

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

|                        |   |                     |
|------------------------|---|---------------------|
| In re 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.            | ) |                     |
|                        | ) |                     |

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Appeal from the Unpublished Decision of the Court of Appeal, First Appellate District, Division 5, Reversing the Order of the Superior Court of the State of California, Honorable Terence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 THE CALIFORNIA WOMEN’S LAW CENTER,  
CALIFORNIA WOMEN LAWYERS, COALITION FOR FAMILY EQUITY,  
CALIFORNIA FEDERATION OF BUSINESS AND PROFESSIONAL  
WOMEN, CALIFORNIA NATIONAL ORGANIZATION FOR WOMEN,  
FEMINIST MAJORITY FOUNDATION, CHILDREN NOW, CALIFORNIA  
ALLIANCE AGAINST DOMESTIC VIOLENCE, NATIONAL COALITION  
AGAINST DOMESTIC VIOLENCE, ET AL., 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 legal, professional, and advocacy organizations dedicated to advancing and protecting the rights of women and children in the areas of family law and/or domestic violence. The individual statements of interests of Amici are contained in Appendix “A” of the attached brief.

Amici have a compelling interest in this case because Respondent Gary LaMusga (“LaMusga”) asks the Court to revisit its decision in In re Marriage of Burgess, (1996) 13 Cal.4<sup>th</sup> 25, which established that custodial parents have a presumptive right to relocate with their children in good faith. As such, the resolution of this case poses a serious threat to the freedom of custodial families, the majority of which are headed by women, to pursue opportunities for improving their circumstances and to seek safety from domestic violence. Indeed, Amici include organizations that joined together in submitting an amici curiae brief to this Court in Burgess emphasizing the importance of relocation to the economic well-being and physical safety of custodial families, as well as legal precedent and authority supporting a custodial family’s right to relocate in good faith.

Amici are deeply concerned that this case will be a vehicle for eroding the protections afforded to custodial families by this Court in the Burgess decision.

Amici believe that it is critical for the Court to consider additional information and argument on the following issues that Navarro has presented for review: (1) should the inevitable consequences of a custodial parent's relocation, including less frequent in-person contact between the child and the noncustodial parent, justify restraining a move and changing custody to the noncustodial parent? and (2) should Burgess be overruled and Family Code §7501 be "reinterpreted" so as to effect a judicial repeal of the statute, thereby allowing courts to disregard its express presumption in favor of relocation, and authorizing restraints on custodial parents who wish to relocate whenever there may be some negative impact from an otherwise good-faith move?

Amici firmly believe that both of these questions must be answered in the negative and submit this brief to provide the Court with supplemental social science data as well as legislative and policy analysis which further establish the importance of the relocation rights articulated in Burgess to custodial families in California and across the nation. Our findings include the following:

1. Relocation restrictions have a disparate and devastating impact on the ability of custodial families headed by women to become emotionally and financially secure following separation or divorce;
2. Relocation restrictions seriously endanger the lives and safety of domestic violence victims and their children who are forced to flee abuse. Such restrictions are contrary to state and federal laws which

ensure that domestic violence victims and their children are free to relocate quickly and safely in order to protect themselves from violence at the hands of an abuser;

3. A custodial parent's right to determine the residence of her child under California law and the necessary link between the interests of a child and the interests of his/her custodial family require allowing good-faith relocations by custodial families, even where a move will result in less frequent "in-person" contact between the noncustodial parent and the child; and
4. Burgess is an integral part of relocation jurisprudence in this country and has actually served as the impetus for courts in other states to expand the right of custodial parents to relocate with their children in good faith. Overruling Burgess, therefore, will constitute a dangerous step backward toward the harmful confinement of custodial families in California and throughout the country.

Because resolution of these issues will have a statewide impact on the rights and safety of women and children in California and, consequently, a significant impact on the communities and individuals that each Amici serves

and/or supports, we respectfully request that the Court permit filing of the accompanying brief in support of Appellant Susan Poston Navarro.

DATED:

Respectfully submitted,

CALIFORNIA WOMEN'S LAW  
CENTER,

By: \_\_\_\_\_  
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**I**  
**INTRODUCTION**

Restricting the right of custodial parents to relocate with their children has a devastating impact on the lives, safety, and economic well-being of custodial families, most of which are headed by women. In 1996, this Court alleviated the significant emotional and economic barriers that relocation restrictions impose upon these families in the landmark case, In re Marriage of Burgess, (1996) 13 Cal.4<sup>th</sup> 25. In Burgess, this Court established that a custodial parent has a presumptive right to relocate with her child in good faith, unless the noncustodial parent can prove that the move is so detrimental to the welfare of the child that it is “essential or expedient” that physical custody be transferred should the move occur.<sup>1</sup>

In placing such a heavy burden of proof on the noncustodial parent, this Court recognized the long-standing right of custodial parents to determine the residence of their child under California statutory law. This Court also recognized the importance of mobility and independent decision-making to ensuring the emotional and financial health of American families. Indeed, for the past six years, Burgess has been instrumental in reducing costly litigation over relocation issues and in providing custodial families with greater access to the resources they need to improve their lives and seek safety from domestic violence.

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<sup>1</sup> Burgess, supra, 13 Cal.4<sup>th</sup> at 37-38.



Nevertheless, Gary LaMusga (“LaMusga”)<sup>2</sup> asks the Court to revisit its decision in Burgess for the purpose of severely limiting the existing relocation rights of custodial families. Specifically, LaMusga argues that any resulting detriment to a child’s relationship with the noncustodial parent from a proposed move, in and of itself, should be sufficient to overcome a custodial family’s presumptive right to relocate and the prospective benefits to the child from such relocation.

A decision in LaMusga’s favor will, in essence, nullify the legal framework established in Burgess that has provided sound guidance to courts throughout the state in deciding relocation issues. Such a ruling will not only result in a return to the harmful confinement of custodial families, it will be a devastating blow to efforts in California and throughout the nation to ensure the safe separation of victims of domestic violence and their children from an abuser. For these reasons, Amici urge the Court to affirm the Court of Appeal decision allowing Susan Poston Navarro (“Navarro”) to relocate with her children pursuant to Burgess.

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<sup>2</sup> On June 18, 2002, Gary LaMusga petitioned this Court for review of the unpublished, unanimous Court of Appeal decision at issue in this case. The Court granted LaMusga’s petition for review on August 28, 2002. Accordingly, pursuant to Rule 28 of the California Rules of Court, Gary LaMusga is the Petitioner and Susan Poston Navarro is the Respondent in this case. However, in the parties’ briefing to the Court, each party is identified according to their position before the Court of Appeal. Gary LaMusga is referred to as Respondent and Susan Poston Navarro is referred to as Appellant. To avoid confusion, Amici refer to each party by name rather than their position before this Court.

## II

### **RELOCATION RESTRICTIONS HAVE A DETRIMENTAL IMPACT ON WOMEN AND THEIR ABILITY TO BECOME SELF-SUFFICIENT AND PROVIDE FOR THEIR FAMILIES FOLLOWING SEPARATION OR DIVORCE.**

#### **A. Relocation Restrictions Have a Disparate Impact on Custodial Families Headed by Women.**

Geographic mobility has long been an important factor in ensuring the emotional and financial well-being of American families. United States Census Bureau (“U.S. Census Bureau”) statistics reveal that an average of 43 million people in American move each year.<sup>3</sup> These statistics further indicate that the primary reasons for relocation include job opportunities, wanting to own a home or move to a better residence, and reasons related to an individual’s family, including changes in marital status.<sup>4</sup>

Accordingly, in Burgess, this Court recognized the inevitability and necessity of relocation in light of current economic pressures and the changing structure of American families:

“As this case demonstrates, ours is an increasingly mobile society. Amici curiae point out that approximately one

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<sup>3</sup> U.S. Department of Commerce, Bureau of the Census, Geographic Mobility: Population Characteristics, Current Population Reports (issued May 2001) P20-538, table A.

<sup>4</sup> U.S. Department of Commerce, Bureau of the Census, Why People Move: Exploring the March 2000 Current Population Survey, Current Population Report (issued May 2001) P23-204, table 1.

American in five changes residences each year [citations omitted]. Economic necessity and remarriage account for the bulk of relocations [citations omitted]. Because of the ordinary need for both parents after a marital dissolution to secure or retain employment, pursue educational or career opportunities, or reside in the same location as a new spouse or other family or friends, it is unrealistic to assume that divorced parents will permanently remain in the same location after dissolution or to exert pressure on them to do so. It would also undermine the interest in minimizing costly litigation over custody and require the trial courts to ‘micromanage’ family decision making by second-guessing reasons for everyday family decision about career and family.’<sup>5</sup>

Little has changed since the Court issued its Burgess decision. Given the current instability of California and the nation’s economy, the increasing demands for mobility within the employment market, and the high incidence of separation, divorce, and remarriage, it is clear that relocation continues to be integral to the survival and growth of American families. In fact, the U.S. Census Bureau found that, from March 1999 through March 2000, relocation rates were greatest among individuals who experience a high frequency of life-changing events, such as marriage, divorce, remarriage, and new employment.<sup>6</sup>

Consequently, as in Burgess, a critical issue in this case is whether custodial parents should have the same right as other parents to pursue opportunities for advancing and improving their family’s well-being. In fact, although custodial families face the same, if not greater, economic and employment pressures as other

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<sup>5</sup> Burgess, *supra*, 13 Cal.4<sup>th</sup> at 35-36.

families, custodial parents remain the only group of individuals who may be subjected to judicial scrutiny when they need to relocate.

As the vast majority of custodial parents are women<sup>7</sup>, it is most often their ability to relocate that is at stake. When compounded with the unique and significant economic barriers that women face following separation or divorce, relocation restrictions have a disparate impact on, and will lead to the dangerous stagnation and impoverishment of, custodial families headed by women.

**B. Economic Realities Make Relocation a Necessity for A Majority Of Women and Their Children.**

Women with custody of their children continue to occupy the bottom rung of the economic ladder in this country. National data reveals that although the majority of custodial families are headed by women,<sup>8</sup> custodial mothers are three times more likely than custodial fathers to be poor (32.1 percent and 10.7 percent, respectively)<sup>9</sup> and nearly 60 percent of all poor children in America live in households headed by

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<sup>6</sup> Geographic Mobility, *supra*, at pp. 2-4.

<sup>13</sup>In 1998, 84.1 percent of all children who lived with a single parent lived with their mother. About 40.3 percent of these children lived with mothers who had never been married. U.S. Department of Commerce, Bureau of the Census, Marital Status and Living Arrangements: March 1998 (Update), Current Population Reports (issued December 1998) P20-514.

<sup>8</sup> Id.

<sup>9</sup> U.S. Department of Commerce, Bureau of the Census, Child Support for Custodial Mothers and Fathers (1997), Current Populations Reports (issued October 2000) P60-212, p. 2.

only their mothers.<sup>10</sup> Indeed, among American families with members in the workforce, those headed by unmarried women with children have the highest poverty rates.<sup>11</sup>

The problem of women and children in poverty is most deeply felt in California. In fact, single women and their dependant children are the poorest of the poor in California with a poverty rate of 37 percent, compared to a national poverty rate of 25 percent for single women with children and an overall poverty rate in California of 14 percent.<sup>12</sup>

The high incidence of poverty among custodial families headed by women can be attributed to the abysmal economic status of women in this country. While women comprise nearly one half of the nation's labor force,<sup>13</sup> they continue to be over-represented in low-wage, low-growth occupations that have few or no benefits, such as sales, services and administrative support occupations.<sup>14</sup>

In addition, women continue to earn less than men with the same occupation or with similar training and skills. In 2000, the median income of women in the United

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<sup>10</sup> U.S. Department of Commerce, Bureau of the Census, "Census Brief: Children With Single Parents—How They Fare," CENBR/97-1 (issued September 1997).

<sup>11</sup> U.S. Department of Commerce, Bureau of the census, Poverty Among Working Families: Findings From Experimental Poverty Measures (1998), Current Population Reports (issued September 2000) P23-203, table 3.

<sup>12</sup> Reed and van Swearingen, "Poverty in California: Levels, Trends, and Demographic Dimensions," ed. Hans P. Johnson, California Counts: Population Trends and Profiles, vol. 3, no. 3 (San Francisco Policy Institute of California, November 2001).

<sup>13</sup> Fullerton, "Labor Force Projection to 2008: Steady Growth and Changing Composition," Monthly Labor Review (November 1999) vol. 122, no. 11, table 1.

States who worked full-time was only 74 percent of that of men, with average earnings of \$27,355 for women and \$37,339 for men.<sup>15</sup> A prime example of the disparity in earnings between women and men is that, while women comprised 97.8 percent of all registered nurses in the United States in 2000, they earned only 88 percent of their male colleagues' wages.<sup>16</sup> The U.S. Census Bureau estimates the cumulative effect of such disparities to mean that men can expect to earn anywhere from \$350,000 to \$2 million more than their female counterparts over an entire work-life.<sup>17</sup>

To make matters worse, women also face a significant, and often devastating, drop in their standard of living after separation or divorce.<sup>18</sup> Although adequate child support can mean the difference between prosperity and poverty for such women and their children, the effective enforcement of child support orders continues to be a problem for many custodial parents.<sup>19</sup> In fact, the inability of custodial mothers to

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<sup>14</sup> U.S. Department of Commerce, Bureau of the Census, Household Data, Annual Averages 2000 (Washington D.C., 2001) table 39..

<sup>15</sup> U.S. Department of Commerce, Bureau of the Census, Money Income in the United States: 2000 (September 2001) table A.

<sup>16</sup> U.S. Department of Labor, Women's Bureau, "20 Leading Occupations of Employed Women 2000 Annual Averages" (Washington D.C., 2000) <[www.dol.gov/dol/wb/public/wb\\_pubs/20lead2000.htm](http://www.dol.gov/dol/wb/public/wb_pubs/20lead2000.htm)>.

<sup>17</sup> U.S. Department of Commerce, Bureau of the Census, The Big Pay Off: Educational Attainment and Synthetic Estimates of Work-Life Earnings, Current Population Reports (issued July 2002) P23-210, p. 6.

<sup>18</sup> McLanahan and Sandefur, Growing Up With a Single Parent: What Hurts, What Helps, (Cambridge: Harvard University Press, 1994) p. 24 (average income of a mother and child decreases by about 50 percent after parents separate); "U.S. Divorce Statistics," Divorce Magazine, <[www.divorcemag.com/statistics/statsUS.shtml](http://www.divorcemag.com/statistics/statsUS.shtml)> (women experience a 45 percent drop in their standard of living after divorce).

<sup>19</sup> See Child Support for Custodial Mothers and Fathers (1997), *supra*.

collect the full amount of child support owed to them was an issue in 62 percent of all child support-related calls received by the California Women's Law Center from July 1998 through December 2002.<sup>20</sup>

Thus, it is evident that, in a majority of cases, a custodial family's economic status and ability to "make ends meet" depends largely upon a custodial mother's economic security. Although the statistics are bleak, a variety of factors including education, training, employment, marriage, and reliance upon family networks and support can significantly improve the financial well-being of custodial families headed by women. Moreover, these same factors have a tremendous impact on the emotional and physical well-being of children in these families. However, like all other families and individuals in America, custodial families often need to relocate in order to pursue such opportunities.

### **1. Education and Training.**

Educational attainment is a strong predictor of a woman's ability to escape poverty and to achieve economic security for her family. When a woman earns a two-year college degree, her likelihood of poverty is reduced by up to 71 percent.<sup>21</sup> A four-

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<sup>20</sup> This statistic is derived from data collected by the California Women's Law Center regarding calls for assistance received by the Law Center from July 1998 through December 2002 from women throughout the state. Of the 851 total calls for assistance received during this period, 136 calls were related to child support matters. Of the 136 child support-related calls that were received, 84 calls involved an issue regarding the custodial parent's inability to collect child support from a noncustodial parent.

<sup>21</sup> Buck, "Reauthorizing Welfare Reform: An Examination of Program Outcomes and Policy Issues" (San Diego State University, 2001).

year college degree reduces her likelihood of poverty by 80 percent.<sup>22</sup> For women who are able to earn an advanced professional degree, the economic benefits are even more staggering. According the U.S. Census Bureau, an individual in the workforce with a professional degree earns nearly four times the average total work-life earnings than that of a worker with a high school diploma.<sup>23</sup>

Accordingly, numerous studies have found that access to post-secondary education and specialized job training are more critical to ensuring real economic security for low-income families than direct employment services.<sup>24</sup> Thus, regardless of a woman’s circumstances, she is likely to need some form of additional education or training in order to find steady employment, move out of a low-wage job, or advance in her career. The economic benefits that flow from such opportunities for a woman’s educational advancement necessarily have a beneficial impact on the economic well-being of her child, particularly if she is a custodial parent.

Studies have also shown that when parents are better educated, their children tend to receive a better education as well. According to the U.S. Department of Education’s National Center for Education Statistics (“NCES”), students who have parents with high levels of educational attainment also tend to exhibit high levels of

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<sup>22</sup> Id.

<sup>23</sup> The Big Payoff: Educational Attainment and Synthetic Estimates of Work-Life Earnings, supra, at p. 4, figure 3.

<sup>24</sup> Geballe, JD, Ph.D, “Investing in Connecticut’s Families: Reducing Child Poverty Through Post-Secondary Education for Low-Income Parents,” Yale Medical Center, Connecticut Voices for Children (November 15, 1999); Karier, “Welfare College



academic performance and persistence. For instance, the NCES found that students who report having at least one parent with a college degree receive higher scores on NCES assessment tests, have higher educational expectations, and have considerably higher rates of enrollment in post-secondary education (93 percent as opposed to 59 percent) than students whose parents did not attend college.<sup>25</sup> Thus, in addition to economic benefits, a parent's educational attainment has a positive impact on a child's intellectual development and achievement.

In the instant case, in 1996, the trial court previously denied Navarro the opportunity to relocate with her children to another state so that she could attend law school.<sup>26</sup> Had Navarro been able to take advantage of this opportunity, she could have dramatically increased her earning potential, resulting in significant additional income and resources for her family, as well as reinforced the value of educational achievement and persistence to her children. Instead, Navarro was prevented from moving forward with her life and taking steps to provide for her family's future at a time when such action is critical to the survival and growth of a custodial family. When combined with the trial court's decision preventing Navarro from relocating with her children to pursue a lucrative job offer for her new husband, the costs suffered

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Students: Measuring the Impact of Welfare Reform," The Jerome Levy Economics Institute (2000).

<sup>25</sup> U.S. Department of Education, National Center for Education Statistics, Findings From the Condition of Education 2001: Students Whose Parents Did Not Go to College, NCES 2001-126; U.S. Department of Education, National Center for Education Statistics, The Nation's Report Card: U.S. History 2001, NCES 2002-483.

<sup>26</sup> See Appellant's Appendix, 224:19-25.

by the custodial family as a result of their effective confinement to California have been substantial.

## **2. Employment**

A child's overall well-being depends greatly upon the employment status of the parent with whom the child resides. Studies show that secure, full-time employment for a resident parent not only reduces the likelihood of poverty for a family, but is an important indicator of whether a child has access to health care, adequate housing, and adequate food and nutrition.<sup>27</sup> Secure employment for a resident parent may also enhance a child's psychological well-being and strengthen family functioning by reducing stress and other negative effects that unemployment or underemployment can have on a resident parent.<sup>28</sup>

An important factor in ensuring the economic and emotional health of custodial families, therefore, is the ability of a custodial parent to obtain secure employment. A woman's participation in the labor force, however, is typically more irregular than a man's because women are significantly more likely than men to take time out of their

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<sup>27</sup> Federal Interagency Forum on Child and Family Statistics, America's Children: Key National Indicators of Well-Being 2002, Federal Interagency Forum on Child and Family Statistics (Washington, D.C.: U.S. Government Printing Office, 2002).

<sup>28</sup> Mayer, "Income, employment and the support of children," in Hauser, Brown, and Prosser (eds.), Indicators of Children's Well-Being, (New York: NY Russell Sage Press, 1997); Smith, Brooks-Gunn, and Jackson, "Parental Employment and Children," in Hauser, Brown, and Prosser (eds.), Indicators of Children's Well-Being, (New York: NY Russell Sage Press, 1997).

careers for child raising or other care-giving responsibilities.<sup>29</sup> As a result, women lose valuable years of establishing business experience, business contacts, and job security. Combined with the abysmal economic status of women and their children, as well as the increasing demand for mobility in today's job market, a woman is likely to face relocation at some point in her life in order to find secure employment.

Relocation for employment is of particular concern for women in California. California has one of the highest costs of living in the nation. However, incomes in California have not kept pace with what it costs to live in our state. In 2001, although California ranked 2<sup>nd</sup> in average annual income for workers in the United States, it had one of the highest rates of working people living in poverty in the nation.<sup>30</sup> Moreover, California ranked 45<sup>th</sup> in the nation in employers providing health coverage to their employees.<sup>31</sup>

Consequently, while women in California may have higher wages than women elsewhere in the country, these wages are often insufficient to cover the high costs associated with living and raising a family in California. The ability to secure employment in an area with a lower cost of living, or where the woman has family or a similar support network to rely upon, allows her to have greater access to the income

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<sup>29</sup> National Economic Council Interagency Working Group on Social Security, Women and Retirement Security (October 27, 1998) citing the Social Security Administration, Office of the Chief Actuary, October 1998 (the median woman works 27 years over her lifetime while the median man works 39 years).

<sup>30</sup> Corporation for Enterprise Development, "Measures," Development Report Card for the States (Washington, D.C. 2002) <<http://drc.cfed.org/measures/>>.

<sup>31</sup> Id.

and resources she needs to establish a stable and secure future for herself and her family.

### **3. Marriage or Remarriage**

Marriage is an important factor in raising the economic security of custodial families headed by women. Unmarried women and their children are among the most economically disadvantaged members of our society.<sup>32</sup> Studies show that single mothers who never marry have significantly lower incomes, are more likely to be on welfare, and are less likely to be working full-time than mothers who marry at some point in their lives.<sup>33</sup> Moreover, U.S. Census Bureau statistics reveal that recently separated and divorced women face a greater risk of living in poverty than married women and married, recently separated, or divorced men.<sup>34</sup> Given the superior economic status of their married counterparts, the ability to marry someone who can contribute to the family's income or share in house-keeping and parental responsibilities can mean true financial success and stability for unmarried women and their families.

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<sup>32</sup> See discussion in Section II.B., supra.

<sup>33</sup> The Alan Guttmacher Institute, "Married Mothers Fare the Best Economically, Even If They Are Unwed at the Time They Gave Birth," Family Planning Perspectives (September 1999) pp. 258-259; Remez, "Single Adult Mothers Are Considerably Less Well-Off Than Their Married Peers," Family Planning Perspectives (September 1998) p. 250.

<sup>34</sup> U.S. Department of Commerce, Bureau of the Census, Number, Timing, and Duration of Marriages and Divorce: 1996, Current Population Report (issued February 2002) p. 13.

Marriage also offers important emotional and psychological benefits for custodial families headed by women. It is well-documented that single, divorced, and separated mothers experience greater and more frequent bouts of depression, anxiety, and other problems related to their overall emotional well-being than their married peers.<sup>35</sup> A mother's wish to marry or remarry, therefore, may be largely based upon her need to make a "fresh start" and establish a happier, more stable life for herself and her children.

The reality, however, is that marriage often necessitates relocation. For instance, a custodial parent may need to relocate to establish a household with her new spouse or, as in the instant case, to pursue employment or other opportunities for improving the social and economic status of her new family. The failure to accommodate such demands for relocation undermines the decision-making ability of, and can lead to serious conflict and disruption within, the new family unit. This increased conflict and obstruction of growth opportunities has a harmful impact on a child's well-being and the well-being of his/her custodial family.

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<sup>35</sup> Hemo and Acock, "Single, Marriage and Remarriage: The Effects of Family Structure and Family Relationships on Mothers' Well-Being," Journal of Family Issues (1996) 17:388-407; Stanton, Why Marriage Matters: Reasons to Believe in Marriage in A Postmodern Society (Colorado Springs: Pinion Press, 1997) pp. 76-79, 86-92; Lorenz, et al., "Married and Recently Divorced Mothers' Stressful Events and Distress: Tracing Change Across Time," Journal of Marriage and the Family (1997) vol. 59, pp. 219-232.

#### **4. Family Networks and Support**

Given the high incidence of relocation among families in America, separated and divorced individuals often find themselves in a city where they have no family, friends, or similar support network when their relationship ends. For custodial parents, these networks can be a critical source of financial and emotional support. For example, family members can assist in caring for a child, thereby reducing childcare expenses for the custodial parent. As quality childcare in California is not only costly, but is also unavailable to many families,<sup>36</sup> reliance upon family members for childcare assistance can be critical to the survival and growth of the custodial family.

Accordingly, after separation or divorce, a custodial parent may need to relocate to rejoin family and friends who can help her develop a sense of emotional and economic well-being. Denying a custodial parent access to these valuable support systems impairs her ability to recover and start anew after separation or divorce and is, therefore, detrimental to the welfare of the custodial family.

Based on the foregoing, it is inevitable that custodial families will continue to face relocation out of economic and emotional necessity. The decision to relocate in such cases is not, as LaMusga suggests, a “whim” or act of self-indulgence on the part of the custodial parent. To the contrary, whether based upon reasons related to a

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<sup>36</sup> In 2001, the average annual cost of childcare for an infant or toddler in a licensed childcare center in California was \$8,521. Moreover, studies show that licensed childcare in California meets only 22 percent of estimated needs. California Child Care Resource and Referral Network, “The 2001 California Child Care Portfolio” (2001) <[www.rnetwork.org/uploads/1012951925.pdf](http://www.rnetwork.org/uploads/1012951925.pdf)>.

parent's education, employment, marriage, or need for emotional support, relocation has become integral to the stability and growth of a custodial family. Prohibiting a custodial parent from moving with her child, therefore, can doom custodial families to an unending cycle of poverty and stagnation, jeopardizing the security of both the custodial parent and the child's future.

**C. Restricting A Custodial Parent's Ability to Relocate in Good Faith Conflicts With the Express Goal of Family Code Section 4320(l) That Divorced Spouses Become Self-Supporting Within a Reasonable Time Following Divorce.**

California law requires divorced spouses to become self-supporting within a reasonable period of time following separation or divorce. As expressly stated in Family Code Section 4320(l) entitled, "Circumstances to be considered in ordering spousal support," courts must take into account:

"The goal that the supported party shall be self-supporting within a reasonable period of time. Except in the case of a marriage of long duration described in Section 4336, a 'reasonable period of time' for purposes of this section generally shall be one-half the length of the marriage."

Family Code Section 4336 deems marriages of ten or more years to be of long duration. This means that custodial parents of short term marriages may have only a few years in which to obtain the training and education they need to become gainfully employed before facing a reduction in, or termination of, spousal support.

As discussed in Section II.B., supra, relocation is often critical to achieving economic stability and self-sufficiency for custodial families. In fact, the published relocation cases in California aptly demonstrate the need for custodial parents to relocate after divorce to obtain or maintain employment, education, remarriage or to be closer to a family support system.<sup>37</sup> Restraints on good faith moves that limit, hinder or prevent a supported spouse from becoming self-supporting thus directly conflicts with the mandate of Family Code Section 4320(l).

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<sup>37</sup> See Burgess, supra (custodial mother requested to move 40 miles away for employment purposes); In re Marriage of Whealon, (1997) 53 Cal. App.4<sup>th</sup> 132 (five year marriage—custodial mother requested to move to Syracuse, New York for employment following divorce); In re Marriage of Condon, (1998) 62 Cal.App.4<sup>th</sup> 533 (six year marriage—custodial mother requested to move to Australia to be near family support system and away from domestic violence); In re Marriage of Biallas, (1998) 65 Cal.App.4<sup>th</sup> 755 (two year marriage—custodial mother requested to move to Nebraska six years after divorce to be with her new husband who lived and worked in Nebraska); In re Marriage of Edlund, (1998) 66 Cal.App.4<sup>th</sup> 1454 (four year marriage—custodial mother requested to move to Indiana for fiance’s job transfer); In re Marriage of Bryant, (2001) 91 Cal.App.4<sup>th</sup> 789 (fifteen year marriage—custodial mother moved to New Mexico where she had family to provide emotional support following divorce); In re Marriage of Lasich, (2002) 99 Cal.App.4<sup>th</sup> 702 (five year marriage—custodial mother moved to Spain where her family lived and where she had more lucrative employment that would enable her to spend more time with her children); In re Marriage of Abrams, (2003) 105 Cal.App.4<sup>th</sup> 979 (custodial mother



### III

#### **RELOCATION RESTRICTIONS PLACE VICTIMS OF DOMESTIC VIOLENCE AND THEIR CHILDREN AT SERIOUS RISK OF INJURY AND EVEN DEATH.**

The ability to relocate quickly and easily is an important factor in ensuring the safety of domestic violence victims and their children who are forced to flee an abuser. Leaving an abusive relationship is often the first, and most critical, step taken by a victim of domestic violence to seek safety from abuse and break the painful cycle of domestic violence. When a victim leaves her abuser, merely ending the relationship is not enough. Often, the victim and her children can only be safe if they are far away from their abuser.

Although domestic violence is not an issue in the present case, nor was it an issue in Burgess, the Burgess decision has been instrumental in ensuring the safety of battered women and their children. Restricting a custodial parent's right to relocate with their child under Burgess will, therefore, result in a dangerous abandonment of women who have courageously left their abuser in order to secure a safe and independent future for themselves and their children.

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requested to move from Elk Grove, California to San Ramon, California for employment reasons, to assist her ailing father, and because her fiance lived there).

**A. Victims of Domestic Violence and Their Children Are at Greatest Risk of Injury or Murder at the Hands of an Abuser When They Leave an Abusive Relationship.**

Once thought to be a private and isolated occurrence, domestic violence is now known to be a national problem that affects the lives, health and well-being of millions of women and children in the United States. In fact, the U.S. Department of Justice (“U.S. DOJ”) reports that women are the victims in 85 percent of all domestic violence incidents and 75 percent of all domestic violence homicides in the United States.<sup>38</sup> The U.S. DOJ also reports that 66 percent of all violent crimes committed against women in 2001 were committed by an intimate partner, relative or acquaintance.<sup>39</sup>

It is not surprising, therefore, that domestic violence is the leading cause of injury to women in the United States<sup>40</sup> and that it can, and too often does, result in the death of the victim. According to the U.S. DOJ, approximately 1,500 women are killed by a husband or boyfriend each year.<sup>41</sup> In California alone, an average of 115

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<sup>38</sup> U.S. Department of Justice, Intimate Partner Violence (May 2000) NCJ 178247.

<sup>39</sup> U.S. Department of Justice, Criminal Victimization 2001 (September 2002) NCJ 194610.

<sup>40</sup> U.S. Dept. of Justice, Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriend, and Girlfriends (March 1998) (although women account for only 39 percent of hospital emergency visits for violence related injuries, they constitute 84 percent of persons treated for injuries inflicted by intimates).

<sup>41</sup> Id., finding that 31,260 women were murdered by an intimate partner from 1976-1996.

women are killed each year as a result of domestic violence committed by a current or former spouse or boyfriend.<sup>42</sup>

Given these statistics, it is also not surprising that domestic violence against women and the abuse of children often go hand-in-hand. Approximately 3 million children in the United States are exposed to domestic violence each year.<sup>43</sup> Among children exposed to domestic violence, 45 to 70 percent are also victims of physical abuse.<sup>44</sup> In fact, 40 to 60 percent of men who abuse women also abuse their children and children face significant risk of injury when present during a domestic violence incident or while trying to protect their parent from abuse.

Despite the disturbing and overwhelming evidence of violence against women and children in the family home, studies show that a victim of domestic violence is at greatest risk of being seriously injured or killed by an abuser when she attempts to leave the relationship. Commonly referred to as “separation violence,” it is well-documented that when a victim leaves an emotionally or physically abusive relationship, her risk of serious violence increases dramatically. In fact, in its most

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<sup>42</sup> This statistic represents the average number of women killed each year in California, as reflected in the California Department of Justice’s records of Willful Homicide Crimes from 1992 through 2000 where the precipitating event was domestic violence and the offender was the current or former husband or boyfriend of the victim.

<sup>43</sup> American Psychological Association, Violence in the Family: Report of the American Psychological Association Presidential Task Force on Violence in the Family (1996).

<sup>44</sup> Margolin, “The Effects of Domestic Violence on Children,” in Trickett & Schellenbach (eds.), Violence Against Children in the Family and the Community, American Psychological Association (1998), pp. 57-102

recent report on intimate partner violence, the U.S. DOJ identifies divorced and separated women as having higher rates of intimate partner victimization than single and married women combined.<sup>45</sup>

Even more terrifying, victims of separation violence face a heightened risk of being murdered by their abuser.<sup>46</sup> In a 1997 Florida study of domestic violence homicides, for example, 65 percent of the intimate partner homicide victims had recently separated from their abuser prior to their death.<sup>47</sup> In California, an ongoing examination of 50 intimate homicides of women by the California Women's Law Center's Murder at Home Project revealed that 58 percent of the victims in these cases were either divorced, separated, or in the process of separating at the time they were killed.<sup>48</sup>

Experts now understand the reason for the increased risk of violence after separation. Separation violence is used by a batterer to maintain or reestablish control

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<sup>45</sup> U.S. Department of Justice, Bureau of Justice Statistics, Special Report: Intimate Partner Violence (2000) p. 5.

<sup>46</sup> See American Psychological Assn., Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family, American Psychological Association (1996) p. 39 (most intimate partner murders occur within the first two years of separation); Wilson and Daly, Spousal Homicide Risk and Estrangement (1993) Violence and Victims, vol. 8, issue 1, p. 3-16 (women are at greatest risk of murder during the first two months of separation).

<sup>47</sup> Florida Governor's Task Force on Domestic and Sexual Violence, Florida Mortality Review Project (1997) table 17, p. 47.

<sup>48</sup> California Women's Law Center, Murder at Home: A Case Study of the Violent Deaths of Women at the Hands of Their Intimate Partners (December 2000).

over his victim.<sup>49</sup> During the relationship, the batterer often employs a pattern of abusive behaviors that can also include intimidation, threats of violence, emotional abuse, sexual abuse, economic abuse, and isolating his victim from family and friends.<sup>50</sup> When a victim takes affirmative steps to leave the relationship, such as filing for a protection order or divorce, the batterer experiences a loss of power and control over his victim. Desperate to regain control, the batterer heightens the level of violence and intimidation that he uses against his victim.<sup>51</sup> Tragically, murder is often the ultimate form of control in these cases.

#### **B. Batterers Use the Courts as a Means to Control and Further Abuse Their Victims.**

After separation, an abuser will also use the family court system as a “symbolic battleground” on which to continue to abuse and punish his victim and to drain her both emotionally and financially.<sup>52</sup> Batterers are three times more likely than non-

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<sup>49</sup> See Pence & Paymar, Power and Control: Tactics of Men Who Batter, Minnesota Program Development (1986); National Institute of Justice, Centers for Disease Control and Prevention, Extent, Nature and Consequences of Intimate Partner Violence: Findings From the National Violence Against Women Survey (July 2000) NCJ 181867.

<sup>50</sup> Violence and the Family, *supra*, at pp. 31-34.

<sup>51</sup> Sev'er, Recent or Imminent Separation and Intimate Violence Against Women: A Conceptual Overview and Some Canadian Examples in Violence Against Women (December 1997) vol. 3, no. 6, pp. 572-75

<sup>52</sup> Violence and the Family, *supra*, at p. 40.

abusive parents to be in child support arrears and they also are more likely than non-abusers to engage in protracted litigation over all aspects of divorce.<sup>53</sup>

Abusers are particularly aware that using children is often the best way to hurt their victim. Abusive parents are far more likely to fight for custody of their children than non-abusive parents.<sup>54</sup> The end result is that abusive parents are sometimes successful in retaining custody of their children. In such cases, the abuser can use threats involving the children to intimidate and harass his victim.

Even if an abuser is not awarded physical custody of a child, he is rarely denied visitation rights. Visitation rights provide an abuser with dangerous access to and control over his victim. For example, many battered women report physical violence and threats against their lives during visitation exchanges, and some are even killed in this context.<sup>55</sup>

Once an abuser has visitation rights, he also has the power to prevent his victim from moving away with her children. When combined with the increased risk of violence to victims and their children following separation from an abuser, one of the critical hallmarks of the Burgess decision is that it saves lives. Any attempt to restrict the relocation rights articulated by this Court in Burgess, therefore, will have a

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<sup>53</sup> Id.

<sup>54</sup> American Psychological Association, "Issue 5: When parents separate after an abusive relationship, shouldn't fathers have as much right as mothers to be granted physical custody of and visitation rights with their children?" Issues and Dilemmas in Family Violence, APA Presidential Task Force on Violence and the Family (1998).

<sup>55</sup> Sheeran and Hampton, "Supervised Visitation in Cases of Domestic Violence," Juvenile and Family Court Journal (Spring 1999) p. 14.

dangerous impact on the lives and safety of thousands of women and children throughout the state who are forced to flee from an abuser.

**C. State and Federal Public Policy Dictate That Victims of Domestic Violence and Their Children be Free to Relocate To Protect Themselves From Abuse.**

Over the past few decades, state and federal lawmakers have consistently and deliberately passed laws to ensure that domestic violence victims are free to relocate with their children in order to protect themselves or their children from domestic violence. These laws reflect a very clear public policy of making safe separation from an abuser paramount to relocation restrictions or maintaining continuing contact between a child and an abusive parent.

In 1979, the California legislature enacted the Domestic Violence Prevention Act (“DVPA”). The DVPA was intended to prevent the recurrence of violence by providing for the safe and immediate separation of parties involved in domestic violence.<sup>56</sup> As such, the DVPA not only simplifies procedures for obtaining temporary and permanent restraining orders against an abuser, it enables victims who have left their abuser to petition for temporary physical custody of their children.<sup>57</sup>

The DVPA also mandates that California courts and law enforcement agencies recognize and enforce domestic violence protective orders issued by other states and

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<sup>56</sup> Family Code §6220.

territories of the United States.<sup>58</sup> There is no requirement that a victim register an out-of-state protective order before it may be enforced.<sup>59</sup> Indeed, these provisions of the DVPA are echoed under federal law in the Violence Against Women Act (“VAWA”), codified in part at 18 U.S.C. Sections 2261 et seq., which contains similar provisions requiring the uniform enforcement of domestic violence protective orders among the various states, territories, and tribunals of the United States.<sup>60</sup>

In addition to ensuring inter-state enforcement of protective orders, both California and federal law recognize the special safety needs of victims and their children by making protecting oneself or one’s child from domestic violence an affirmative defense to criminal child abduction statutes.<sup>61</sup> To further ensure the safety of victims and their children who flee abuse, VAWA also makes it a federal crime for an abuser to cross state lines to commit domestic violence or to violate a domestic violence protective order.<sup>62</sup> Moreover, California and a growing number of states have instituted confidential address programs whereby victims of domestic violence who fear for their safety or the safety of their children can keep confidential the location of

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<sup>57</sup> Family Code §§6323 and 6340.

<sup>58</sup> Family Code §§6400, et seq.

<sup>59</sup> Family Code §6403.

<sup>60</sup> 18 U.S.C.A. §2265.

<sup>61</sup> See 18 U.S.C. §1204 and Penal Code §278.7.

<sup>62</sup> 18 U.S.C. §§2261 and 2262.



their home, workplace, school or other address which, if disclosed, would increase the parent or child's likelihood of violence at the hands of an abuser.<sup>63</sup>

Acknowledging the serious risks to children who are exposed to or who are themselves victims of domestic violence, lawmakers in California have also taken steps to ensure the safety of children and their placement with a non-abusive parent in child custody determinations. In fact, the California legislature has specifically declared that the "perpetration of child abuse or domestic violence in a household where a child resides is detrimental to the child."<sup>64</sup> The legislature has further declared that it is a public policy of this state that when a child's safety and the interest of ensuring "frequent and continuing contact" between a parent and child are in conflict, decisions regarding custody and visitation must be "made in a manner that ensures the health, safety, and welfare of the child and the safety of all family members."<sup>65</sup>

Accordingly, the legislature enacted Family Code Section 3044 which creates a rebuttable presumption against awarding sole or joint legal or physical custody to a parent who has been found to have perpetrated domestic violence against the other parent, the child, or the child's siblings within the past five years. The legislature also enacted Family Code Section 3046 which prohibits a court from considering a parent's relocation or absence from the family home as a factor in determining custody or

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<sup>63</sup> This is achieved by designating the Secretary of State as the victim's agent for receipt of mail and service of process. See Government Code §6206.

<sup>64</sup> Family Code §3020.

visitation if that parent has relocated due to actual or threatened domestic violence by the other parent. In addition, the legislature adopted the Uniform Child Custody Jurisdiction Act (“UCCJA”) which makes the need to protect a child or a child’s parent from abuse one of the grounds upon which California courts may exercise temporary emergency jurisdiction over child custody matters for parties from another state.<sup>66</sup>

Taken together, these state and federal laws reflect a strong public policy of ensuring that victims of domestic violence are free to relocate quickly and frequently in order to protect themselves or their children from an abuser. Indeed, these laws reflect an understanding among lawmakers that, when a victim needs to relocate, having to endure obstacles such as lengthy and costly court battles over custody is seriously inconsistent with the victim and her child’s need for safety. They also reflect an understanding that victims of domestic violence must not be further endangered, nor should they risk losing custody of their children, when they seek protection from abuse.

The Burgess decision strongly complements existing domestic violence protections. For instance, even though a domestic violence victim has utilized one or more of the above protections to safely flee her abuser, if her abuser has visitation or other custody rights regarding her children, she may nevertheless be forced to engage in protracted litigation in family court with her batterer over relocation issues. By

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<sup>65</sup> Id.

making it easier for victims and their children to relocate, Burgess reduces the abuser's ability to use the family court system as a means for terrorizing, confining, and gaining easy access to his victim.

For a victim who has not utilized available protections—whether it is because she does not want to disclose to law enforcement or another government agency that she is a victim of abuse or does not want to endure having to prove and obtain a finding by the court that she is a victim of domestic violence—Burgess offers an alternative means for achieving safe relocation away from an abuser. Restricting this Court's holding in Burgess, therefore, will be a devastating blow to efforts among policymakers in California and throughout the nation to increase protections for domestic violence and will render existing protections for battered women and their children meaningless.

#### IV

#### **IGNORING THE IMPORTANCE OF RELOCATION TO THE WELL-BEING OF CUSTODIAL FAMILIES IMPERILS THE WELL-BEING OF CHILDREN.**

##### **A. The Best Interests of the Child Necessarily Include What is In The Best Interests of the Custodial Family.**

In granting primary physical custody to the custodial parent, the court has already determined that it is in the child's best interest to be in that parent's care and

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<sup>66</sup> Family Code §3424.

custody.<sup>67</sup> This includes having confidence in the custodial parent's ability to make decisions regarding the custodial family's welfare.

Indeed, while there are always some exceptions, the majority of children in cases of separation or divorce belong to healthy, functioning custodial families. Custodial parents, whether acting as single parents or remarried parents, are providing ongoing care, economic support and emotional stability to their children. As such, custodial parents are trusted to make numerous decisions, on a daily basis, about what is best for their child, including decisions about what is best for the custodial family in which the child resides. Whether a custodial parent's decision is as significant as securing a better paying job or as simple as installing a new security system for the family home, decisions made by the custodial parent for the benefit of the custodial family clearly have direct benefits for the child as a member of that family.

Relocation decisions are no exception. As discussed in Sections II and III, supra, relocation is often critical to ensuring the economic stability and growth of the custodial family and to protecting both the custodial parent and the child from ongoing abuse. The forced confinement of custodial families in such cases is never in the best interests of the child. Moreover, ordering the removal and separation of a child from the family unit and the parent whom the child has primarily relied upon for daily emotional support and care, simply because the custodial parent needs to move, is also never in the best interest of the child.

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<sup>67</sup> Family Code §3011.

**B. California Law Presumes That A Custodial Parent’s Good-Faith Decision to Relocate is in The Best Interests of the Child.**

Accordingly, in Burgess, this Court established that custodial parents have a presumptive right to relocate with their children when the relocation is in good faith. In recognizing this right, the Court relied heavily upon the application of Family Code Section 7501. Family Code Section 7501, which has been a part of California law since 1872, grants custodial parents the express right to determine the residence of their child, so long as a change in residence is not detrimental to the rights or welfare of the child.<sup>68</sup>

In addition, the Court’s decision in Burgess was based on its acknowledgement of the “paramount need for continuity and stability in custody arrangements.”<sup>69</sup> Accordingly, the Court noted in Burgess that the interests of the child in remaining in the custodial parent’s care and custody “will most often prevail” when relocation is at issue.<sup>70</sup> The Court further noted that, once it has been determined that it is in the best interests of the child to be with the custodial parent, the child should not be removed from the custody of that parent unless it is “essential or expedient for the welfare of the child” that custody be changed.<sup>71</sup>

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<sup>68</sup> Burgess, supra, 13 Cal. 4<sup>th</sup> at 32, 38, and nt. 4.

<sup>69</sup> Id. at 32-33.

<sup>70</sup> Id. at 39.

<sup>71</sup> Id. at 38; See also In re Marriage of Carney, 24 Cal. 3d 725, 730 (1979).

The emphasis placed in Burgess on the custodial family relationship, and its importance to the child's well-being, was simply a reassertion and reaffirmance of prior rulings made by this Court establishing that, in all but the most extraordinary circumstances, removing a child from his/her caretaker is not in the best interests of the child. For instance, in Burchard v. Garay, (1986) 42 Cal.3d 531, a case which examined the proper application of the "best interest of the child" standard in resolving custody disputes, this Court warned against the disruption of custodial family relationships as follows:

"All of these [deficiencies in the mother's parenting that were identified by the trial court, i.e., mother worked and had to place the child in day care, mother left the child alone briefly on one occasion, etc.] are insignificant compared to the fact that [the mother] has been the primary caretaker for the child from birth to the date of the trial court hearing, that no serious deficiency in her care has been proven, and that [the child], under her care, has become a happy, healthy, well-adjusted child. We have frequently expressed, in this opinion and others, the importance of stability and continuity in the life of a child, and the harm that may result from disruption of established patterns of care and emotional bonds. The showing made in this case is, we believe, wholly insufficient to justify taking the custody of a child from the mother who has raised him from birth, successfully coping with the many difficulties encountered by single working mothers."<sup>72</sup>

Consequently, the showing required to overcome the presumption in favor of relocation by the custodial family under California law is substantial. The presumption may only be overcome if the noncustodial parent can prove that (1) the

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<sup>72</sup> Burchard, supra, 42 Cal.3d at 541.

move is intended merely to frustrate his/her visitation rights or (2) the move will result in such significant detriment to the child that a change in custody is warranted.<sup>73</sup>

The mere showing of detriment or inconvenience to a child's relationship with the noncustodial parent as a result of a move has never been sufficient to overcome the presumptive right articulated in Burgess. Indeed, if it were, Burgess would be self-defeating; by definition, a noncustodial parent's relationship always will be affected by a move. In In re Marriage of Edlund, *supra*, a case which interpreted and followed Burgess, the Court of Appeal stated as much:

“ . . . we 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 [i.e. decreased involvement in parenting and care of the child] 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 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’ .”<sup>74</sup>

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<sup>73</sup> Burgess, *supra*, 13 Cal.4<sup>th</sup> at 38 and nt. 6.

<sup>74</sup> Edlund, *supra*, 66 Cal.App.4<sup>th</sup> at 1472, citing Burgess, *supra*, 13 Cal.4<sup>th</sup> at 39. See also Whealon, *supra*, 53 Cal.App.4<sup>th</sup> at 142 (allowing mother to move to New York with her son despite the fact that father had extensive visitation time with the child); Condon, *supra*, 62 Cal.App.4<sup>th</sup> 533, 539 (allowing mother to move with sons to Australia despite fact that father had “strong and bonded relationship with his sons” and offered expert testimony about “Parental Alienation Syndrome”); Biallas, *supra*, 65 Cal.App.4<sup>th</sup> at 762-764 (reversing denial of mothers request to move to Nebraska with her child on the grounds that the trial court did not identify any specific detriment to the child other than the negative effect that the move would have on the child’s relationship and visitation with his father and paternal grandmother).

Rather, Burgess and its progeny have consistently recognized that relocation by a custodial family does not mean that the noncustodial parent will be deprived of regular and meaningful access to the children. To the contrary, in order to minimize the adverse effects of a move on the child's relationship with the noncustodial parent, these decisions have preserved the broad discretion of the family courts to order reasonable visitation rights to the noncustodial parent in light of the move.<sup>75</sup>

Nevertheless, LaMusga demands that the Court seriously reduce the standard of "detriment" needed to prevent relocation by the custodial family. In fact, the only "detriment" asserted by LaMusga in this case is his fear that his already strained relationship with his children will deteriorate even further if the move is allowed. The "detriment" claimed by LaMusga is exactly the type of "detriment" that has been rejected by the courts of this state as being insufficient to overcome a custodial family's presumptive right to relocate. It is the same "detriment" which has been determined to be more properly addressed by awarding adequate post-move visitation rights to the noncustodial parent.

The adoption of LaMusga's diluted "detriment standard," therefore, would completely eviscerate the principles established in Burgess and subsequent appellate

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<sup>75</sup> Burgess, *supra*, 13 Cal.4<sup>th</sup> at 36 (trial court satisfied its obligation to ensure "frequent and continuing contact" between the children and their father by ordering liberal visitation with the father if the mother relocated); Edlund, *supra*, 66 Cal.App.4<sup>th</sup> at 1475 (trial court has broad discretion in formulating post-move visitation orders); Condon, *supra*, 62 Cal.App.4<sup>th</sup> at 539-540 (trial court sufficiently crafted visitation order to minimize the adverse effects of the custodial family's move to Australia on the father-child relationship).



court decisions which have provided sound guidance to courts in deciding relocation issues and have resulted in a dramatic decrease in costly and emotionally draining litigation over relocation issues. Moreover, the adoption of this “detriment standard” would effectively revoke the existing presumption under California law favoring the freedom of a custodial family to move in good-faith. Indeed, California courts have made it abundantly clear that, if the “detriment” claimed by LaMusga were sufficient to block a move by the custodial family, virtually every relocation request by a custodial parent would be denied.

By severely restricting the relocation rights of custodial families, the “detriment standard” espoused by LaMusga completely ignores the importance of relocation to the well-being and growth of custodial families. Ignoring the well-being of custodial families jeopardizes the well-being of children. It also belittles the vital role that custodial parents play in fulfilling their child’s basic needs and in acting as primary caregivers for their children. As such, LaMusga’s “detriment standard” is contrary to the best interests of the child and to the long-standing recognition by this Court, and courts throughout the state, of the importance of custodial family relationships to a child’s well-being.

**C. Burgess is Part of An Established and Growing Body of Law Which Has Expanded Relocation Rights For Custodial Parents In The Interest of Ensuring the Integrity of the Custodial Family and The Well-Being of Children.**

Since it was decided by this Court in 1996, Burgess has become part of an established and growing body of law across the nation expanding the rights of custodial parents to relocate with their children in good-faith.<sup>76</sup> As in Burgess, the expansion of relocation rights for custodial families in other states has been largely based upon the recognition that, while the noncustodial parent's interests may be important, a child's interest is so necessarily interwoven with the interests of his/her custodial family unit, that what is in the best interest of the custodial family is also in the child's best interest.<sup>77</sup>

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<sup>76</sup> Roddy, "Stabilizing Families in a Mobile Society: Recent Case Law on Relocation of the Custodial Parent," 8 Divorce Litigation 141 (1996) (citing Burgess and other state court decisions, states that the general trend among states appears to favor permitting good-faith relocations and denying custody transfers when the custodial parent seeks to relocate); Ireland v. Ireland, (Conn. 1998) 717 A.2d 676 (citing Burgess, Connecticut Supreme Court found that a growing number of states now presume that a custodial parent's good faith decision to relocate is in the best interests of the child); Baures v. Lewis, (N.J. 2001) 770 A.2d 214 (citing cases, including Burgess, which demonstrate a growing trend in the law easing restrictions on the custodial family's right to relocate and recognizing the identity of the interest of the custodial parent and child).

<sup>77</sup> See Fortin v. Fortin, (S.D. 1993) 500 N.W.2d 229 (South Dakota Supreme Court held that relocation by the custodial family should be permitted so long as the custodial parent has a good reason for the move and the move is consistent with the best interests of the child; Court emphasized the importance of protecting the new post-divorce custodial family unit and recognized that the child's best interest is closely related to the best interest of the custodial family); In re Marriage of Francis, (Colo. 1996) 919 P.2d 776 (Colorado Supreme Court created a rebuttable presumption

Indeed, not only is Burgess an integral part of relocation jurisprudence in this country, it has actually inspired courts in other states to ease relocation restrictions imposed upon custodial families. In Kaiser v. Kaiser, for example, (Okla. 2001) 23 P.3d 278, the Oklahoma Supreme Court reviewed a trial court order denying the custodial mother permission to move to Washington, D.C. with her child to accept employment with the National Aeronautics and Space Administration (“NASA”). The Court noted that, under Oklahoma statutory law, a “parent entitled to custody of child has a right to change his residence, subject to the power of the district court to restrain a removal which would prejudice the rights or welfare of the child.”<sup>78</sup> Based upon its interpretation of this provision, the Court held that, absent a showing of prejudice to

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in favor of relocation by the custodial family where the custodial parent has a sensible reason for the move; Court found that the child’s best interests are served by recognizing the close link between the best interests of the custodial parent and the best interests of the child); In re Matter of Custody of D.M.G. and T.J.G., (Mont. 1998) 951 P.2d 1377 (Montana Supreme Court concluded that the custodial parent had a presumptive right to relocate with the child under state statutory law; Court found that, to the greatest possible extent, the custodial parent is entitled to the same freedom to seek a better life for herself and her child as the noncustodial parent); Elder v. Elder, (2001) 2001 Tenn.App.LEXIS 681 (Tennessee Court of Appeal affirmed trial court order allowing custodial parent to move to another state based upon new state statute mandating a presumption in favor of relocation by the custodial family, unless it is found that the move is without reasonable purpose or would pose a threat of specific and serious harm to the child; Court stated that, once one parent is awarded physical custody of the child, decisions regarding the child’s residence fall to the custodial parent); Baures, supra, (New Jersey Supreme Court eliminated requirement that the custodial parent establish “real advantage from the move” to allow relocation in cases where the custodial parent has good faith reasons for the move and the move is not inimical to the child’s interests; Court found that the child’s interests are served by preserving the custodial relationship and by recognizing the close link between the best interests of the custodial parent and the best interests of the child).

<sup>78</sup> 10 Okl. St. §19.

the rights of welfare of the child, a custodial parent has a statutory presumptive right to change the residence of their child.<sup>79</sup>

In so holding, the Oklahoma Supreme Court cited Burgess as an example of how states with identical relocation statutes have interpreted such statutes as creating a rebuttable presumption in favor of relocation by the custodial family.<sup>80</sup> In addition, the Court specifically highlighted the emphasis placed by this Court in Burgess on the inevitability of relocation by custodial families following divorce and the importance of affording substantial deference to the custodial relationship in light of the close emotional bond between the custodial parent and child.<sup>81</sup>

Similarly, in Resor v. Resor, (Wyo. 1999) 987 P.2d 146, the Wyoming Supreme Court looked to Burgess in rejecting the father's argument that the trial court should have required the mother to prove that relocation was "necessary" before it granted her primary physical custody of the children at her new place of residence in Seattle, Washington.<sup>82</sup> Instead, the Court held that relocation by the custodial family should be granted so long as the custodial parent has good faith reasons for the move and reasonable visitation is available to the noncustodial parent.<sup>83</sup> Citing the policies

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<sup>79</sup> Kaiser, *supra*, 23 P.3d at 282-288.

<sup>80</sup> Id. at 283.

<sup>81</sup> Id. at 20-24.

<sup>82</sup> Resor, *supra*, 987 P.2d at 151-152.

<sup>83</sup> Id.

articulated by this Court in Burgess in favor of relocation by the custodial family, the Wyoming Supreme Court stated as follows:

“ . . . the district court determined Mother was the primary care giver of these children and found that it was in the best interests of the children to place them in the primary care and physical custody of Mother. Once that decision was made, the ‘necessity’ of her move has little, if any, substantive bearing on her suitability to care for the children. Geographic relocation does not make a parent who has cared for the children less capable of maintaining parental responsibilities and obligations.”<sup>84</sup>

Reducing the existing relocation rights set forth in Burgess, therefore, would undermine the very policies and legal precedent that have served this state so well, and have been a model for practice around the country. Such a result would be a serious step backward toward confinement of custodial families—the very harm that a growing number of states have averted by recognizing the importance of mobility and custodial family relationships to the overall well-being of children.

## V CONCLUSION

While it is preferable that children live in the same community as both of their parents, the reality is that this ideal cannot always be met. A substantial number of relationships in this country end in separation or divorce. A substantial number of children are born to single mothers. When compounded with the increasing mobility of families, the poor economic status of women and children in our society, and the

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<sup>84</sup> Ibid.

epidemic of domestic violence across the nation, it is unrealistic, if not dangerous, to require custodial families to remain in the same location throughout a child's minority, especially if such confinement is at the significant cost to the custodial family's ability to start a new and potentially improved life.

Accordingly, Burgess and its progeny have established a framework for resolving relocation issues which accommodates both the custodial family's need to move on and move forward in life and the noncustodial parent's interest in maintaining meaningful contact with the child. This framework provides sound guidance to courts throughout the state, thereby reducing the need for costly and lengthy litigation in these cases.

The only deficiency that needs to be addressed by the Court in this case, therefore, does not involve a deficiency with the framework established in Burgess, but rather, involves the failure of family courts, such as the trial court in this case, to adhere to and properly apply this framework when relocation by the custodial family is at issue. For these reasons, Amici Curiae respectfully request that the Court reaffirm its holding in Burgess by affirming the Court of Appeal decision in this case.

DATED:

Respectfully submitted,

CALIFORNIA WOMEN'S LAW  
CENTER

By: \_\_\_\_\_  
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**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 Times 13-point typeface, and contains 7,641 words.

DATED:

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MARCI FUKURODA