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SUSAN POSTON NAVARRO

6 IN THE SUPERIOR COURT OF CALIFORNIA  
7 CONTRA COSTA COUNTY

8 In re the Marriage of: )

CASE NO. D95-01136

9 **SUSAN NAVARRO,** )

10 Petitioner, )

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

11 vs. )

12 **GARY LaMUSGA,** )

13 Respondent. )  
14

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

26 \_\_\_\_\_  
27 <sup>1</sup> The formulation set forth in the Court's July 25, 2003 Order Appointing Custody  
Evaluator.

28 <sup>2</sup> 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.

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

2 BACKGROUND PROCEDURAL HISTORY

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

- 4 1. July 8, 1996 Dr. Stahl appointed to evaluate custody and visitation issues for two young  
5 boys, ages 2 and 4 at the time, including Navarro's proposed move to  
6 Cleveland, Ohio, where she has been accepted to law school and where her  
7 sister and her family (with whom the children are especially close) lives.
- 8 2. November 1996 Navarro voluntarily relinquishes her admission to law and remains in  
9 California in light of Dr. Stahl's report dated October 10, 1996, which  
10 recommended against the relocation at that time because he felt the children  
11 were too young to hold on to their relationship with their father without  
12 establishing a greater attachment through frequent visitation "prior to a move  
13 taking place" and suggested that the relocation question be reviewed "in  
14 approximately two years."
- 15 3. December 23, 1996 Final custody order awarding sole physical custody of the children to Navarro  
16 and containing no travel or relocation restrictions.
- 17 4. April 1999 Dr. Stahl reappointed to perform an updated review of the visitation  
18 arrangement.
- 19 5. February 13, 2001 After waiting more than four years for LaMusga's relationship with his  
20 children to improve, and after her husband, Todd Navarro, accepts a  
21 management position in January 2001 with a Toyota dealership in Cleveland  
22 and moves to Ohio, Navarro (who by this time has a 15-month-old daughter  
23 with Todd to whom the LaMusga boys, now ages 9 and 7, are very attached)  
24 again seeks to relocate to Ohio with all three of her children.
- 25 6. February 26, 2001 Dr. Stahl's updated evaluation report on visitation issues expressly declines  
26 to address the relocation issue.
- 27 7. March 19, 2001 Court appoints Dr. Stahl to provide focused evaluation on issue of "whether  
28 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

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

- 5 • Navarro is the primary caretaker and custodial parent of the minor children;
- 6 • Navarro seeks to move to Ohio for legitimate, good faith reasons and is not  
7 acting in bad faith because the move is not designed to interfere with  
8 LaMusga's relationship with the children; and
- 9 • Navarro is engaging in neither affirmative acts of alienation as alleged by  
10 LaMusga nor "unconscious" alienation as suggested by Dr. Stahl.<sup>3</sup>

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

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

25 Therefore, since the Court assumes that the presumption does not apply, it  
26 holds that relocating the children in Ohio, 2,000 miles from California, would  
27 not promote frequent and continuing contacts with LaMusga, and thus would  
28 inevitably under the circumstances be detrimental to their welfare.<sup>6</sup> 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.<sup>7</sup>

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

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22 <sup>3</sup> See Reporter's Transcript of Trial Proceedings ("RT"), August 23, 2001, at 106-07.

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

25 <sup>5</sup> RT 107.

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

28 <sup>7</sup> RT 108-09.

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

3 11. April 18, 2002

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

8 12. May 10, 2002

9 The Court of Appeal unanimously reverses Judge Bruiniers' order of August  
10 23, 2001, holding that:

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

22 The Court of Appeal returns the case to this Court for proper application of  
23 the correct legal standards governing Navarro's request to move to Ohio.<sup>8</sup>

24 The Court of Appeal issues directions to this Court to determine whether, in  
25 light of Navarro's presumptive right to move with the children to Ohio, a  
26 change of custody is essential for the children's welfare, taking into account  
27 any additional circumstances bearing on the children's best interest that may  
28 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.<sup>9</sup>

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<sup>8</sup> *In re Marriage of LaMusga*, 2002 Cal. App. Unpub. LEXIS 1027 at \*10-14, 18-22 (1<sup>st</sup> 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).

<sup>9</sup> 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

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

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

12 15. August 28, 2002 California Supreme Court grants review of the Court of Appeal's May 10,  
13 2002 decision reversing this Court's August 23, 2001 order dealing solely  
14 with the move to Ohio.

#### 15 RELEVANT FACTS AND EVENTS

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

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

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

27 "Any action that this court might take at this time with respect to this request  
28 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."

1. 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.

1 Court Services.

2 5. July 5, 2003 With her husband's new employer unwilling to wait for him to begin his new  
3 position any longer, Navarro moves to Mesa, Arizona with her family.  
Navarro's husband begins his new employment in Mesa.

4 6. July 8, 2003 Navarro advises Court and LaMusga that the previously-announced move to  
5 Arizona has now taken place.

6 7. July 9, 2003 LaMusga files and serves *ex parte motion to change custody* of children  
because Navarro has moved to Arizona.

7 8. July 15, 2003 Navarro purchases and takes possession of new residence in Mesa, Arizona,  
8 the first home she has ever been able to afford to own. The house is spacious  
9 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.

10 9. July 16, 2003 Judge Kennedy orders children to visit with LaMusga from 7/17/03 through  
11 7/31/03, orders supplemental briefing on the issue of the Court's jurisdiction,  
12 and schedules oral argument on the jurisdictional issues, along with a hearing  
on the remainder of summer visitation, for July 24, 2003. Because Family  
13 Court Services has not interviewed the children, Judge Kennedy appoints  
Leanne Schlegel as counsel for the minor children.

14 10. July 23, 2003 Leanne Schlegel reports to Court that the two children, now ages 11 and 9,  
15 like their new home in Mesa and strongly desire to live there with their  
16 mother. They suggest that they should have visitation with their father twice  
17 a month, especially on long weekends, during the school year. They agree that  
18 it would be fair to spend most of the summers with their father, and a lot of  
19 time during other vacations from school. The children would greatly prefer  
20 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  
21 better living with their Mom" in Arizona but need to spend significant time  
22 with their father in California that takes into consideration "reasonable  
23 scheduling" during the school year and their sports activities throughout the  
24 year.

25 11. July 24, 2003 Judge Kennedy reverses Judge Austin's November 14, 2002 order and rules  
26 that the Court has jurisdiction to enter temporary orders regarding both  
27 custody and visitation matters without interfering with the jurisdiction of the  
28 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.

25 12. July 25, 2003 Judge Kennedy enters Order Appointing Custody Evaluator which now  
26 specifically states that the matter of temporary custody of the children is in  
27 question, not just modifying the visitation schedule in light of the children's  
28 move to Arizona.

The Order overrules Navarro's objection to Dr. Stahl, appoints him as the

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

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

#### 17 POINTS AND AUTHORITIES

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

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

24 Navarro, as the parent with sole physical custody of the children since December 1996, has the  
25 presumptive right to change the children's residence to Arizona, as she did on July 5, 2003, subject to  
26 the court's power to restrain a move that would prejudice the children's welfare. Fam. Code § 7501; *In*  
27 *re Marriage of Burgess* (1996) 13 Cal. 4<sup>th</sup> 25, 32. If LaMusga now seeks a temporary change of custody,  
28 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.4<sup>th</sup> 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.

*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."*

1 *Burgess, supra*, 13 Cal. 4<sup>th</sup> at 37 (citations omitted) (emphasis supplied). This required showing of  
2 substantial detriment to the children’s welfare resulting from the relocation before a change of custody  
3 is permissible is consistent with the custodial parent’s statutory presumptive right to change the children’s  
4 residence unless doing so would prejudice their rights or welfare, and it recognizes the reality of “an  
5 increasingly mobile society.” *Whealon, supra*, 53 Cal.App.4th at 141; *see also Burgess, supra*, 13 Cal.  
6 4<sup>th</sup> at 38, *and* § 7501.

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

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

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

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

25 *Id.* at 32-33.

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



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

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

18           Moreover, the statutory policy encouraging a child’s “frequent and continuing contact” with both  
19 parents after the dissolution of a marriage (Fam. Code § 3020(b)) must be considered in conjunction with  
20 other important policies pertinent to custody, including the policies of allowing the custodial parent the  
21 freedom to relocate and the children’s need for continuous, stable custody arrangements. The fact that  
22 the move to Arizona by Navarro as the custodial parent may have an adverse effect on the frequency of  
23 contact between the children and LaMusga is not determinative; what is determinative is whether, given  
24 that the custodial parent has moved to Arizona, it is essential for the children’s welfare to change their  
25 custody to the noncustodial parent. *Burgess, supra; In re Marriage of Bryant* (2001) 91 Cal.App.4th  
26 789, 794. If the policy of frequent and continuing contact with the noncustodial parent conflicts with the  
27 policy that the custodial parent has a presumptive right to relocate, or with the policy that the Court’s  
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1 primary concern should be assuring and maintaining the children's established patterns of care and  
2 emotional bonds with the primary caretaker, those conflicts should be satisfied and resolved by an order  
3 for liberal visitation with the noncustodial parent. *Burgess, supra*, at 36; *see* Fam. Code § 3020(c).

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

21 Of course, the "detriment" that will justify a change of custody cannot properly include the kinds  
22 of harms which any move-away will occasion. Parties frequently assert, and judges often agree, that  
23 children's relationships with their noncustodial parents will be profoundly damaged by relocation. The  
24 move itself cannot constitute "detriment" in this context. Furthermore, even if a threshold showing of  
25 some prejudice or detriment is made, a court must weigh and balance any such harms to the children as  
26 a result of relocating with their custodial parent against those they would suffer by a change in custody  
27  
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1 in determining whether such a transfer of custody is essential to their welfare.<sup>11</sup>

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

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

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

21 Therefore, if this Court has jurisdiction to consider post-move custody issues at the August 8,  
22 2003 hearing, it should not alter or deviate from the standard for such proceedings that the Court of  
23 Appeal prescribed and Judge Austin endorsed and imposed.

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24 <sup>11</sup> In the analogous context of awarding custody to non-parents, Fam. Code § 3041(c),  
25 effective January 1, 2003, now defines “detriment to the child” to include “the harm from removal  
26 from a stable placement of a child with a person who has assumed, on a day-to-day basis, the role of  
27 his or her parent, fulfilling both the child’s physical needs and the child’s psychological needs for  
28 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.

<sup>12</sup> Transcript of Proceedings, June 18, 2002, at 8:11-24, 16:5-10, 17:17-24.

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

6 On September 16, 2002, almost eleven months ago, Navarro filed her motion to modify the  
7 existing visitation schedule to reflect her changed plans to move to the Phoenix area because her husband  
8 had received a career-enhancing offer of a management position with an auto dealership in Mesa,  
9 Arizona. Navarro's counsel twice informed the Court and LaMusga in open court, on May 29, 2003 and  
10 June 18, 2003, that Navarro intended to move to Arizona with the children and her family before the new  
11 school year started in August, but still no hearing on her motion to modify visitation was scheduled. Only  
12 after she actually moved and only after LaMusga filed an *ex parte* motion to change custody on July 9,  
13 2003, was a hearing scheduled for August 8, 2003.

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

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

27 [T]here is no statutory basis for permitting the trial court to test parental  
28 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. 4<sup>th</sup> at 36 n.7. Similarly, in this

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

5           As long as the custodial parent has a good faith reason to move, and the  
6 noncustodial parent has not made a substantial showing that, as a result of  
7 the move, the child will suffer detriment making a change of custody  
8 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.***

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

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

18           As the Court of Appeal correctly noted, Navarro was not required to seek the court’s prior  
19 approval before relocating out of state (in that proceeding, to Ohio). *Id.*, 2002 Cal. App. Unpub. LEXIS  
20 1027 at \*9-10. If she had simply moved to Ohio and brought a motion to modify the visitation schedule,  
21 that would have been sufficient. *See also In re Marriage of Condon*, 62 Cal. App.4th 533 (1998); *In re*  
22 *Marriage of Whealon*, 53 Cal.App.4th 132 (1997). The custodial parent does not place his or her custody  
23 rights in jeopardy by so doing.

24           In this proceeding, Navarro chose to file her motion to modify visitation schedule in September  
25 2002, approximately 10 months before she moved, rather than waiting until after she had moved to  
26 Arizona to do so. In fact, Navarro and her family did not actually move until July 2003 when, even  
27 though she had no hearing date for and no ruling on her motion, her husband’s job offer was about to  
28 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

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

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

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

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

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

18 THE COURT: *I am not proposing [to] delay the move, that the move be delayed. You  
19 are moving at the end of the week, right?*

20 MS. ROBINSON: She is intending to, yes.

21 THE COURT: My understanding [is] that dad's got most of the summer, is that right?

22 \* \* \*

23 MS. ROBINSON: If I may, right now the current order that's in place is essentially  
24 alternating weekends and every Thursday night. We have proposed that  
25 or we have agreed, put out there that when mom moves we would like dad  
26 to have the children for the whole month of July and first week of August,  
27 which would be –

28 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

1 period of time, and I make a decision in July based on the Court of Appeal  
2 opinion and Dr. Stahl's recommendations.<sup>13</sup>

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

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

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

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

17 At the hearing on July 16, 2003, Navarro's counsel was given a copy of a Minute Order dated as  
18 of the very same date, indicating that it was prepared over a year after the June 18, 2002 hearing it  
19 purports to reflect. It does not, however, accurately reflect what Judge Austin actually ruled at the June  
20 18, 2002 hearing. The unsigned Minute Order states, in pertinent part:

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

24 Besides the ambiguity over the meaning of "the schedule for July," the Minute Order is not accurate. As  
25 set forth above, Judge Austin did not rule that "the children shall not be allowed to move their place of  
26 residence at this time." He merely stated his understanding that it was unnecessary to address the  
27 question during July because the children would be visiting with LaMusga anyway. Judge Austin stated  
28 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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<sup>13</sup> Transcript of Proceedings, June 18, 2002, at 7:23-8:24 (emphasis supplied).

1 More importantly, when the Court gave its explicit permission to Navarro to move to Ohio, as  
2 the custodial parent she was also permitted to move the residence of the children absent an express  
3 determination that such a move should be restrained because of the factors set forth in the Court of  
4 Appeal decision to which Judge Austin referred. Clearly, he made no such determination on June 18,  
5 2002, and thus Navarro was factually and legally entitled to move the children's residence subject to a  
6 post-move *Burgess* determination that a change of custody was essential for their welfare.

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

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

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

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



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

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

12 The jurisdictional about-face has placed Navarro in an unfair position. More importantly, Judge  
13 Austin's November 14, 2002 ruling is law of the case. One judge does not have the authority to overrule  
14 another judge of the same Court in the same case. The Court should reconsider its rulings on July 24,  
15 2003 and July 25, 2003, and should decline jurisdiction to rule on a change of custody – even temporarily  
16 – until the California Supreme Court has returned the case to this Court. In the meantime, the only matter  
17 that should be addressed and adjudicated at the August 8, 2003 hearing is Navarro's long-pending motion  
18 to modify the visitation schedule in light of her move to Arizona in July 2003.

19 Respectfully submitted,

20 \_\_\_\_\_  
21 KIM M. ROBINSON (SBN 136228)  
22 Attorney for Petitioner,  
23 Susan Poston Navarro  
24  
25  
26  
27  
28

1 **PROOF OF SERVICE**

2 THE UNDERSIGNED STATES:

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

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

7 on the parties in this action as follows:

8 GARRET C. DAILEY (SBN 76180)  
2915 McClure Street  
Oakland, CA 94609  
9 Attorney for Respondent, Gary LaMusga

10 SUSAN POSTON NAVARRO  
7122 East Medina Avenue  
11 Mesa, AZ 85208

12 GARY LAMUSGA  
The LaMusga Insurance Company  
13 2964 Bishop Drive, Suite 208  
San Ramon, CA 94583

14 LEANNE SCHLEGEL (SBN 167942)  
15 736 Ferry Street  
Martinez, CA 94553-1624  
16 Attorney for Minor Children,  
Garrett LaMusga and Devlen LaMusga

17 HONORABLE JOHN W. KENNEDY (VIA HAND DELIVERY)  
18 Judge, Superior Court for  
Contra Costa County  
19 725 Court St.  
P.O. Box 911  
20 Martinez, CA 94553

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

23 I declare under penalty of perjury that the foregoing is true and correct. Executed on July 29,  
24 2003, at Oakland, California.

25 \_\_\_\_\_  
KIM M. ROBINSON