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IN THE SUPERIOR COURT OF CALIFORNIA
CONTRA COSTA COUNTY

In re the Marriage of: **SUSAN NAVARRO**, Petitioner, vs. **GARY LaMUSGA**, Respondent.	CASE NO. D95-01136 **PETITIONER'S *EX PARTE* MOTION TO CLARIFY OR RECONSIDER THE COURT'S ORDER ENTERED ON JULY 25, 2003**

Petitioner, Susan Navarro, hereby respectfully moves the Court to clarify or reconsider its Order Appointing Custody Evaluator entered on July 25, 2003, because it misstates the proper legal standard for the August 8, 2003 hearing and for any focused evaluation performed by the evaluator. The correct standard is not "whether the best interests of the parties' minor children are served under the current circumstances by temporarily allowing them to remain in the primary physical custody of [Navarro] in Arizona . . . or by temporarily changing primary physical custody" to Respondent, Gary LaMusga,[1] but rather "whether, in light of Navarro's presumptive right to move with the children to Arizona, a temporary change of custody is ***essential for the children's welfare*** to prevent ***substantial 'detriment'*** to the children as a result of the move."[2] Clarification is also needed to ensure that Navarro's long-pending motion to modify visitation will be addressed and ruled upon before the Court considers

[1] The formulation set forth in the Court's July 25, 2003 Order Appointing Custody Evaluator.

[2] The legal standard representing the law of the case for this litigation as set forth in the Court of Appeal decision of May 10, 2002, and as adopted by Judge Austin in his ruling and order at the hearing on June 18, 2002.

LaMusga's recent *ex parte* motion to change custody.

BACKGROUND PROCEDURAL HISTORY

The following chronology summarizes the background procedural history of this case:

1. July 8, 1996	Dr. Stahl appointed to evaluate custody and visitation issues for two young boys, ages 2 and 4 at the time, including Navarro's proposed move to Cleveland, Ohio, where she has been accepted to law school and where her sister and her family (with whom the children are especially close) lives.
2. November 1996	Navarro voluntarily relinquishes her admission to law and remains in California in light of Dr. Stahl's report dated October 10, 1996, which recommended against the relocation at that time because he felt the children were too young to hold on to their relationship with their father without establishing a greater attachment through frequent visitation "prior to a move taking place" and suggested that the relocation question be reviewed "in approximately two years."
3. December 23, 1996	Final custody order awarding sole physical custody of the children to Navarro and containing no travel or relocation restrictions.
4. April 1999	Dr. Stahl reappointed to perform an updated review of the visitation arrangement.
5. February 13, 2001	After waiting more than four years for LaMusga's relationship with his children to improve, and after her husband, Todd Navarro, accepts a management position in January 2001 with a Toyota dealership in Cleveland and moves to Ohio, Navarro (who by this time has a 15-month-old daughter with Todd to whom the LaMusga boys, now ages 9 and 7, are very attached) again seeks to relocate to Ohio with all three of her children.
6. February 26, 2001	Dr. Stahl's updated evaluation report on visitation issues expressly declines to address the relocation issue.
7. March 19, 2001	Court appoints Dr. Stahl to provide focused evaluation on issue of "whether the relocation of the parties' two minor children is in the best interest of said children." Navarro's counsel objects to order because it does not set forth the proper legal standard for assessing the move-away request.
8. June 29, 2001	Dr. Stahl's third report again offers no opinion whether the move to Ohio should occur. He concludes that the children would suffer no detriment from the move other than the "potential" for detriment to their relationship with their father. Dr. Stahl describes LaMusga's relationship with the boys as "tenuous at best" and notes that the boys want to move and have a well-established relationship with their mother, stepfather and sister. The report concludes: "Now that the children are older, it's ***likely*** that they will be able to 'hold onto' their relationship with their dad, ***even with a move***, unlike what I felt when I did my original evaluation for this family." (Emphasis supplied.)
9. August 23, 2001	After Dr. Stahl testifies that LaMusga was responsible for his "tenuous and [sometimes] difficult" relationship with the boys, that no amount of effort on

Navarro's part would improve the children's relationship with their father, and that there was no reason to believe that Navarro would not continue to comply with court orders for visitation if she moved to Ohio with the boys, Judge Bruiniers finds:

- Navarro is the primary caretaker and custodial parent of the minor children;
- Navarro seeks to move to Ohio for legitimate, good faith reasons and is not acting in bad faith because the move is not designed to interfere with LaMusga's relationship with the children; and
- Navarro is engaging in neither affirmative acts of alienation as alleged by LaMusga nor "unconscious" alienation as suggested by Dr. Stahl.[3]

Nevertheless, Judge Bruiniers refuses to apply the statutory presumption of Family Code § 7501 that Navarro, as the primary custodial parent, has the presumptive right to relocate with the children for two reasons not found in the statute or in the *Burgess* decision – because he finds that the parents were not always cooperative in the co-parenting of their children and because a motion to modify visitation was pending before the Court.[4]

Instead, Judge Bruiniers' decision places "primary importance" on improving and reinforcing the longstanding "tenuous and somewhat detached relationship" between LaMusga and the children before Navarro would be permitted to move, and concludes that disrupting the counseling therapy which is aimed at promoting that relationship "would be extremely detrimental" at the present time. The Court further concludes that the proposed relocation to Ohio "would likely result at this time" in the loss of the boys' relationship with their father.[5]

Therefore, since the Court assumes that the presumption does not apply, it holds that relocating the children in Ohio, 2,000 miles from California, would not promote frequent and continuing contacts with LaMusga, and thus would inevitably under the circumstances be detrimental to their welfare.[6] Judge Bruiniers states that Navarro is entitled to move to Ohio, but orders custody of the children immediately transferred to LaMusga for at least one year if she does.[7]

10. February 2002 — After living and working for a year in Cleveland without his family, Todd

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[3] *See* Reporter's Transcript of Trial Proceedings ("RT"), August 23, 2001, at 106-07.

[4] RT 105-06. However, the Court states that if the statutory presumption had applied, Navarro would have been authorized to move to Ohio and that there were ways and means to alleviate LaMusga's concerns. (RT 106.)

[5] RT 107.

[6] RT 108. Judge Bruiniers also states that "these issues could be revisited" if the situation improves in the future and the relationship between LaMusga and the children "could be maintained at a distance." *Id*.

[7] RT 108-09.

Navarro quits his position in Ohio and moves back to the Bay area but at sharply reduced pay.

11. April 18, 2002 — The children's therapist, Mr. Barry Tuggle, MFT, informs Navarro that they have had their last visit with him because he does not see the need for further counseling and because he is phasing out his practice in order to close his office in Pleasanton.

12. May 10, 2002 — The Court of Appeal unanimously reverses Judge Bruiniers' order of August 23, 2001, holding that:

- Navarro's presumptive right to relocate under Family Code § 7501 and the *Burgess* decision should have been applied, and that Judge Bruiniers' two newly-crafted exceptions to the statutory presumption were improper;
- the correct legal principles of § 7501 and *Burgess* place "primary importance" on maintaining the children's stability and continuity of established modes of care with their primary caretaker, not on the children's relationship with the noncustodial parent;
- no substantial evidence supported Judge Bruiniers' finding that the children would lose their relationship with LaMusga if they moved to Ohio; and
- frequent and continuing contacts could be maintained with LaMusga even after moving to Ohio through various effective means.

The Court of Appeal returns the case to this Court for proper application of the correct legal standards governing Navarro's request to move to Ohio.[8]

The Court of Appeal issues directions to this Court to determine whether, in light of Navarro's presumptive right to move with the children to Ohio, a change of custody is essential for the children's welfare, taking into account any additional circumstances bearing on the children's best interest that may have developed since August 23, 2001.

13. June 18, 2002 — Judge Austin states on the record that (i) Navarro may go ahead and move to Ohio in light of the proposal that LaMusga will have visitation with the children during the entire month of July and the first week in August, (ii) the children will stay in California during that period of time, and (iii) the Court will schedule a hearing in August before the visitation period ends and school starts to make a decision based on the Court of Appeal opinion and Dr. Stahl's recommendations whether, in light of Navarro's presumptive right to move with the children, a change of custody is essential for the children's welfare.[9]

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[8] *In re Marriage of LaMusga*, 2002 Cal. App. Unpub. LEXIS 1027 at *10-14, 18-22 (1st Dist. 2002). As the Court of Appeal correctly noted, Navarro was not required to seek the court's prior approval before relocating out of state. *Id*. at *9-10. If she had simply moved to Ohio and brought a motion to modify the visitation schedule, that would have been sufficient. *See also In re Marriage of Condon*, 62 Cal. App.4th 533 (1998); *In re Marriage of Whealon*, 53 Cal. App.4th 132 (1997).

[9] Petitioner has never been served with a Minute Order signed by the Court or by the clerk accurately reflecting Judge Austin's orders entered on the record at the hearing on June 18, 2002. On July 16, 2003, Petitioner's counsel was handed an unsigned Minute Order dated and apparently

Judge Austin also instructs Dr. Stahl to prepare a focused evaluation based on the Court of Appeal decision specifically related to whether a change of custody is essential for the children's welfare in light of Navarro's presumptive right to move with the children, including but not limited to circumstances that may have developed since August 23, 2001. But no Evidence Code § 730 order appointing Dr. Stahl was ever entered by the Court.

14. June 18, 2002 — LaMusga files petition for review in California Supreme Court, which prevents Court of Appeal from issuing remittitur to remand case to this Court. LaMusga's counsel does not inform Court or Navarro of this development at hearing held on this date.

15. August 28, 2002 — California Supreme Court grants review of the Court of Appeal's May 10, 2002 decision reversing this Court's August 23, 2001 order dealing solely with the move to Ohio.

RELEVANT FACTS AND EVENTS

The following chronology summarizes the relevant facts of this case pertaining to the pending motions:

1. September 16, 2002 — Following her husband's receipt of a career-enhancing offer to assume a management position with an auto dealership in Mesa, Arizona, which will more than double his income, Navarro abandons her plans to move to Ohio and files ***motion for modification of visitation schedule*** in light of her intended relocation with the children to Arizona.

2. November 14, 2002 — Judge Austin rules that this Court has jurisdiction over visitation schedule but not over custody issues, and stays proceedings on Navarro's "new request to relocate" to Arizona pending review of the Ohio move-away request by the California Supreme Court, specifically holding:

"Any action that this court might take at this time with respect to this request to relocate with the children [to Arizona] would interfere with the jurisdiction of the Supreme Court and carries with it great potential for rendering the appeal futile."

3. May 29, 2003 — In open court, Navarro's counsel advises Judge Kennedy and LaMusga that Navarro and her family will be moving to Arizona by the end of the summer (*i.e.*, before the start of the new school year) so that her husband can begin his new position of employment.

4. June 18, 2003 — For a second time in open court, Navarro's counsel informs Judge Kennedy and LaMusga that Navarro and the children will be moving to Arizona by August 1, 2003. Judge Kennedy orders visitation schedule through July 17, 2003 – LaMusga has visitation from 6/19/03 through 7/3/03, and the children return to Navarro's custody from 7/3/03 through 7/17/03 – and declines to enter further visitation schedule until children are interviewed by Family

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prepared on that same day, over a year after the hearing, which inaccurately and incompletely purports to recite Judge Austin's rulings.

		Court Services.
5.	July 5, 2003	With her husband's new employer unwilling to wait for him to begin his new position any longer, Navarro moves to Mesa, Arizona with her family. Navarro's husband begins his new employment in Mesa.
6.	July 8, 2003	Navarro advises Court and LaMusga that the previously-announced move to Arizona has now taken place.
7.	July 9, 2003	LaMusga files and serves *ex parte* ***motion to change custody*** of children because Navarro has moved to Arizona.
8.	July 15, 2003	Navarro purchases and takes possession of new residence in Mesa, Arizona, the first home she has ever been able to afford to own. The house is spacious enough also to accommodate Navarro's elderly and infirm mother who is moving from Houston to live with them because she is no longer able to live alone.
9.	July 16, 2003	Judge Kennedy orders children to visit with LaMusga from 7/17/03 through 7/31/03, orders supplemental briefing on the issue of the Court's jurisdiction, and schedules oral argument on the jurisdictional issues, along with a hearing on the remainder of summer visitation, for July 24, 2003. Because Family Court Services has not interviewed the children, Judge Kennedy appoints Leanne Schlegel as counsel for the minor children.
10.	July 23, 2003	Leanne Schlegel reports to Court that the two children, now ages 11 and 9, like their new home in Mesa and strongly desire to live there with their mother. They suggest that they should have visitation with their father twice a month, especially on long weekends, during the school year. They agree that it would be fair to spend most of the summers with their father, and a lot of time during other vacations from school. The children would greatly prefer such an arrangement to the current alternating two-week arrangement that does not permit them to get involved in summer sporting or scouting activities. Ms. Schlegel advises the Court that the children "would thrive better living with their Mom" in Arizona but need to spend significant time with their father in California that takes into consideration "reasonable scheduling" during the school year and their sports activities throughout the year.
11.	July 24, 2003	Judge Kennedy reverses Judge Austin's November 14, 2002 order and rules that the Court has jurisdiction to enter temporary orders regarding both custody and visitation matters without interfering with the jurisdiction of the California Supreme Court. Judge Kennedy schedules hearing on August 8, 2003, to address an appropriate temporary modification of the visitation schedule to accommodate the children's new location in Arizona. Judge Kennedy also indicates that he will consider whether to reappoint Dr. Stahl for focused evaluation of the visitation schedule in light of Navarro's objections.
12.	July 25, 2003	Judge Kennedy enters Order Appointing Custody Evaluator which now specifically states that the matter of temporary custody of the children is in question, not just modifying the visitation schedule in light of the children's move to Arizona. The Order overrules Navarro's objection to Dr. Stahl, appoints him as the

Court's expert under Evidence Code § 730, and directs him "to conduct a focused evaluation directed at determining ***whether the best interests of the parties' minor children are served*** under the current circumstances by temporarily allowing them to remain in the primary physical custody of [Navarro] in Arizona with liberal visitation for [LaMusga], or ***by temporarily changing primary physical custody*** to [LaMusga] with liberal visitation for [Navarro], all pending the decision by the California Supreme Court" (emphasis supplied).

The Order also *sua sponte* (i) extends LaMusga's existing visitation by one day, until August 1, 2003, (ii) allows the children to return to the custody of Navarro in Arizona for three days from August 1, 2003 until August 4, 2003, and (iii) grants LaMusga additional visitation from August 4, 2003 at least through the hearing on August 8, 2003, for the sole ostensible purpose of "enabl[ing] Dr. Stahl to perform his focused evaluation," and orders Navarro to pay for all of the children's travel expenses, including the additional trip ordered by the Court.

POINTS AND AUTHORITIES

I. TO THE EXTENT THE COURT PRESENTLY HAS JURISDICTION TO CONSIDER A TEMPORARY CHANGE OF CUSTODY AT ALL, THE CORRECT LEGAL STANDARD FOR THE COURT TO UTILIZE IS SET FORTH IN FAMILY CODE § 7501 AND IN THE *BURGESS* DECISION:

WHETHER, IN LIGHT OF NAVARRO'S PRESUMPTIVE RIGHT TO MOVE WITH THE CHILDREN TO ARIZONA, A TEMPORARY CHANGE OF CUSTODY IS ***ESSENTIAL FOR THE CHILDREN'S WELFARE*** BECAUSE OTHERWISE THEY WILL SUFFER ***SUBSTANTIAL "DETRIMENT"*** AS A RESULT OF THE MOVE.

Navarro, as the parent with sole physical custody of the children since December 1996, has the presumptive right to change the children's residence to Arizona, as she did on July 5, 2003, subject to the court's power to restrain a move that would prejudice the children's welfare. Fam. Code § 7501; *In re Marriage of Burgess* (1996) 13 Cal. 4th 25, 32. If LaMusga now seeks a temporary change of custody, he has the burden of showing that the children's relocation to Arizona will result in a substantial change of circumstances so affecting their interests that a change of custody is essential for their welfare. *Id*. at 37-38; *In re Marriage of Whealon* (1997) 53 Cal.App.4th 132, 141. As the Court ruled in *Burgess*:

> Once it has been established [by a judicial custody order] 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.
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> ***The showing required is substantial***. . . . In a "move-away" case, ***a change of custody is not justified simply because the custodial parent has chosen, for any sound good faith reason, to reside in a different location***, but only if, as a result of relocation with that parent, the child will suffer detriment rendering it "essential or expedient for the welfare of the child that there be a change."

Burgess, supra, 13 Cal. 4th at 37 (citations omitted) (emphasis supplied). This required showing of substantial detriment to the children's welfare resulting from the relocation before a change of custody is permissible is consistent with the custodial parent's statutory presumptive right to change the children's residence unless doing so would prejudice their rights or welfare, and it recognizes the reality of "an increasingly mobile society." *Whealon, supra*, 53 Cal.App.4th at 141; *see also Burgess, supra*, 13 Cal. 4th at 38, *and* § 7501.

The dispositive issue is not whether relocating to Arizona, by itself, is in the children's best interests or is essential or expedient for their welfare. *See In re Marriage of LaMusga, supra*, slip op. at 7. This illustrates the problem with the Order Appointing Custody Evaluator as entered by the Court on July 25, 2003 – it expressly directs the evaluator to focus on determining whether it is currently in the children's best interests to allow them to remain in Navarro's custody in Arizona or to temporarily change their custody to LaMusga. This is precisely the wrong focus, and is contrary to the law established by the General Assembly in § 7501, by the California Supreme Court in *Burgess, supra*, and by every appellate court decision since *Burgess* which has addressed the issue.[10]

Rather, the appropriate dispositive determination is whether, in light of Navarro's presumptive right to relocate with the children in Arizona, "***a change in custody*** is 'essential or expedient for the [children's] welfare'" because otherwise they will suffer substantial "detriment" as a result of the move to Arizona. *Burgess, supra*, at 38 (citation omitted) (emphasis in original).

The Supreme Court in *Burgess* instructed the family courts regarding the correct balance to strike in dealing with such issues:

> the paramount need for continuity and stability in custody arrangements – and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker – weigh heavily in favor of maintaining ongoing custody arrangements.

Id. at 32-33.

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[10] *See In re Marriage of LaMusga* (2002)(1st Dist.) 2002 Cal. App. Unpub. LEXIS 1027; *In re Marriage of Lasich* (2002)(3rd Dist.) 99 Cal.App.4th 702; *In re Marriage of Bryant* (2001)(2nd Dist.) 91 Cal.App.4th 789; *In re Marriage of Edlund & Hales* (1998)(1st Dist.) 66 Cal.App.4th 1454; *In re Marriage of Biallas* (1998)(4th Dist.) 65 Cal.App.4th 755; *In re Marriage of Condon* (1998)(2nd Dist.) 62 Cal.App.4th 533; *In re Marriage of Whealon* (1997) (4th Dist.) 53 Cal.App.4th 132; *Ruisi v. Theiriot* (1997)(1st Dist.) 53 Cal.App.4th 1197.

As this Court has already noted, a court's function in determining custody-related issues is "not to reward or punish the . . . behavior of any party, but to judge each party's current ability to provide care for the children." *In re Marriage of Condon* (1998) 62 Cal.App.4th 533, 553. Navarro's presumptive right as the custodial parent to move to Arizona with the children can be defeated only by a "substantial" showing that the move will cause such detriment to the children that a change of custody is essential for their welfare. *Burgess, supra*, 13 Cal. 4th at 38.

Any post-move evaluation of these issues must give "heavy" weight to the presumption favoring continuation of the existing custodial arrangement so that the stability and continuity of the children's environment with their primary caregiver is not disrupted. *Id*. at 32-33. If such an evaluation concentrated on the effect of the move to Arizona on the children's relationship with LaMusga, it would overlook the severe disruption to the children's lives that would ensue if they were separated from Navarro, the parent who has been their primary caretaker all their lives. *Id*. There is inevitably a significant detriment to the relationship between a child and the noncustodial parent when the custodial parent makes a good faith decision to move away. *In re Marriage of Edlund & Hales* (1998) 66 Cal.App.4th 1454, 1472. However, if evidence of such detriment due to geographical separation were sufficient to mandate a change of custody, the primary custodial parent – far from having the presumptive right to move the children's residence – would never be able to relocate. *Id.*

Moreover, the statutory policy encouraging a child's "frequent and continuing contact" with both parents after the dissolution of a marriage (Fam. Code § 3020(b)) must be considered in conjunction with other important policies pertinent to custody, including the policies of allowing the custodial parent the freedom to relocate and the children's need for continuous, stable custody arrangements. The fact that the move to Arizona by Navarro as the custodial parent may have an adverse effect on the frequency of contact between the children and LaMusga is not determinative; what is determinative is whether, given that the custodial parent has moved to Arizona, it is essential for the children's welfare to change their custody to the noncustodial parent. *Burgess, supra; In re Marriage of Bryant* (2001) 91 Cal.App.4th 789, 794. If the policy of frequent and continuing contact with the noncustodial parent conflicts with the policy that the custodial parent has a presumptive right to relocate, or with the policy that the Court's

primary concern should be assuring and maintaining the children's established patterns of care and emotional bonds with the primary caretaker, those conflicts should be satisfied and resolved by an order for liberal visitation with the noncustodial parent. *Burgess, supra*, at 36; *see* Fam. Code § 3020(c).

The Court of Appeal has already issued instructions to this Court in this case (in the context of Navarro's intended move of over 2,000 miles to Ohio, rather than her move earlier this month of approximately 600 miles to Arizona) to determine whether, in light of Navarro's presumptive right to relocate with the children, a change of custody is essential for their welfare. *In re Marriage of LaMusga, supra*, slip op. at 14. In so doing, however, this Court was ***not*** authorized to determine whether the children's "best interests are served" by allowing them to remain post-move in Navarro's custody, as the July 25, 2003 Order Appointing Custody Evaluator specifies. Such a "best interests" determination that Navarro should be the primary custodial parent was made almost seven years ago, and may not be reexamined without a substantial showing of significant "detriment" to the children's welfare that warrants and justifies disrupting the established mode of custody and emotional bonds with their primary caregiver. The Court of Appeal concluded that "[g]iven the paramount importance of maintaining a stable and continuous custodial arrangement, the detriment to the children of losing their primary caregiver and their established pattern of care and emotional bonds with her outweighs the detriment of possibly jeopardizing a relationship with the noncustodial parent." *Id*. at 13-14. This Court was authorized only to consider additional circumstances that may have developed since August 23, 2001, which bear on the question of whether a change of custody is essential for the children's welfare in order to keep them from suffering significant "detriment" as a result of the move. *Id*. at 14.

Of course, the "detriment" that will justify a change of custody cannot properly include the kinds of harms which any move-away will occasion. Parties frequently assert, and judges often agree, that children's relationships with their noncustodial parents will be profoundly damaged by relocation. The move itself cannot constitute "detriment" in this context. Furthermore, even if a threshold showing of some prejudice or detriment is made, a court must weigh and balance any such harms to the children as a result of relocating with their custodial parent against those they would suffer by a change in custody

in determining whether such a transfer of custody is essential to their welfare.[11]

II. THE CORRECT LEGAL STANDARD – WHETHER, IN LIGHT OF NAVARRO'S PRESUMPTIVE RIGHT TO MOVE WITH THE CHILDREN TO ARIZONA, A TEMPORARY CHANGE OF CUSTODY IS "ESSENTIAL FOR THEIR WELFARE" – IS ALREADY LAW OF THE CASE BY VIRTUE OF THE COURT OF APPEAL DECISION ON MAY 10, 2002 AND JUDGE AUSTIN'S ORDERS ENTERED ON THE RECORD AT THE JUNE 18, 2002 HEARING.

As set forth above, the Court of Appeal decision on May 10, 2002 reversed the August 23, 2001 order by Judge Bruiniers and announced the correct legal standard to be applied by this Court – whether, in light of Navarro's presumptive right to relocate with the children (in that case to Ohio; in the pending matter to Arizona), a temporary change of custody is essential for the children's welfare because otherwise they would suffer substantial detriment as a result of the move. *In re Marriage of LaMusga, supra*, slip op. at 14. This legal standard is established as law of the case unless or until the California Supreme Court rules otherwise, and no lower court is free to ignore or disregard it.

Furthermore, Judge Austin has already adopted the standard as the law applying to this case (again in the context of Navarro's previous intention to move to Ohio) in his rulings entered on the record at the hearing held on June 18, 2002. At that hearing, Judge Austin subscribed to the holding of the Court of Appeal and ruled that he would instruct Dr. Stahl to conduct a focused evaluation based on the Court of Appeal decision specifically related to whether a change of custody is essential for the children's welfare in light of Navarro's presumptive right to move with the children, including but not limited to circumstances that may have developed since August 23, 2001.[12]

Therefore, if this Court has jurisdiction to consider post-move custody issues at the August 8, 2003 hearing, it should not alter or deviate from the standard for such proceedings that the Court of Appeal prescribed and Judge Austin endorsed and imposed.

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[11] In the analogous context of awarding custody to non-parents, Fam. Code § 3041(c), effective January 1, 2003, now defines "detriment to the child" to include "the harm from removal from a stable placement of a child with a person who has assumed, on a day-to-day basis, the role of his or her parent, fulfilling both the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time." This is an apt description of the role that Navarro, as the children's primary caregiver since birth, has fulfilled.

[12] Transcript of Proceedings, June 18, 2002, at 8:11-24, 16:5-10, 17:17-24.

III. GIVEN THE FACT THAT NAVARRO'S MOTION TO MODIFY VISITATION SCHEDULE IN LIGHT OF HER INTENDED MOVE TO ARIZONA WAS FILED ALMOST 11 MONTHS AGO, AND THAT LAMUSGA'S *EX PARTE* MOTION TO CHANGE CUSTODY HAS BEEN PENDING FOR LESS THAN ONE MONTH, THE COURT SHOULD CONSIDER ONLY NAVARRO'S LONG-STANDING REQUEST TO MODIFY VISITATION TO ACCOMMODATE HER MOVE TO ARIZONA AT THE AUGUST 8, 2003 HEARING.

On September 16, 2002, almost eleven months ago, Navarro filed her motion to modify the existing visitation schedule to reflect her changed plans to move to the Phoenix area because her husband had received a career-enhancing offer of a management position with an auto dealership in Mesa, Arizona. Navarro's counsel twice informed the Court and LaMusga in open court, on May 29, 2003 and June 18, 2003, that Navarro intended to move to Arizona with the children and her family before the new school year started in August, but still no hearing on her motion to modify visitation was scheduled. Only after she actually moved and only after LaMusga filed an *ex parte* motion to change custody on July 9, 2003, was a hearing scheduled for August 8, 2003.

Navarro submits that it would be fundamentally unfair for the Court to consider LaMusga's *ex parte* motion to change custody first, at the August 8 hearing, thereby jeopardizing Navarro's continued custody while potentially rendering her motion to modify visitation moot. Instead, the Court should consider Navarro's long-standing and first-filed request to modify visitation to accommodate her relocation with the children to Arizona, and only that motion, at the August 8 hearing. In this way, in the event the Court were to deny her motion for modification of the visitation schedule, Navarro can know and accurately assess the situation confronting her and the children before her custody rights become imperiled.

Navarro is being placed in a position similar to the one in which she found herself as a result of Judge Bruiniers' August 23, 2001 order, when she was "permitted" to move to Ohio but would immediately lose custody of the children if she did. The Court of Appeal held that such a conditional order, which it construed as "calling the relocating parent's bluff" because she will not move if doing so would result in a loss of custody, was error:

> [T]here is no statutory basis for permitting the trial court to test parental attachment or risk detriment to the best interest of the child on those grounds.

In re Marriage of LaMusga, supra, slip op. at 14, *citing Burgess*, 13 Cal. 4th at 36 n.7. Similarly, in this

matter where Navarro has acted in a completely lawful manner and filed a request for the Court to consider and address a modification in the existing visitation schedule almost 10 months before her family actually moved, Navarro should not be punished for her diligence by being placed in such a coercive "Catch-22". The law in California is quite clear on this point:

> As long as the custodial parent has a good faith reason to move, and the noncustodial parent has not made a substantial showing that, as a result of the move, the child will suffer detriment making a change of custody essential for the child's custody, ***the custodial parent cannot be prevented, directly or indirectly, from exercising his or her right to change the child's residence.***

Id. (emphasis supplied). If, as the Court of Appeal held, LaMusga failed to make such a substantial showing at the August 23, 2001 trial with respect to Navarro's request to move over 2,000 miles away to Ohio (*id.* at 11-14), he clearly cannot sustain his burden with respect to the move of approximately one-quarter the distance to Arizona.

IV. NAVARRO ADHERED TO THE CORRECT PROCEDURE AND WAS LEGALLY ENTITLED TO MOVE TO ARIZONA WITHOUT ANY PRIOR COURT PERMISSION BECAUSE SHE HAS THE PRESUMPTIVE RIGHT TO MOVE. SHE COULD THEN HAVE FILED A MOTION TO MODIFY VISITATION SCHEDULE AFTER RELOCATING. INSTEAD, SHE ELECTED TO PRESENT SUCH MOTION TO THE COURT WELL IN ADVANCE OF HER MOVE.

As the Court of Appeal correctly noted, Navarro was not required to seek the court's prior approval before relocating out of state (in that proceeding, to Ohio). *Id*., 2002 Cal. App. Unpub. LEXIS 1027 at *9-10. If she had simply moved to Ohio and brought a motion to modify the visitation schedule, that would have been sufficient. *See also In re Marriage of Condon*, 62 Cal. App.4th 533 (1998); *In re Marriage of Whealon*, 53 Cal.App.4th 132 (1997). The custodial parent does not place his or her custody rights in jeopardy by so doing.

In this proceeding, Navarro chose to file her motion to modify visitation schedule in September 2002, approximately 10 months before she moved, rather than waiting until after she had moved to Arizona to do so. In fact, Navarro and her family did not actually move until July 2003 when, even though she had no hearing date for and no ruling on her motion, her husband's job offer was about to expire and be withdrawn. Navarro and her husband Todd have made considerable sacrifices during the past several years – they have given up, respectively, law school and a good job in Ohio, and endured a year in which Todd lived in Ohio apart from his family. They could not afford, nor should they be

required, to sacrifice a second excellent career opportunity for Navarro's husband and the chance to better themselves financially. Navarro's family has already accomplished many goals in the short time since they moved to Arizona which have likewise benefitted the living environment for the children – Navarro has become a first-time homeowner, her husband has begun his employment in a management position at more than double the salary he was earning in California, and the children's grandmother has come from Houston to live with them.

By bringing a motion to modify the visitation schedule in light of her relocation to Arizona, Navarro has placed this matter in the correct procedural posture for decision by the Court.

V. BY MOVING TO ARIZONA ON JULY 5, 2003, NAVARRO HAS NOT VIOLATED ANY COURT ORDER, INCLUDING JUDGE AUSTIN'S JUNE 18, 2002 ORDER AND THE ORDER BY JUDGE BRUINIERS ON AUGUST 23, 2001 WHICH WAS REVERSED BY THE COURT OF APPEAL.

A. Judge Austin's ruling in open court on June 18, 2002 did not prohibit Navarro from moving out of state; indeed, it expressly contemplated that she would move to Ohio at the end of that week.

More than once, and over the objections of LaMusga's counsel, Judge Austin ruled in open court at the June 18, 2002 hearing that Navarro could immediately move to Ohio without thereby jeopardizing custody of the children. As the Court stated:

> THE COURT: ***I am not proposing [to] delay the move, that the move be delayed***. You are moving at the end of the week, right?
>
> MS. ROBINSON: She is intending to, yes.
>
> THE COURT: My understanding [is] that dad's got most of the summer, is that right?
>
> * * *
>
> MS. ROBINSON: If I may, right now the current order that's in place is essentially alternating weekends and every Thursday night. We have proposed that or we have agreed, put out there that when mom moves we would like dad to have the children for the whole month of July and first week of August, which would be –
>
> THE COURT: Yes, what I am thinking is ***you [Navarro] can go ahead and move*** [to Ohio], adopt that schedule for July, and then we will see what happen[s] in July, and then I make my decision whether or not that, in light of, in light of what the Court's telling me to do here, in light of mother's presumptive right to move with the children a change of custody is essential for the children's welfare. So we have a hearing on that, I have Dr. Stahl look into this, give him a copy of the opinion, so that he can follow the directions there, ***you can go ahead and move***, we adopt the schedule that you are proposing, that [the children stay] here during that

> period of time, and I make a decision in July based on the Court of Appeal opinion and Dr. Stahl's recommendations.[13]

Therefore, the Court stated three times that Navarro could "go ahead and move" to Ohio and that he would not delay her intended move before the end of June 2002.

B. Judge Austin's actual ruling on June 18, 2002 did not restrain changing the children's residence; it merely reflected the Court's expectation that the children would have visitation with LaMusga throughout July, and that the issues specified by Court of Appeal on remand would be decided during that time frame.

As set forth above, Judge Austin did not actually order that the children would not be allowed to move their place of residence at the time of the June 18, 2002 hearing. He merely stated that he understood the children would be visiting with LaMusga throughout July and the first week in August, and he intended to make a decision during that time frame. The Court's expectation in this regard did not come to pass because LaMusga's petition for review in the California Supreme Court stayed the Court of Appeal's issuance of its remittitur to remand the case to this Court.

C. The Minute Order dated July 16, 2003 does not accurately reflect what Judge Austin ruled, and was prepared over a year after the hearing it purports to reflect.

At the hearing on July 16, 2003, Navarro's counsel was given a copy of a Minute Order dated as of the very same date, indicating that it was prepared over a year after the June 18, 2002 hearing it purports to reflect. It does not, however, accurately reflect what Judge Austin actually ruled at the June 18, 2002 hearing. The unsigned Minute Order states, in pertinent part:

> Court makes the following orders: Mother is permitted to move away, however the children shall not be allowed to move their place of residence at this time. Parties agree to adopt the schedule for July.

Besides the ambiguity over the meaning of "the schedule for July," the Minute Order is not accurate. As set forth above, Judge Austin did not rule that "the children shall not be allowed to move their place of residence at this time." He merely stated his understanding that it was unnecessary to address the question during July because the children would be visiting with LaMusga anyway. Judge Austin stated his intention to decide the relevant issues directed by the Court of Appeal before the time period for visitation with LaMusga ended.

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[13] Transcript of Proceedings, June 18, 2002, at 7:23-8:24 (emphasis supplied).

More importantly, when the Court gave its explicit permission to Navarro to move to Ohio, as the custodial parent she was also permitted to move the residence of the children absent an express determination that such a move should be restrained because of the factors set forth in the Court of Appeal decision to which Judge Austin referred. Clearly, he made no such determination on June 18, 2002, and thus Navarro was factually and legally entitled to move the children's residence subject to a post-move *Burgess* determination that a change of custody was essential for their welfare.

The exactly analogous situation faces Navarro in this proceeding. She has emphatically not violated any court order by moving to Arizona with the children on July 5, 2003; she had the presumptive right to do so. Her move is, however, subject to a post-move modification of the visitation schedule to accommodate both the custodial parent's and the noncustodial parent's legitimate interests in light of the relocation, and if appropriate a determination under *Burgess* and its progeny of whether a change of custody is essential for the welfare of the children upon a substantial showing by LaMusga that the children will suffer significant "detriment" as a result of the move.

D. Judge Austin's rulings on June 18, 2002 dealt solely with Navarro's intended move to Ohio, and have no bearing on or application to her subsequent good faith change of plans and decision to move to Arizona.

The only issue before Judge Austin on June 18, 2002, was Navarro's request to move to Ohio. Therefore, the only rulings he actually made, or could have made, in the case dealt with moving to Ohio and nothing and nowhere else. In the event the Court were to conclude that the Minute Order is accurate and valid, and restrains relocation of the children's place of residence, it does so only in the context of moving their residence to Ohio, because that is the only request pending before the Court at the time. Such Order does not and cannot apply to her subsequent request to modify visitation in light of her intended move to Arizona.

Moreover, notwithstanding the foregoing, any such Order to restrain moving the children's residence would be invalid and unenforceable in the absence of an express *Burgess* evaluation and determination as required by *Burgess* and its progeny, and by the Court of Appeal decision in the former proceedings involving the move away to Ohio.

VI. THE COURT PREVIOUSLY RULED ON NOVEMBER 14, 2002, WHEN NAVARRO'S MOTION TO MODIFY VISITATION WAS THE ONLY RELEVANT PENDING MOTION, THAT IT DID NOT HAVE JURISDICTION OVER CUSTODY MATTERS BUT ONLY OVER VISITATION SCHEDULE; THAT DECISION SHOULD NOT BE OVERRULED MERELY BECAUSE LAMUSGA HAS NOW FILED AN *EX PARTE* MOTION TO CHANGE CUSTODY.

The Court's change in direction with respect to its jurisdiction at this time is perplexing, but boils down to a matter of fundamental fairness. At the time of Navarro's move to Arizona on July 5, 2003, the Court had previously made clear that it did not have jurisdiction to decide custody issues. Now that Navarro has actually moved, the Court is reversing its prior determination and holding that it does have jurisdiction to decide custody issues, and that, indeed, it is going to consider whether to change custody at the August 8, 2003 hearing.

The jurisdictional about-face has placed Navarro in an unfair position. More importantly, Judge Austin's November 14, 2002 ruling is law of the case. One judge does not have the authority to overrule another judge of the same Court in the same case. The Court should reconsider its rulings on July 24, 2003 and July 25, 2003, and should decline jurisdiction to rule on a change of custody – even temporarily – until the California Supreme Court has returned the case to this Court. In the meantime, the only matter that should be addressed and adjudicated at the August 8, 2003 hearing is Navarro's long-pending motion to modify the visitation schedule in light of her move to Arizona in July 2003.

Respectfully submitted,

_____

KIM M. ROBINSON (SBN 136228)
Attorney for Petitioner,
Susan Poston Navarro

PROOF OF SERVICE

THE UNDERSIGNED STATES:

I, Kim M. Robinson, am a citizen of the United States of America. I am over the age of 18 years and am not a party to the above-entitled action. On July 29, 2003, I served copies of the following documents:

PETITIONER'S *EX PARTE* MOTION TO CLARIFY OR RECONSIDER THE COURT'S ORDER ENTERED ON JULY 25, 2003

on the parties in this action as follows:

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Attorney for Minor Children,
Garrett LaMusga and Devlen LaMusga

HONORABLE JOHN W. KENNEDY (VIA HAND DELIVERY)
Judge, Superior Court for
Contra Costa County
725 Court St.
P.O. Box 911
Martinez, CA 94553

XX (**BY MAIL**) I placed a true copy of the aforementioned document(s) in a sealed envelope with postage fully prepaid and addressed as indicated above in a United States Post Office Box at Oakland, California.

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 29, 2003, at Oakland, California.

_____
KIM M. ROBINSON