

IN THE SUPREME COURT OF CALIFORNIA

In re the Marriage of  
SUSAN POSTON NAVARRO (L&MUSGA)  
Appellant,  
GARY L&MUSGA  
Respondent.  
Supreme Court  
Case No. S107355  
Court of Appeal  
Case No. A096012  
Contra Costa County  
Superior Court  
Case No. D95-01136

BRIEF OF AMICI CURIAE SUPPORTING AFFIRMANCE OF THE  
COURT OF APPEAL'S DECISION

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**PRELIMINARY STATEMENT**

Like religious wars that often conceal the warring parties' actual goals of territory and power, child custody litigation – which ostensibly seeks to

ascertain the child's "best interest" – often reflects multiple agendas that are

not primarily about the children. As Justice Chin has reminded us:

The "best interests" standard is "an elusive

guideline that belies rigid definition. Its purpose

is to maximize a child's opportunity to develop

into a stable, well-adjusted adult". . . . "The best

interest of the child is in being raised by the best

parent. But that is not a matter that can be

*ascertained by crude calculation.*"<sup>1</sup>

This case is not about parents' rights – mothers' or fathers'. Nor is it

about whether fathers are important; they unquestionably are. It is about how

to do the best we can for children when the original two-parent household is

gone and the parents are unable to cooperate in raising their children.

This Court's decision in *Marriage of Burgess*<sup>2</sup> speaks wisely to the

central question. It says that stable relationships between custodial parents

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<sup>1</sup> *In re Adoption of Matthew B.* (1991) 232 Cal.App.3d 1239, 1263, quoting in part *Jernstad v. McNelis* (1989) 210 Cal.App.3d 528, 553 (Blease, J.); emphasis added.

<sup>2</sup> (1996) 13 Cal.4th 25.

No social science research since *Burgess* undermines any of these pillars. Indeed, recent studies, like those in existence when *Burgess* was decided, strongly support them. Furthermore, the psychological pillars of *Burgess* strongly support the Court of Appeal's decision in the present case, which this Court should affirm.

following relocation.

- Support the child's relationship with the non-custodial parent
- Hear the child's voice, not simply those of warring parents.
- Protect primary custodial relationships, not geographical locations, in making moveaway decisions.

decisionmakers to:

*Burgess* is undergirded by three psychological pillars that direct custody know about children's experience during and after separation and divorce. From amici's point of view, *Burgess* is well-grounded in what we independent, productive, and happy adults.

Only in this way can the post-divorce family enable children to be Children's interests – what they need and reasonably want – are paramount of the *children* – not those of the parents or anyone else – otherwise require. and children need to be respected and protected unless the "rights or welfare"

## DISCUSSION

### I. BURGESS REMAINS SOUND IN LIGHT OF WHAT WE KNOW ABOUT CHILDREN AND DIVORCE.

Since Dr. Wallerstein's *amica curvae* brief in *Burgess*,<sup>3</sup> psychological research has further reinforced her conclusion that divorce has long-term residual effects on children.<sup>4</sup> Those effects – and the means by which they can be mitigated – ought to be the central focus of child custody decisionmaking. Regrettably, as in this case, the focus is too often on the “rights” of parents who seek a division of the child’s time that will preserve contact at their convenience.

#### A. Factors Affecting the Children of Divorce

Divorce is not, as social scientists originally thought, a brief crisis in a child’s life. Children are badly shaken by the breakup and they grieve the loss of their home and intact family.<sup>5</sup> As described by Hetherington, a prominent

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<sup>3</sup> Represented by present counsel, Dr. Wallerstein filed an *amica curvae* brief in *Burgess*. Dr. Wallerstein’s brief appears, in a slightly edited version, as Judith S. Wallerstein & Tony J. Tanke, To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce (1996) 30 FAM.L.Q. 305 (hereafter “Wallerstein & Tanke”).

<sup>4</sup> Wallerstein & Tanke, pp. 308-10.

<sup>5</sup> Paul R. Amato & Alan Booth, A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL (Harvard University Press, 1997); E. Mavis Hetherington & John Kelly, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED (Norton, 2002); Judith S. Wallerstein, Julia M. Lewis & Sandra Blakeslee, THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY (Hypertion, 2000).



<sup>6</sup> Hetherington & Kelly, *supra*, p. 10.

<sup>7</sup> Hetherington & Kelly, *supra*; Wallerstein *et al.*, *supra*.

<sup>8</sup> Janet R. Johnston & Vivienne Roseby, IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF CONFLICTED AND VIOLENT DIVORCE (Free Press, 1997) pp. 53-54; Wallerstein *et al.*, *supra*, pp. 264-66.

<sup>9</sup> Eleanor Maccoby, *Divorce and Custody: the Rights, Needs, and Obligations of Mother, Father, and Child*, published in THE INDIVIDUAL, THE FAMILY, AND SOCIAL GOOD: PERSONAL FULFILLMENT IN TIMES OF CHANGE (Gary Melton, ed.), 135-72 (University of Nebraska Press, 1995), pp. 164-165; Hetherington & Kelly, *supra*, p. 126.

The most critical of these factors is the psychological health and parenting practices of the custodial parent.<sup>9</sup> Hetherington makes this very clear

**1. Relationship with the Custodial Parent.**

Children vary in the degree to which they are able to cope with the crisis of their parent's divorce. Some children are vulnerable; others are more resilient.<sup>8</sup> However, key factors in addition to the child's psychological health can mitigate or exacerbate the psychological distress the child experiences.

relationships.<sup>7</sup>

in life, including the ability to establish meaningful and lasting adult which it is managed by adults, influences the child's response to future changes become untrustworthy?"<sup>6</sup> The child's post-divorce experience, and the way in inexplicable. How could a child feel safe in a world where suddenly adults had "To the boys and girls of my study, divorce seemed cataclysmic and divorce researcher, in her recent report of a 20 year study of over 900 children:

<sup>13</sup> The fear generated in a child of divorce at the prospect of being separated from her primary relationship, as well as the long-term positive

Press, 1996) p. 38.

<sup>12</sup> See Christy M. Buchanan, Eleanor E. Maccooby & Sanford M. Dornbusch, *ADOLESCENTS AFTER DIVORCE* (Harvard University

(Harvard University Press, 1992) p. 183.

<sup>11</sup> In their longitudinal study of 1,100 California families in which parents divorced, Maccooby and Minookin found that fathers were somewhat more likely to move following a divorce than mothers, although the moves that resulted in a change in children's residence or visitation were the same for mothers and fathers. Eleanor E. Maccooby & Robert H. Minookin, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY*

<sup>10</sup> Hetherington & Kelly, *supra*, p. 126.

relationship with the custodial parent provides a secure source of support.<sup>13</sup>

family's financial situation.<sup>12</sup> Throughout these life changes, the child's by either parent may require the parent to be absent more often or affect the away.<sup>11</sup> Close friends and family may experience illness or death. Job changes child has close relationships, including non-custodial parents, may move accompanying changes in school and friendships. Individuals with whom the or remarriage sometimes require a change in local residence, with stepparents and siblings. The financial constraints resulting from divorce same geographic area following divorce. The child may need to adjust to new Post-divorce stresses are present whether or not a child remains in the nuclear family life."<sup>10</sup>

mother – remained the first line of defense against the stresses of the post- when she reports that "the custodial parent – which in most cases meant a

## 2. The Non-Custodial Parent.

The psychological health and adjustment of the non-custodial parent –

most often the father – is likewise important. However, in contrast to the

strong and consistent research findings supporting the importance to children

of the custodial parent's parenting and psychological state, findings regarding

the effects of the non-custodial parent's contact with the child are

inconsistent.<sup>14</sup> In a major review of the literature, Amato and Gilbreth suggest

this lack of a clear connection between father's visitation and child's well

being may be due to an over-emphasis on the frequency of contact.<sup>15</sup> They

conclude: "[H]ow often fathers see their children is less important than what

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impact of a mother's relocation on the child and her relationship with both

parents is illustrated in a letter from Dr. Phyllis Preciado attached hereto as

Appendix A. Dr. Preciado is the mother in the first case study included in

Dr. Wallerstein's *amica* brief in *Burgess*. The mother in Case Study 2,

who does not wish to be identified, is now a professor at a major university.

Her son, who is currently a college student at an esteemed university,

maintained his visitation schedule of half of every summer and seven times

during the year throughout middle school and high school, in spite of a

distance of 1,500 miles between parents.

<sup>14</sup> Paul R. Amato & Joan G. Gilbreth, *Non Resident Fathers and*

*Children's Well Being: A Meta Analysis* (1999) 61 JOURNAL OF MARRIAGE

AND THE FAMILY 557, 563-70; Valerie King, *Nonresident Father*

*Involvement and Child Well-Being: Can Dads Make a Difference?* (1994)

15 JOURNAL OF FAMILY ISSUES, 78. See also McLanahan & Sandefur,

GROWING UP WITH A SINGLE PARENT (Harvard University Press, 1994), p.

98; Furstenberg & Cherlin, *DIVIDED FAMILIES: WHAT HAPPENS TO*

CHILDREN WHEN PARENTS PART? (Harvard University Press, 1991), p. 62;

Maccooby, *supra*, p. 163.

<sup>15</sup> Amato & Gilbreth, *supra*.

they do with their children. . . . Non-resident fathers who are not highly motivated to enact the parental role or who lack the skills to be effective parents are unlikely to benefit their children, even under conditions of regular visitation."<sup>16</sup> Thus, the time and frequency of the contact between father and child may be far less important than the quality of the relationship and the capacity of the father to provide parenting rather than entertainment time. As Hetherington and Kelly note: "Fathers do contribute vitally to the financial, social and emotional well-being of a child. But the contribution is not made through a man's sheer physical presence. . . . Qualities like stability and competency in children have to be nurtured carefully and patiently by active, engaged fathering."<sup>17</sup>

### 3. Post-Divorce Relationship Between Parents.

Although a cooperative co-parenting relationship in which both divorced parents communicate with each other and cooperate amicably regarding child-related issues is important to children, this ideal is seldom realized. Studies show that while most couples do not litigate their differences, they do continue to harbor hurt and angry feelings over the years.<sup>18</sup> Animosity

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<sup>16</sup> Amato & Gilbreth, *supra*, p. 569.

<sup>17</sup> Hetherington & Kelly, *supra*, p. 9.

<sup>18</sup> Maccoby & Mnookin, pp. 20-21.

<sup>20</sup> Maccooby & Mnookin, *supra*, pp. 234-36.

<sup>19</sup> As Hetherington and Kelly reported, "When a former spouse remarried, divorced men and women often re-experienced the same sense of loss, betrayal, anger and anxiety they had felt when they divorced." Hetherington & Kelly, *supra*, p. 58.

In a well-known longitudinal study of 1,124 families with 1,875 minor children in two Northern California counties, Maccooby and Mnookin reported that three to four years post-separation, 29% of the parents engaged in cooperative parenting with high communication and low discord; 26% were in high conflict with each other, 41% of the parents were disengaged and had little communication and 4% exhibited a mixed pattern of cooperation and discord.<sup>20</sup> The largest category of divorced couples avoided conflict by staying away from each other. In sum, only 29% of a relatively well-educated Northern California parent population cooperated as parents after their divorce. The investigators further reported that, over the three-year period, it was rare for conflicted parents to become cooperative. Parental feelings were the same whether sole or joint legal custody was involved. In another longitudinal study of 98 divorcing couples, parents clustered into five descriptive categories: perfect pals, cooperative colleagues, dissolved

and better able to litigate – is likely to use these events to renew a custody battle. A parent with repressed anger – especially one who is economically stronger may rekindle when parents remarry, move, or experience other life changes.<sup>19</sup>

duos, angry associates, and fiery foes. At the time of the divorce, about half the divorced couples were cooperative and half were conflictual. Five years after the divorce, many relationships changed. Some improved; some remained the same. 45% were cooperative and 55% were conflictual.<sup>21</sup> Dr. Phillip Stahl, who served as custody evaluator in this case, sums it up this way: "*Children of divorce rarely have parents who support each other.*"<sup>22</sup>

Children who are raised in a post-divorce family where the parents continue actively to distrust each other as parents, to dislike each other, or to be angry, are likely to suffer with psychological and learning problems.<sup>23</sup> Not surprisingly, the greater the contact between warring parents, the worse the outcome for their children. When divorced couples who do not like or respect each other are required to interact more closely because of the demands of court-ordered joint physical custody or increased visitation, aggressive acting out and other forms of misbehavior arise in their children.<sup>24</sup>

Increased contact between high-conflict parents may aggravate conflict,

<sup>21</sup> Constance R. Ahrons, *THE GOOD DIVORCE* (Harper Collins, 1998), pp. 51-59.

<sup>22</sup> Phillip M. Stahl, *PARENTING AFTER DIVORCE* (2000), p. 46; emphasis added.

<sup>23</sup> Janet R. Johnston, *Research Update: Children's Adjustment in Sole Custody Compared to Joint Custody Families and Principles for Custody Decision Making* (1995) 33 *FAMILY AND CONCILIATION COURT REVIEW* 415, 420-421.

<sup>24</sup> *Id.*

fear, and suffering in children.<sup>25</sup> When parents' relationships are strained, plans that minimize the number of transitions between parents may be a great advantage to the child, who is otherwise doomed to go back and forth between two warring adversaries.<sup>26</sup>

Amici are aware that a different position is suggested by Richard Warshak in an analysis of research data published in the *Family Law Quarterly*,<sup>27</sup> and summarized in a July 10, 2002 letter to this Court. Regrettably, Dr. Warshak's analysis both misstates Dr. Wallerstein's position and fails to recognize the true character of the custody cases coming before the courts, including *Burgess* and the present case.

Nothing in Dr. Wallerstein's writings denies the critical importance of fathers. To the contrary, both her work and the work of the other authors of this Amici Curiae Brief strongly support the importance of fathers to a child's development and sense of well-being. However, Warshak paints a picture of father-child relationships that is far from typical in contested relocation cases. While "day-to-day" involvement of the father may characterize some ideal cases of cooperation among divorced parents, it is unlikely to be present in those situations in which one parent has primary custody and the relationships

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<sup>25</sup> *Id.*

<sup>26</sup> Johnston, *supra*, p. 423.

<sup>27</sup> Richard A. Warshak, *Social Science and Children's Best Interests in Relocation Cases: Burgess Revisited* (2000) 34 FAMILY L.Q. 830.

Children need financial as well as emotional support. It costs money to raise them, especially in 21<sup>st</sup> Century California. The economic stability of the post-divorce family and its ability to provide adequately for the nurturance and education of the children and an adequate life style for the parent is an additional factor contributing to children's well-being.

#### 5. Economic factors.

The importance of this cooperative element is clearly recognized by Warshak who quotes extensively from studies showing the importance to child-father relationships of cooperation between the parents following divorce.<sup>28</sup> Because *Burgess* by definition applies only to situations in which the non-custodial parent *opposes* a proposed relocation, there is likely to be high conflict in those families who bring their dispute before the courts, as there is in this case. Warshak's assumption that merely increasing contact with the non-custodial parent in a high-conflict situation will improve the parent-child situation is supported neither by research nor the history of the children in this case.

#### 4. The research showing that children benefit from participation of both parents in their lives deals, without exception, deals with mothers and fathers who voluntarily make and agree to cooperative arrangements.

among parents and children are strained. It is not present here.



6. Remarriage.

While divorced individuals are delaying remarriage more than in the past, they are not delaying living with a partner. And most eventually do remarry - two thirds of divorced women and three-quarters of divorced men.<sup>29</sup>

There has been a good deal of recent research on stepfamilies with particular emphasis on their benefit or detriment to children.<sup>30</sup> The evidence on

economic contribution is particularly strong. Stepparents make a major difference in determining the everyday economic well-being of their

stepchildren. Researcher Mary Ann Mason reports that, according to data from the National Survey of Families and Households (NSFH), the family income in

families where the stepparent is a stepfather (by far the most common type of stepfamily) rises threefold upon remarriage, placing these stepfamilies in the

same income bracket as intact families.<sup>31</sup> As a result, stepchildren benefit from the superior resources that accompany a greater family income, e.g., better

schools and generally more social and economic opportunities. On the lower end of the income scale, the differences are staggering: only 8% of children in

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<sup>29</sup> Andrew J. Cherlin, *MARRIAGE, DIVORCE, REMARRIAGE* (Harvard University Press, 1992), p. 28.

<sup>30</sup> Alan Booth and Judy Dunn (eds.), *STEPFAMILIES: WHO BENEFITS? WHO DOES NOT?* (Erlbaum, 1994).

<sup>31</sup> Mary Ann Mason, *The Modern American Stepfamily: Problems and Possibilities*, published in *ALL OUR FAMILIES: NEW POLICIES FOR A NEW CENTURY* (2nd ed., Mary Ann Mason, Arlene Skolnich, & Stephen Sugarman, eds.), 100-01 (Oxford University Press, 2003).

mother-stepfather households are living below the poverty line, as compared to 49% of children in single-mother households.<sup>32</sup>

Stepparents often take on many of the everyday caregiving tasks of their stepchildren. The NSFH survey indicates that stepparents function very much like biological parents on important parental caregiving tasks such as helping with homework and having private talks with children. 43% of parents in biological families stated that they frequently had private talks with the children.<sup>33</sup> The same percentage of parents in stepfamilies (43%) said they frequently had private talks with the children.<sup>34</sup> As for helping with homework, 51% of parents in biological families claimed they frequently helped with homework, as compared to 48% in stepfamilies.<sup>35</sup> One recent study showed that children benefitted as much from good relationships with stepfathers as they did from relationships with their biological fathers.<sup>36</sup>

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<sup>32</sup> Christine Bachrach, *Children in Families: Characteristics of Biological, Step- and Adopted Children* (1983) 45 JOURNAL OF MARRIAGE AND THE FAMILY 171, 176.

<sup>33</sup> Mary Ann Mason, Sidney Jay, Gloria Svare & Nicholas H. Wolinger, *Stepparents: De Facto Parents or Legal Strangers* (2002) 23 JOURNAL OF FAMILY ISSUES, 507.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Lynn White & Joan G. Gilbreth, *When Children Have Two Fathers: Effects of Relationships with Stepfathers and Noncustodial Fathers on Adolescent Outcomes* (2001) 63 JOURNAL OF MARRIAGE AND THE FAMILY 155, 160.

<sup>38</sup> Hetherington & Kelly, *supra*, p. 88.

<sup>37</sup> Colleen Leahy Johnson, EX FAMILIA: GRANDPARENTS, PARENTS AND CHILDREN ADJUST TO DIVORCE (Rutgers University Press, 1988), p. 215; Wallerstein *et al.*, *supra*.

In their longitudinal study of 1,400 families, Hetherington reports that the poor women and children in the study moved seven times within the first six years of the divorce aftermath, almost twice as often as women who remained in the middle class after the divorce.<sup>38</sup> She describes this "downward spiral" as taking divorced women and their children into "progressively poorer provided by other family members.

A number of factors influence relocation decisions in the post-divorce family. These include economic factors, educational or occupational opportunities, remarriage, and the desire to take advantage of resources

#### **B. Divorce and Relocation**

Grandparents and other extended family members can be enormously helpful to children during the years after divorce.<sup>37</sup> They can provide an additional source of support to children whose parents may have limited time, energy and emotional resources while they adjust to postdivorce life. Family members often provide needed funding, especially for college. In many cases they can also provide something the children's parents could not – role models of stability in marriage and fidelity in relationships.

#### **7. The Support of Extended Family.**

neighborhoods with higher rates of crime and unemployment, with more inadequate day care facilities and schools, and more single mothers and children who had serious behavior problems.”<sup>39</sup>

Even women who are not poor move to obtain greater incomes that will allow them to enjoy the many benefits of American society that are wealth-accessible. If mothers can succeed in increasing the family income, their children will benefit from better schools, enriched after-school programs, and more opportunities to pursue their interests and develop their talents – in short, in exercising the basic freedom from want.

When divorced parents remarry, a move of some kind is often required, whether it is across the city or out of the state. Custodial mothers and fathers remarry for many reasons, but certainly among them is the need to share the economic and caregiving obligations of parenting. The economic advantages of remarriage for the children, as described above, are considerable. Divorced mothers may also search for a variety of jobs or educational opportunities, such as degree programs they gave up when they married or became pregnant. Finally, as described above, custodial parents may seek to move in order to take advantage of the financial and emotional support of other family members.

At the time *Burgess* was decided, little was known about the effects of

relocation on children.<sup>40</sup> To a large degree, that is still the case. Child relocation as a separate variable has not been the focus of significant long-term study. None of the few studies that have been done shows that moving generally affects children in adverse ways. In a full-scale review of the impact of moving on the psychological health of children in intact families, Martion Gindes observes: "While no definitive conclusions can be reached because of limitations and comparability problems of existing studies, it should be noted that very little research support exists for long-term negative effects of moves for children in intact families. Under ordinary conditions, children generally adjust to the move after a relatively short time."<sup>41</sup>

Unfortunately, most studies of the impact of moving are cross-sectional rather than longitudinal and do not tell us how long it takes for the adult or the child to adjust to the new environment. Longitudinal studies follow individuals over time and can assess the impact of change from a baseline measure. In contrast, cross-sectional studies look at individuals at only one point in time, and frequently do not take into account pre-existing differences between them. This difference – and its impact – are well illustrated by the Braver, Elman and Fabricious study cited by Leslie Shear, Joan Kelly, and Donald S. Eisenberg

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<sup>40</sup> Wallerstein & Tanke, pp. 307-08.

<sup>41</sup> Martion Gindes, *The Psychological Effects of Relocation for Children of Divorce* (1988) 15 JOURNAL OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS 119, 126.

<sup>42</sup> The hypothesis that relocation is a *consequence* of a stressful and unhappy environment rather than a *cause* of it receives support from an extensive and sophisticated analysis of 92 studies comparing children of divorce to children from intact families. The authors compared three explanations for findings that children of divorce scored lower on a variety of outcome measures. While there was some support for explanations based on the increased absence of a parent and economic disadvantages resulting from the divorce, the explanation that received the most consistent support was that divorce affects children primarily because of the conflict that occurs before and during the separation process. In particular, children in high-conflict *intact* families scored lower than children from divorced families on a number of outcome variables, including psychological

could be responsible for those outcomes that differed by relocation status.<sup>42</sup>

these factors, rather than the presence of both parents in the same community, they had a more cooperative relationship with the other parent. Any or all of means of financial security that allowed them to stay in the community; (4) standing relationships in the community; (3) they had jobs or some other children were older and in school at the time of the divorce; (2) they had long-term those who moved did so because of any of the following factors: (1) their study who remained in the same community following divorce as compared to For example, it is certainly possible, if not likely, that the parents in the *consequence* of a stressful and unhappy environment rather than a *cause* of it. failing to recognize the equally likely possibility that relocation was a compared to those who did not relocate were a result of the move itself, while drive or more away from their non-custodial parent following a divorce as differences between college freshmen who reported having moved an hour's in their July 8, 2002 letter to this Court. The authors of that study suggest that

- We also note that one of the most striking findings of the Braver et al. study, virtually ignored in the authors' discussion of their results, was that, on all of the major mental health measures, including personal and emotional adjustment and general life satisfaction, there were *no differences* between those who remained in the same community with both parents and those who moved with the custodial mother. At the same time, those children in their fathers' custody showed a higher level of distress.
- While there is no body of research specifically addressing the effects of moves on children of divorce, an important series of studies of children in military families offers an encouraging perspective. These studies of children in the military who experience not only the moves, but also the repeated absences of a parent on military duty, showed that those who are stressed by moving recover fairly quickly, unless they were symptomatic before the move.<sup>43</sup> Indeed, a range of studies of military children have found no significant difference in psychological adjustment between children in military families and those in the general community.<sup>44</sup> These studies are important
- <sup>43</sup> Peter S. Jensen, Ronel L. Lewis & Stephen N. Xenakis, *The Military Family in Review: Context, Risk and Prevention* (1986) 25 JOURNAL OF THE AMERICAN ACADEMY OF CHILD PSYCHIATRY 225.
- <sup>44</sup> Peter S. Jensen, Stephen N. Xenakis, Perry Wolf & Michael W. Bain, *The Military Family Syndrome Revisited* (1991) 179 JOURNAL OF PSYCHOLOGICAL BULLETIN 26, 30-40.
- adjustment and self-esteem. Paul R. Amato & Bruce Keith, *Parental Divorce and the Well-Being of Children: A Meta-Analysis* (1991) 110

<sup>46</sup> Gardner, *Therapeutic Intervention for Children with Parental Alienation Syndrome* (Creative Therapeutics, 2001).

<sup>45</sup> AA 411 (Stahl Evaluation Report dated 6/29/01).

NERVOUS AND MENTAL DISEASE 102.

Though propounded continually and defended repeatedly by Gardner, parental alienation has not found support in standard child or adult psychiatric textbooks or official diagnostic or treatment manuals since the idea was first proposed. Indeed, it has been rejected by the vast majority of the scientific the target parent.<sup>46</sup>

The term "parent alienation" refers to a concept created by psychiatrist Richard Gardner and proposed by him as a psychiatric syndrome in two books which he self-published in 1987 and 1988. He defined parent alienation as: "The child's campaign of denigrating a parent, a campaign that has no justification, resulting from a combination of programming (brainwashing), parent's indoctrination, and the child's own contribution to the vilification of the target parent."<sup>45</sup>

In his final custody assessment in this case, Dr. Stahl stated that the two boys – Garrett and Devlen – could be victims of what he called "unconscious alienation" by their mother that might account for their negative perceptions of their father.<sup>45</sup>

**C. The Scientific Invalidity of "Unconscious Alienation"**

because military families are more likely to experience multiple relocations.



community.<sup>47</sup>

Dr. Stahl found no evidence in the family of overt or deliberate

vitiification of the father by the mother.<sup>48</sup> Moreover, the boys did not reject all

contact with their father, as Gardner described as typical of the child who is

caught in the so-called syndrome. Although the parents did not like each other,

and there was tension and even animosity between them, there was no evidence

that the mother had deliberately tried to turn the children against their father.

The father's visitation and communication with the boys continued without

interruption throughout the five years preceding the second and third

evaluations. In addition, he received time with the boys beyond that granted

in court orders, a fact which he acknowledged to Dr. Stahl.<sup>49</sup>

In attempting to illustrate that Ms. Navarro would try to interfere with

the boys' relationship with him following a move, Mr. LaMusga pointed to an

incident in which Garrett mistakenly wrote his stepfather's name, rather than

that of Mr. LaMusga, in a school assigned genealogical chart.<sup>50</sup> However,

when this incident occurred, Ms. Navarro encouraged Garrett to change the

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<sup>47</sup> See Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases* (2001) 35 FAMILY LAW QUARTERLY 527, 537-39.

<sup>48</sup> AA 391 (Stahl evaluation of 10/10/96).

<sup>49</sup> AA245:22-246:5; AA 246:19-247:8, AA 409.

<sup>50</sup> AA 409.

chart to correct his error. Garrett refused. His mother later discussed this incident with the children's therapist, who validated her decision to suggest the correction, but not to force it on Garrett or to make the change herself.<sup>51</sup> In spite of Mr. LaMugsa's concern about this incident, Dr. Stahl did not discuss it with Ms. Navarro in preparing his third evaluation in June, 2001.<sup>52</sup>

Finding no evidence of parent alienation in Gardner's terms, or any specific behavior by mother that had alienated the boys from their father, Dr. Stahl resorted to an observation that the mother was somehow "unconsciously" alienating the children from their father. His description of this "unconscious" process was overtly non-specific. He pointed to no behavior on the mother's part amounting to active undermining of the father's relationship – e.g., denigrating the father or refusing to allow visitation or to support child-father contact.

The concept of unconscious mental activity is a central aspect to the psychoanalytic theory of mental functioning. Within psychoanalysis, behavior is motivated by underlying feelings that are not known to the person. They are blocked from any consciousness because the awareness of those feelings would create intolerable anxiety, guilt or shame.

In accord with psychoanalytic theory, inferences of unconscious

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<sup>51</sup> AA 252:3-11.

<sup>52</sup> RT 61:18-21.

motivation are always speculative because they cannot be demonstrated or examined. They are necessarily only entertainable when arrived at within a psychoanalytic situation in which the necessary supporting data can come to light. It was therefore inappropriate for the evaluator to introduce complex inferences about the alleged unconscious motivations of the mother without any of the necessary detailed life history data that could only become available within a prolonged psychotherapy. Moreover, it was also unwarranted to presume that because the mother has negative feelings towards her ex-husband, and the children also have negative feelings towards their father, that the mother had somehow unconsciously planted her feelings in the children.

This line of reasoning employed by the evaluator is eerily akin to the conviction in the Salem witchcraft trials that the hysterical seizures of young girls were caused by the accused women who must, therefore, be witches. The evaluator's attribution of the children's negative feelings towards their father to the mother's "unconscious" intent in the total absence of supportive behavior puts her in an untenable position. She cannot refute the conclusion since, by definition, the inferred alienation is unconscious.

While it is certainly appropriate to take into account observable behaviors in which a parent may engage that interfere with the relationship with the other parent, use of the term "unconscious alienation" gives undue credibility to a concept that has no scientific or clinical recognition.

In addition, reference to the "alienating parent" places on one individual the total responsibility for a more complex pattern or system of behavior. For example, in a recent study of 215 children from the family courts, which included 124 children from high-conflict litigation, Janet Johnston found that rejection of one parent is usually multi-determined with both parents contributing to the problem, in addition to the vulnerabilities of the children themselves. Her most striking observation was that the rejected parents often appeared to be the architects of their own rejection – *i.e.*, deficits in parenting behaviors were strongly linked to the rejection of the parents by their children.<sup>53</sup>

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<sup>53</sup> Janet R. Johnston, *Parental Alignments and Rejection: An Empirical Study of Alienation in Children of Divorce*, JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW (publication pending); Johnston & Roseby, *supra*, pp. 197-205. These behaviors may include, for example, expressing anger towards the child and trying to assert one's parental position by force, pursuing the child with phone calls, letters and unannounced visits that feel intrusive or frightening to the child, and dismissing the child's negative reactions as "the other parent talking." Johnston & Roseby, *supra*, pp. 198-99.

II. THE PSYCHOLOGICAL PILLARS OF BURGESS FULLY SUPPORT THE COURT OF APPEAL'S DECISION IN THIS CASE.

A. Burgess Pillar No. 1 – Protecting the Child's Relationship with the Primary Caregiver

In the tradition of this Court's landmark decisions in *Marriage of Carney*,<sup>54</sup> *Burgess* emphasizes the overriding importance of the child's relationship with his or her primary custodial parent:

[O]nce it has been established [under a judicial custody decision] that a particular custodial arrangement is in the best interests of the child, the court need not reexamine that question. Instead, it should preserve the established mode of custody unless some significant change in circumstances indicates that a different arrangement would be in the child's best interest.<sup>55</sup>

Garrett LaMusga, who will turn 11 years old on May 5, 2003, and Devlen LaMusga, who will be 9 on the same day,<sup>56</sup> spend most of their time in the family comprised of their mother, stepfather and halfsister. The family gave up one relocation plan after their stepfather actually moved to Ohio to

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<sup>54</sup> (1979) 24 Cal.3d 725.  
<sup>55</sup> *Burgess, supra*, p. 38.  
<sup>56</sup> AA 1.

take a lucrative new job – in anticipation of court approval that never came because of prolonged litigation. They now have another opportunity – a proposed move to Arizona where the stepfather-husband has an even better job offer. This family has experienced a great deal of disruption and anxiety – and will continue to do so – until this case is resolved.

In a series of evaluations, Dr. Philip Stahl, the court-appointed custody evaluator, described the boys' mother as nurturing and her relationship with the boys as emotionally supportive, close and loving.<sup>57</sup> He also described their relationship with their stepfather and halfsister as well established.<sup>58</sup>

In contrast, Dr. Stahl saw the father's relationship with the boys, after five years of visitation, as "tenuous at best" and sometimes "difficult."<sup>59</sup> Although the children spent an additional five years in the same community as their father after Dr. Stahl recommended against the mother's initial request to move in 1996, the children still do not see their father as a source of strength

<sup>57</sup> AA 411 (Stahl evaluation of 6/29/01).

<sup>58</sup> AA 411, 413 (Stahl evaluation of 6/29/01).

<sup>59</sup> As Dr. Stahl stated: "In my opinion, Mr. LaMusga is somewhat self-centered and doesn't seem to deal with the boys' feelings that well. . . . He is a bit detached from [the boys] and has a hard time interacting with them when they are with him. . . ." AA 403 (Stahl's Evaluation Report of 2/26/01). "As indicated above and in my recent report, the boys have a more tenuous relationship with their father." AA 412 (Stahl's Evaluation Report of 6/29/01). Mr. LaMusga himself acknowledged that his relationship with the boys is a tenuous and difficult one at times. (RT 57:17-18.)

AA 413: “[The boys] certainly have their own desire to move. They were clear with me about that when I saw them during the previous update.”

The showing required is substantial. We have previously held that a child should not be removed from prior custody of one parent and given to the other “unless the material facts and circumstances occurring subsequently are of a kind to render it essential or expedient for the welfare of the child

justify a custody change. As *Burgess* states:

Well before *Burgess*, this Court recognized that stable custodial-parent relationships, especially those of longstanding, need to be protected by family courts. Once a final custody order is entered, whether on a stipulation or after a contested hearing, significant “changed circumstances” must be present to

permission to move on a change in custody.

From a psychological point of view, this case is not a difficult one. In light of the mother’s close attachment and connection with the boys, their tenuous and difficult relationship with their father, and their own expressed desires to remain in the same family unit,<sup>60</sup> there is no psychological justification for refusing to allow the requested move, or to condition

or supports their individual talents or interests.

or affection. Nor do they view him as someone who enhances their self-esteem

<sup>62</sup> *Id.*

<sup>61</sup> *Burgess*, 13 Cal.4th at 38, *citing Carney*, *supra*, 24 Cal.3d at 730.

[A] physical handicap that affects a parent's ability to participate with his children in purely physical activities is not a changed circumstance of sufficient relevance and materiality to render it either "essential or expedient" for their welfare

to that point.<sup>62</sup> As *Carney* explains:

The vital importance of stability in custodial relationships was the centerpiece of *Marriage of Carney* in which this Court reversed *as an abuse of discretion* an order removing custody from a custodial parent who had cared for his two young children for almost five years, "virtually all of their lives up

that there be a change."<sup>61</sup>

"essential or expedient for the welfare of the child parent, the child will suffer detriment rendering it but only if, as a result of relocation with the good faith reason, to reside in a different location, the custodial parent has chosen, for any sound change of custody is not justified simply because that there be a change." In a "move-away" case, a



that they be taken from his custody.<sup>63</sup>

*Burgess* is thus consistent with established law, undoubtedly well-known to the California Legislature both before and after *Burgess* was decided seven years ago, preserving stable and functional parent-child relationships. The Legislature has made no attempt to alter the holdings of any of these cases and *Burgess* remains in good standing after seven years on the books.

One case may deviate from the norm. In *Montenegro v. Diaz*,<sup>64</sup> this Court upheld as an exercise of discretion an order changing primary physical custody of a five-year-old who had spent his preschool years in his mother's primary physical care. The reasoning and decision in *Montenegro* have no application to this case because the post-custody orders there were temporary and relocation was not at issue.

Regrettably, the Court in *Montenegro* said nothing about the child's attachments or relationships, but confined its reasoning to the father's greater willingness to "share Gregory." There was no evidence of refusal on the mother's part to provide visitation. The *Montenegro* decision is not in the

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<sup>63</sup> *Carney, supra*, at 740. As the Court elaborated: "[T]he essence of parenting is not to be found in the harried rounds of daily carpooling endemic to modern suburban life, or even in the doggedly dutiful acts of "togetherness" committed every weekend by well-meaning fathers and mothers across America. Rather, its essence lies in the ethical, emotional and intellectual guidance the parent gives the child throughout his formative years, and often beyond." *Id.* at 739.

<sup>64</sup> (2001) 26 Cal.4th 249, 258-59.

<sup>65</sup> Even Dr. Stahl noted in his evaluation report of June 29, 2001 that: "[The children] certainly have their own desire to move. They were clear with me about that when I saw them during the previous update. If they don't move, they're likely to feel that their wishes aren't being heard." (AA 413.) "The major risk of keeping the boys here is that the boys will increase their rejection of their father, blaming him for disruption of their family with their mother. If that occurs, they will potentially make everyone's life miserable, and they could regress in their functioning with school and peers." (AA 414.)

Refusing to listen carefully and attentively to children is not only of children in reasonably well-functioning intact families. muting of children's voices in the courts is strangely at odds with the treatment devastating for the child who seeks to be heard and has no place to turn.<sup>65</sup> The and many do not bother to ascertain the child's wishes at all. This can be Yet courts often turn a deaf ear to the wishes of children and even adolescents, welcomes the child's input into the family decisions which involve the child. Within the boundaries of good parenting, the average intact family pressures may constrain the reliability of their assessments.

whose necessarily short visits and limited knowledge of the circumstances and differences between the two homes than even well-trained professionals, stepparents and siblings. Children often have more knowledge of the Post-divorce children are likely to have different views of their parents,

**B. *Burgess* Pillar No. 2 – Custody Decisionmakers Should Hear the Child's Voice**

psychological spirit of this Court's other decisions and makes no effort to hear the child's voice – the second pillar of *Burgess*. It should not be followed here.

<sup>67</sup> *Burgess, supra*, at 39 ; emphasis added.  
<sup>66</sup> Family Code, § 3042(a); emphasis added.

In explaining the importance of the child's preference and Family Code section 3042, *Burgess* quoted Dr. Wallerstein's *amica curiae* brief as follows: We note that *amica curiae* Professor Judith S. Wallerstein, who has published extensively on

modifying custody;<sup>67</sup>  
*wishes of the child* in making an order granting or  
*court shall consider and give due weight to the*  
form an intelligent preference as to custody, *the*  
is of sufficient age and capacity to reason so as to  
*account the preferences of the child* . . . If a child  
Where appropriate, [the court] *must also take into*

Citing Family Code section 3042, *Burgess* also noted that:  
order granting or modifying custody;<sup>66</sup>

*weight to the wishes of the child* in making an  
custody, the court *shall consider and give due*  
reason so as to form an intelligent preference as to  
If a child is of sufficient age and capacity to  
by both the Legislature and this Court. As the Legislature has mandated:

intolerable psychology, it is a direct violation of California law as announced

<sup>69</sup> “[The boys’] expressed frustration that [their father] and his wife Karin treats [sic] Karin’s daughter Kelsey better than they treat them.” (AA 401.) “The [sic] were times when this examiner asked the boys why they were so extreme in their feelings, and generally they were unable to describe it, they simply kept saying that their father is too mean and yells too much. This is also consistent with what their therapist reported.” (*Id.*)

<sup>68</sup> *Burgess, supra*, at 39 fn. 11.

The LaMusga children’s strong expressed preference for spending time in the custodial mother’s home is remarkably consistent over the years. The children report fondness of their stepfather. They are also consistent in their mixed, but predominantly negative, perception of their father, as well as their feelings of exclusion from the father’s new household.<sup>69</sup> The evaluation is supported by the boys’ views that their father is mean and yells at them and by

parent.”<sup>68</sup>

issues concerning children after divorce, observes that for “reasonably mature adolescents, *i.e.*, those who are well adjusted and performing on course in their education and social relationships, stability may not lie with either parent, but may have its source in a circle of friends or particular sports or academic activities within a school or community.” She suggests that “[t]hese adolescents should be given the choice . . . as to whether they wish to move with the moving

their attempts to exclude him from various life events. The boys expressed to Dr. Stahl, in front of their father and while at his house, their strong desire to relocate with their mother.<sup>70</sup>

In response to questions about the likely impact of the move on the

children, Dr. Stahl notes:

[The boys] have been in the primary care of their mother since the parents' divorce and will likely have a significant loss if she moves without them. They have a close relationship with their sister as well as [their stepfather] and they will feel those losses as well. . . . [T]hey certainly have their own desire to move. They were clear with me about that when I saw them during the previous update. If they don't move they are likely to feel that their wishes aren't being heard. . . . [R]ejecting their desire to move will increase their anger and frustration. On top of that, they are likely to blame their Dad, potentially increasing their rejection of their Dad for forcing them to stay in

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<sup>70</sup> AA 402.

This case is regrettably one of many examples of a judicial attitude that children are not worth listening to. Although he noted the wishes of the boys, the evaluator did virtually nothing to explore the reasons for their desires, to evaluate those reasons, or to present them to the court. And the trial judge was similarly oblivious to both the needs and desires of the children. He did not even refer to their needs or desires in his decision. Rather, he ordered their custody to be changed to a father with whom they have a distant and tenuous relationship, expressing an unfounded hope that the estranged relationship would somehow improve to some unspecified degree. From a psychological point of view which gives primacy to children, this outcome is difficult to fathom and impossible to support.

C. *Burgess Pillar No. 3 – Protecting the Child's Relationship With the Non-Custodial Parent*

In deciding that a change in custody from mother to father was merited in this case, the trial judge elevated the mere frequency of the boys' contact with their father over all other factors, including the boys' relationship with their custodial mother and their own consistently expressed and apparently reasonable desires. In the court's view, preserving the existing visitation schedule with the father, regardless of its impact on the father-child relationship, overrode the boys' primary custodial relationship with their

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<sup>71</sup> AA 413; emphasis added.

mother, their tenuous and difficult relationship with their father, and their own desires and preferences to move with their mother.

The trial judge's approach is based on two false assumptions: (1) relocation *per se* diminishes the father-child relationship, and (2) any possible diminution in the father-child relationship constitutes "prejudice" under section 7501 that can be used by a court to restrain a move and to support a transfer of custody to the father.

Neither of these assumptions has a sound psychological foundation, either generally or in this case. Indeed, the LaMusga case is a good example of the failure of more than five years of geographic proximity to improve an unhappy father-child relationship or an antagonistic relationship between divorced parents. While a move may necessitate less frequent face-to-face child-father contact, it does not eliminate contact or necessarily impair the father-child relationship. In fact, because the father has a tenuous and problematic relationship with the boys, less frequent contact may actually improve the relationship by creating higher quality time. Dr. Stahl expressly recognized this prospect in his report.<sup>72</sup>

There is no reason to believe that the mother will impair the boys' relationship with their father following a relocation. The mother has no history of disrupting or interfering with the father's time with the boys. Dr. Stahl

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<sup>72</sup> AA 410, 414.

found no reason to believe she would do so following a move.<sup>73</sup> The evaluator's reference to what he called "unconscious alienation" by the mother was both non-specific and unrelated to any behavior on her part. It cannot serve as a reliable basis to transfer custody from mother to father. Consistent with the research described above showing that the parenting difficulties of "rejected" parents contribute significantly to their own perceived rejection, Dr. Stahl properly assigned primary responsibility for the boys' tenuous relationship with their father to him.<sup>74</sup> And the trial judge expressly rejected alienation as a basis for his decision.<sup>75</sup>

*Burgess* recognizes and gives great weight to the relationship between children and non-custodial parents in relocation cases. As *Burgess* teaches,

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<sup>73</sup> RT 53:22-26.

<sup>74</sup> AA 390 (Stahl evaluation of 10/10/96). As Dr. Stahl reported: "[I]nterviews and psychological testing reveal significant concern about [father's] dependency, perceptual accuracy and decision making. It is this examiner's observation that [father] perceives things in a rather idiosyncratic manner, and has a somewhat narcissistic approach in the way he deals with problems that he experiences." (*Id.* at 389, emphasis added.) In addition, "it is equally possible that his distorted perception causes him to see alienation where none exists. In fact, it is this examiner's observation that his projection of blame onto [mother] for alienating Tori [father's daughter from a previous marriage] against him is just that, i.e., blaming her for alienating Tori when he, in fact, is feeling guilt at detaching from Tori. While a different process may be operating with the boys, it is this examiner's opinion that the issues in this case increase the likelihood of [father's] fear of alienation, even where there is no alienation taking place." (*Id.* at 390, emphasis added.)

<sup>75</sup> RT 106:6-11.



parents can retain and develop their relationship with their children by enjoying regular weekly or even daily contact by phone or e-mail, coupled with longer periods of in-person contact during summer and school holidays:

Even if "prejudice" is not established and a change in custody is not "essential or expedient for the welfare of the child," however, the trial court has broad discretion under *Burgess* to modify orders concerning contact and visitation to minimize the minor children's loss of contact and visitation with the noncustodial parent in the event of a move, e.g., by increasing the amount of visitation with the noncustodial parent during vacations from school, allocating transportation expenses to the custodial parent, or requiring the custodial parent to provide transportation of the children to the noncustodial parent's home. Indeed, such modifications of orders regarding contact and visitation may obviate the need for costly and time-consuming litigation to change custody, which may itself be detrimental to the welfare of minor children because of the uncertainty, stress,

and even ill-will that such litigation tends to generate. Similarly, a noncustodial parent's relocation far enough away to preclude the exercise of existing visitation rights can be ground for modifying a visitation order to allow for a different schedule for contact with the minor children, e.g., longer, but less frequent, visitation periods.<sup>76</sup>

The trial judge did not ever consider the prospect that the father's relationship with the boys could be preserved – or even, as Dr. Stahl suggested, improved – by longer and less frequent contact with him. In this way, his decision directly contravened *Burgess*.

As amici have noted, relocations are not *per se* disastrous for children. There is no psychological evidence that they destroy father-child relationships nor does any research suggest that the *Burgess* methods of promoting continuing contact are unworkable. Our collective experience suggests that for fathers who want to retain and improve their relationships with their children, these methods are readily available and successful.

D. “Prejudice” Sufficient to Restrain Relocation with the Custodial Parent

*Burgess* directed family courts to evaluate relocation cases on their “unique facts,” wisely admonishing, however, that “the interests of a minor child in the continuity and permanency of custodial placement with the primary caretaker will most often prevail.”<sup>77</sup> In assessing the kind of “prejudice” to the child that might override the primary caretaker relationship, *Burgess* enumerated factors such as: “(1) the nature of the child’s existing contact with both parents – including de facto as well as de jure custody arrangements; and (2) the child’s age, community ties, and health and emotional needs.”<sup>78</sup>

The concept of “prejudice” has been considered in a continually growing number of published relocation cases since *Burgess*, and moves have been upheld over the objection of noncustodial parents who made far stronger showings of alleged prejudice than that made by the father here.<sup>79</sup> For

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<sup>77</sup> *Burgess, supra*, at 39.

<sup>78</sup> *Id.*

<sup>79</sup> See, e.g., *In re Marriage of Condon* (1998) 62 Cal.App.4th 533 [allowing mother to move with sons to Australia, where mother had extensive family ties and could become self-supporting, despite fact father had a “strong and bonded relationship with his sons” and offered expert testimony from a psychologist about “Parental Alienation Syndrome”; trial court carefully crafted visitation order “to minimize adverse effects of the move on the father-child relationship”]; *In re Marriage of Whelan* (1997) 53 Cal.App.4th 132, 137-41 [allowing mother to relocate to New York with infant son despite fact that father had extensive weekly visitation with the child]; *In re Marriage of Biallas* (1998) 65 Cal.App.4th 755, 762-64 [reversing denial of mother’s request for move-away order where mother

example, in *Marriage of Edlund and Hales*, the evaluator believed that “detriment” to the minor child would result from (i) “being fathered primarily by a step-father,” and (ii) the father not being “involved in the primary parenting or typical parent-child activities as [the child] grows older.” The father in that case also relied on the fact that the evaluator had recommended psychotherapy for the child if the move occurred. In assessing detriment or “prejudice” to the minor child in that case, the Court stated:

[W]e cannot imagine a case in which a child with any meaningful relationship with the noncustodial parent would not be “significantly negatively impacted” by a good faith decision by a custodial parent to move, over the noncustodial parent’s objection, to a distant location. But if the evidence of “detriment” contained in [the evaluator’s] report were sufficient to support denial of a move-away order in this case, no primary custodial parent would ever be able to secure such an order. A reversal in this case

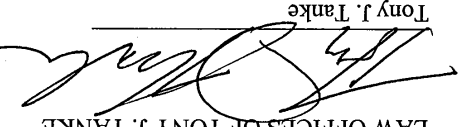
had physical custody; trial court did not give sufficient weight to statutory presumption favoring continuation of existing custodial arrangement, and the only showing of detriment related to “negative effects” of move on visitation with the father and paternal grandmother]. *See also In re Marriage of Lasich* (2002) 99 Cal.App.4th 702; *In re Marriage of Bryant* (2001) 91 Cal.App.4th 789.

Indeed, to do anything other than affirm the decision of the Court of Appeal in this case would not be in the best interest of the LaMusga children, and would essentially create a new exception to Family Code section 7501 – the “I have a bad relationship with my children and they need to stay in California so that I can work it out” exception – that would potentially stop any good faith move. Moreover, the Court’s adoption of the father’s unsupported assertion that a move would interfere with the children’s psychotherapy (as if there are no psychotherapists in other places) could cause any custodial parent who may wish to relocate in the future to think twice about placing a child in therapy at all.

<sup>80</sup> *In re Marriage of Edlund and Hales* (1998) 66 Cal.App.4th 1454, 1472, quoting *Burgess, supra*, 13 Cal.4th at 38, 39.

While recognizing that the stability of a child’s relationship with a custodial parent will most often control in a relocation case, *Burgess* nonetheless imparts necessary flexibility to account for the exceptional case. For reasons stated above, however, this case is not exceptional because of the boys’ poorly functioning relationship with their father. It is, in all respects, a psychological “no-brainer.”<sup>81</sup>

would run contrary to *Burgess* where our Supreme Court noted that “. . . the interests of a minor child in the continuity and permanency of custodial placement with the primary caretaker will most often prevail,” and that the showing required to overcome this presumption is “substantial.”<sup>80</sup>

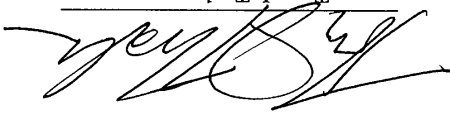
LAW OFFICES OF TONY J. TANKE  
  
 Tony J. Tanke  
 Attorney for *Amici Curiae*,  
 Judith S. Wallerstein, et al.

Respectfully submitted,

Dated: May 12, 2003

In psychological terms, *Burgess* is not broken and it is not in need of fixing. Indeed, it is one of the most sensitive, psychologically sound, and far-reaching decisions in the history of child custody adjudication in the United States. Had it been followed by the trial judge, these children would have been spared years of parental conflict and agony. To this end, the Court of Appeals decision should now be upheld.

CONCLUSION

  
 \_\_\_\_\_  
 Tony J. Tanke  
 Attorney for *Amici Curiae*,  
 Judith S. Wallerstein, et al.

DATED: May 12, 2003      LAW OFFICES OF TONY J. TANKE

I, Tony J. Tanke, counsel of record for Appellant, hereby certify, pursuant to Rule 14(c)(1) of the California Rules of Court, that the foregoing Brief of the *Amici Curiae* Supporting Affirmance was produced using 13-point Times New Roman font including footnotes and that this Brief, including the appendix attached thereto, contains approximately 11,250 words, which is fewer than the 14,000 words permitted by this Rule. Counsel relies on the word count of the computer program, Word Perfect 10, used to prepare this Brief.

(Cal. Rules of Court, Rule 14(c)(1))

**CERTIFICATE OF COMPLIANCE**

When my daughter was 7 years old and my son was 2 years old, I decided to apply to medical school. I had always wanted to be a medical doctor, and when I was accepted into University of California Irvine College of Medicine, I was elated. I immediately phoned my daughter's father, and discussed relocating to Irvine. Her father's initial response was, "Congratulations Phyllis. I know you have always wanted to be a medical doctor". I reminded him that I intended to relocate to Irvine with our daughter, and that based on previous discussions we had, custody of our daughter would remain with me. I also reminded him of my intentions to continue his twice monthly weekend visits, as well as summer vacations. I stated I would pay for our daughter to fly every other weekend. He stated, "I don't think it will be a problem, but let me discuss it with my wife". The following day, he called to inform me that he would seek full custody of our daughter, and that he would not allow me to relocate to Irvine.

I completed a nursing program at Evergreen Valley College, in San Jose, CA and practiced as a Registered Nurse for 16 years. I married, had a daughter, and when my daughter was 2 years old, I decided to leave her father and obtain a divorce. I continued working as a RN, maintaining greater than 50% custody until my daughter was 4 years old. When my daughter was 4 years old, I gained full custody of her, and decided to be a stay-at-home mother until she was in elementary school. I remarried, and had a son.

I recently graduated from Alameda County Medical Center Internal Medicine Residency Program, in Oakland, CA. The path towards fulfilling my desire to become a Physician began in 1992.

I am the eldest daughter of a large Mexican-American family. I was raised in East San Jose, CA picking apricots, prunes and walnuts. My parents did not graduate from high school, and felt proud to provide support for a high school education. I wanted to be a medical doctor, but my parents did not have either the financial, or the academic background to support my career development in medicine. I did not have the option to apply to college, and was encouraged to seek work, get married and have kids as soon as I graduated from high school. Reluctant to follow the path my mother chose, I decided to pursue nursing, in part because I could attend a local community college for my AA, and I was able to remain in the health care field.

To Whom It May Concern:

Josephine Phyllis Preciado, M.D.  
7377 North Bond Ave.  
Fresno, CA 93720

March 16, 2003



I had many choices for residency but only one option. I had agreed to make a "good faith" effort to return to the bay area. So, though I wanted to seek a residency in New Mexico working with the migrant farm workers, I settled on a residency in Oakland.

I completed medical school in 1999. At my graduation, I walked to the stage to receive my diploma. Waiting for me at the end of the stage was my beautiful daughter. She embraced me and said, "I am so proud of you. I am so glad I have a mother who is a doctor".

My daughter and I, along with my husband and son, relocated to Irvine so that I could attend medical school. My daughter attended a local elementary school, and immediately made friends. I decided to extend my medical school from 4 years to 5 years, in part so that I could continue balancing my role as both mother and medical student. My daughter excelled in school, resumed dancing lessons, participated in after-school programs and ceased having nightmares and stomachaches. I paid for my daughter to fly to San Jose, CA from Irvine, CA every other weekend to see her father during the academic year. Every summer my daughter spent in San Jose, CA with her father. I incurred all expenses for this arrangement. Her father made one visit to Irvine to see her during the 5 years.

In early January 1994, I decided to seek legal counsel to pursue the right to go to medical school with my daughter. After 6 months of litigation, the father of my daughter agreed to settle out of court. The settlement was exactly the terms I had offered when I learned of my acceptance to medical school. In addition, I agreed to make a "good faith" effort to return to the San Jose, CA area so that my daughter would be close to her father.

I did not anticipate the emotional distress my decision had on my daughter. My daughter witnessed the effect the trial had on me, and became fearful and sad. She repeatedly asked me if I was going to leave her to go to medical school, though I repeatedly told her I was not going to medical school, and if I did I would take her with me. She began to have nightmares, and chronic stomachaches. I took her to her pediatrician, who told me that my daughter was distraught that I might leave her to attend medical school without taking her.

I asked for, and was granted, a one-year deferment from UC Irvine College of Medicine. With legal counsel, I litigated for one year for the right to relocate to Irvine, CA with my daughter. The year was difficult, in part because I was told that I had to make a decision to either attend medical school without my daughter, or give up medical school and keep my daughter. I decided that I had no option but to give up medical school. I signed an agreement in the fall of 1993 stating I would not relocate to Irvine to attend medical school. I returned to work as a RN, retaining full custody of my daughter.

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CA, which provided an opportunity for me to work with the underserved population. It was difficult to move back to the Santa Clara County area in 1999 because the housing market was at its peak, and renting took most of my salary. I decided to rent an apartment in Belmont, CA so that my daughter could attend a high school near our apartment, and she would be 20 minutes from her father's home. In addition, the schools in Oakland were not as academic as the ones in the peninsula. I had to commute to Oakland, from Belmont for 3 years. My daughter attended a local catholic elementary school, achieved high grades, and was accepted into Notre Dame High School in Belmont, CA, walking distance from our apartment. She continued to excel in high school, participated in the schools crew team, continued dancing lessons and remained in good health. Her father continued the arrangement as set by the courts. He did not pursue any additional time, though she and I reminded him of the opportunity.

I obtained my medical license in 2000, completed my residency in 2002, and was awarded a HRSA (Human Resources Service Administration) grant to develop a comprehensive diabetes management program for low-income patients. I accepted a faculty position at UCSF-Fresno Internal Medicine Department, and I am involved in a research project to determine the prevalence of type 2 Diabetes in adolescents. My work is geared towards providing health care services to rural farm workers in the Central Valley. As a Spanish-speaking Physician, I am very proud of my ability to provide medical care to the Latino community, in particular to the farm workers in rural San Joaquin Valley.

I relocated to Fresno, CA with my daughter, my son and my husband. My daughter was willing to leave her high school and attend a new high school. Her father agreed, and my daughter started San Joaquin Memorial High School in Fresno, CA. My daughter started this high school in August 2002. She tried to adjust to this school, a coed school, but was unhappy. I asked her daily, "How are you? How is school?" My daughter and I have always had a level of communication that allowed for honesty, and discussion. She started to share with me some of her thoughts. "Mom, I don't like coed schools. I am accustomed to an all girls school, where I don't have to worry about the boys interrupting me", "Mom, I miss my friends. I loved my school", "Mom, I want to go back to Notre Dame, but I don't want to leave you", "Mom, I don't know what to do".

After several months, I realized I had to give my daughter permission to leave. The most heart-breaking moment came for me when I realized that I had to let my daughter go. In the second week of October 2002, I asked my daughter to sit with me, as I needed to talk to her. The following is a synopsis of our discussion:

"I love you very much. I know you are unhappy. It makes me unhappy to see you so sad. I want to tell you something. You are a young woman who has options. Never forget that. You always have options. You are telling me that you do not

Josephine Phyllis Preciado, M.D.

Sincerely,

Thank you for allowing me to give voice to the dilemma faced by so many mothers. The tragedy that befalls women who are not allowed to resume their careers, relocate for job advancement, or move closer to family affects not only the mother, but more importantly, the child.

The path that I had to take to realize my dream of becoming a physician was not easy. I am grateful to the people along the way who helped me realize that I had the right to attend medical school with my daughter. I am most proud of the fact that I did not abandon my daughter. She and I remain close. She is now 17 years old, ending her junior year at Notre Dame High School. She lives with her father, calls me daily, and returns home as his daughter. She is preparing for her SAT exams, continues her dancing classes, and is reviewing the many brochures from college recruitment offices. She has a strong sense of her ethnicity, and is healthy.

My daughter hugged me and said, "I love you, mom. Thank you." Two weeks later, my daughter informed me that her father agreed to allow her to live with him. In addition, she received permission to leave San Joaquin High School, and attend Notre Dame High School. The remarkable thing about this is that she conveyed to me that she realized through this process that she knows she always has options. She was able to orchestrate the changes required to resume high school at Notre Dame in Belmont, CA.

want to live in Fresno. You have expressed such sadness at leaving your friends. I want to tell you, that you always have options. I also want to tell you that whenever there is a problem, there are solutions. It makes me sad to say this, but I must. If you can get San Joaquin to dismiss you from school, get Notre Dame to admit you mid-semester, and get your father to allow you to live with him, you can go. I know part of your dilemma is that you do not want to leave me. But, remember that our relationship is strong. We can talk every day, as we do now. Only it will be via the telephone. I will help you solve this problem, and find the solution."

**PROOF OF SERVICE  
STATE OF CALIFORNIA - COUNTY OF YOLO**

I am employed in the City of Davis, County of Yolo, State of California. I am over the age of 18, and not a party to this action; my business address is: 1949 5th Street, Suite 101, Davis, California 95616.

On May 12, 2003, I served the document described as: **BRIEF OF AMICI CURIAE SUPPORTING AFFIRMANCE OF THE COURT OF APPEALS DECISION** in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

**PLEASE SEE ATTACHED SERVICE LIST**

(BY MAIL) I am "readily familiar" with the firm's practice for collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Davis, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

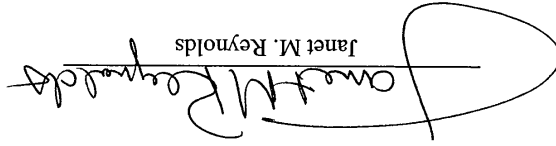
(BY FAX) I transmitted, pursuant to Rules 2001 et seq, the above described document(s) by facsimile machine (which complied with Rule 2003(3)), to the above-listed facsimile number(s). The transmission originated from facsimile phone number (530) 758-4540 and was reported as complete and without error. The facsimile machine properly issued a transmission report, a copy of which is attached hereto.

(BY PERSONAL SERVICE) I caused to be delivered such envelope by hand to the offices of the addressee(s).

(BY OVERNIGHT DELIVERY) I caused said envelope(s) to be delivered overnight via an overnight delivery service in lieu of delivery by mail to the addressee(s).

Executed on May 12, 2003, at Davis, California

(STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

  
Janet M. Reynolds

**SERVICE LIST**

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