides education, training system advocacy and technical assistance to domestic violence programs, other agencies and pro bono attorneys that provide legal representation to battered women. It is Ms. Arrowsmith's experience that low income battered women have very few resources and often are further victimized by the court system.

NINA BALSAM

Nina Balsam is an attorney licensed to practice law in Missouri. She practiced for 21 years at Legal Services of Easter Missouri, concentrating in the area of family law. Most of her legal aid clients were battered women. Ms. Balsam now is the attorney for the Missouri Coalition for Domestic Violence. Ms. Balsam is cognizant of the problems faced by battered women and/or poor custodial parents seeking to relocate. Many custodial parents, especially poor women and victims of domestic violence are denied the right to locate because they cannot afford to hire an attorney. It is vitally important that custodial parents be allowed to relocate so that they can find safety and security for themselves and their children.

ANDREA C. FARNEY

Andrea C. Farney is the Senior Counsel to the Civil Justice Center of the Battered Women's Justice Project in Pennsylvania. Prior to joining the Civil Justice Center in 1998, Ms. Farney practiced family law for seven years as a staff attorney for Souther Minnesota Regional Legal Services (SMRLS) in Winona, Minnesota. Ms. Farney is a member of the Minnesota State Bar Family Law Section, the American Bar Association and the Winona County, MN Bar Association.

Ms. Farney's representation of legal aid clients was primarily in contested family law cases, most involving

domestic violence. Ms. Farney joins amici because custody relocation law critically affects the safety of poor and battered women and their children. Legal standards and rules for relocation that promote litigation give batterers free reign to block moves out of state - and the law becomes another terrorizing tool. Further, relocation standards that require ambitious proof and evidence disadvantage low-income litigants who lack accessible and affordable representation.

DIANNE POST

Dianne Post is licensed to practice law in Arizona and Wisconsin, since 11980 and 1979 respectively. She currently practices in Phoenix, Arizona. She was a staff attorney for five years with Community Legal Services; she now works for the Arizona Coalition Against Domestic Violence. Ms. Post has represented battered women and molested children in divorce, contested custody, and dependency cases since 1980. Ms. Post joins amici because of the importance of this case to domestic violence and child abuse victims whose lives are literally in danger if they cannot relocate to safety. Arizona is second in the nation for men murdering women, and part of the problem is that the abusers have total access to their victims - the abusers know where their victims live, often in towns and neighborhoods chosen by the abusers.

ANNE E. THORKELSON

Anne E. Thorkelson is licensed to practice law in Washington D.C., Massachusetts and California. She is currently a family law appellate attorney and a Certified Mediator for the First District of the Court of Appeal. Ms. Thorkelson formerly was a legal aid attorney and now is a sole practitioner with offices in San Francisco. She does pro bono representation in family law cases at the trial and appellate levels. Prior to Burgess, she could not take any pro bono relocation cases because, as a sole practitioner, she could not afford the time and financial costs required for these resource-intensive cases. Since Burgess, she now accepts pro bono relocation cases, mostly for mediation. In her experience, these relocation cases are good cases for mediation rather than litigation because of the Burgess decision.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco. I am over the age of 18 and not a party to the within action; my business address is 1390 Market St. #818, San Francisco, California 94102.

On April 14, 2003, I served the foregoing document described as **APPLICATION OF MARGARET A. GANNON, CHERYL SENA, CAROLE CULLUM, JOANNE SCHULMAN, DEBORAH APPEL, PATRICIA WAGNER, LESLIE KNIGHT, GLORIA SANDOVAL, STAND! AGAINST DOMESTIC VIOLENCE, ROY F. MALAHOWSKI, BARBARA HART, LYNNE ARROWSMITH, NINA BALSAM, ANDREA FARNEY, DIANNE POST, ANNE THORKELSON FOR LEAVE TO FILE AMICI CURIAE BRIEF; BRIEF OF AMICI CURIAE IN SUPPORT OF SUSAN POSTON NAVARRO** on the parties in this action by placing a true copy thereof, enclosed in a sealed envelope addressed as follows:

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I caused such envelopes to be deposited in the mail at San Francisco, California with postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on April 13, 2003 at San Francisco, CA.

C Catalano

CHERYL CATALANO