

IN THE SUPREME COURT OF CALIFORNIA

In re the Marriage of

SUSAN POSTON NAVARRO (LaMUSGA)

Appellant,

and

GARY LaMUSGA

Respondent.

Supreme Court
Case No. S107355

Court of Appeal
Case No. A096012

Contra Costa County
Superior Court
Case No. D95-01136

_____ /

**APPELLANT'S AND DR. JUDITH WALLERSTEIN'S
REPLIES TO *AMICI* BRIEFS SUBMITTED BY
LESLIE E. SHEAR AND RICHARD A. WARSHAK**

KIM M. ROBINSON
SBN: 136228
2938 Adeline Street
Oakland, California 94608-4410
Tel: 510.832.7117
Fax: 510.834.3301

Attorney for Appellant,
Susan Poston Navarro

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
REPONSE TO SHEAR BRIEF	1
I. SENATE BILL 156 HAS BEEN ENACTED TO AMEND FAMILY CODE § 7501 IN ORDER TO CODIFY THIS COURT’S CONSTRUCTION OF § 7501 IN <i>BURGESS</i>	1
REPONSE TO WARSHAK BRIEF	4
I. THE WARSHAK BRIEF IGNORES CRITICAL ASPECTS OF THE POST-DIVORCE FAMILY IN EVALUATING RESEARCH ON RELATIONSHIPS WITH THE NON- CUSTODIAL PARENT.	7
A. Research Cited by the Warshak Brief, Like that Cited in the Wallerstein Brief, Indicates that it is the Nature of the Father-Child- Relationship, Rather than the Amount of Time Children Spend with their Fathers, that Affects the Children’s Well-Being.	7
B. Research Showing that Children Benefit from Participation of Both Parents in their Lives Deals, <i>Without</i> <i>Exception</i> , with Mothers and Fathers Who Voluntarily Agree to and Implement Cooperative Arrangements.	10
C. Increasing the Frequency of Children’s Contact with the Non- Custodial Parent Is Not Beneficial If It Subjects Children to Conflict.	11
II. THE WARSHAK BRIEF FAILS TO TAKE INTO ACCOUNT THE REASONS FOR CUSTODIAL PARENT MOVES AND THE IMPACT OF THE LEGAL PROCESS ON CHILDREN OF DIVORCE.	14

III. THE WARSHAK BRIEF FAILS TO PROVIDE SOUND RESEARCH EVIDENCE OF THE NEGATIVE EFFECTS OF MOVING EVEN WITHOUT CONSIDERING THE POSSIBLE BENEFITS OF THE MOVE. 16

IV. THE ARGUMENTS ADVANCED IN THE WARSHAK BRIEF TO DISCREDIT THE VOICE OF THE LAMUSGA CHILDREN ARE PSYCHOLOGICALLY UNSOUND AND CONTRARY TO CALIFORNIA’S STATUTORY MANDATE. 20

CONCLUSION 24

CERTIFICATE OF COMPLIANCE 25

PROOF OF SERVICE 26

TABLE OF AUTHORITIES

Cases

<i>In re Marriage of Burgess</i> (1996) 13 Cal.4th 25	1-7, 16, 20, 24
--	-----------------

Statutes

Family Code § 3042	24
Family Code § 7501	1, 2, 4

Legislative History

Senate Bill 156	1-4
-----------------------	-----

RESPONSE TO SHEAR BRIEF

Appellant, Susan Navarro (“Navarro”), hereby responds to the Brief of *Amici Curiae* Leslie Ellen Shear, *et al.* filed with the Court on July 25, 2003 (the “Shear Brief”). Respondent and his supporting *amici*¹ want courts in California to factor the role of the primary caregiver completely out of the “best interests” equation. Negating and nullifying the primary caregiver’s role and its importance to the children, and allowing trial courts to change custody by placing “primary importance” on the children’s relationship with their noncustodial parent – even where that relationship is a “tenuous and somewhat detached” one – is not only illogical but is contrary to the *true* best interests of children in a post-divorce relocation situation.

I. SENATE BILL 156 HAS BEEN ENACTED TO AMEND FAMILY CODE § 7501 IN ORDER TO CODIFY THIS COURT’S CONSTRUCTION OF § 7501 IN *BURGESS*.

As the Shear *amici* submit to the Court:

Certainly appellate courts must give greater weight to contemporary acts intended to address the specific issue before them than they do to artifacts of the defunct common law rule that fathers control their children’s fates after their death.

(Shear Brief at 10). Navarro could not agree more.

¹ Although *amici* Shear and Warshak purport to be filing their briefs on behalf of the minor children in this action, their briefs were not authorized by the children’s court-appointed counsel, Leanne Schlegel. These *amici* briefs are unabashed advocacy pieces for respondent’s position in this case – a position which has been shown to be adverse to the children’s best interests as reported by attorney Schlegel. (*See* *Minors’ Opposition to Respondent’s Motion to Stay Trial Court Proceedings Set for Hearing on August 8, 2003*, filed herein on August 7, 2003.)

Senate Bill No. 156, an act to amend Section 7501 of the Family Code relating to child custody, was approved by the Governor on October 5, 2003, filed with the Secretary of State on October 6, 2003, and provides as follows:

The people of the State of California do enact as follows:

SECTION 1. Section 7501 of the Family Code is amended to read:

7501. (a) A parent entitled to the custody of a child has the right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child.

(b) It is the intent of the Legislature to affirm the decision in *In re Marriage of Burgess* (1996) 13 Cal. 4th 25, and to declare that ruling to be the public policy and law of this state.

The amended statute is prefaced by the Legislative Counsel's Digest, which states:

SB 156, Burton. Custody, residence of the child.

Existing law provides that a parent entitled to the custody of a child has a right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child. Existing law as established in *In re Marriage of Burgess* (1996) 13 Cal. 4th 25, provides that when a judicial custody order is in place, a custodial parent seeking to relocate bears no burden of establishing that it is necessary to do so.

This bill would state the intent of the Legislature to affirm the decision in the case described above and to declare that ruling to be the public policy and law of this state.

SB 156 passed both houses of the Legislature in landslide margins of 76-1 in the Assembly and 30-5 in the Senate.²

² See Exhibit "A" to Motion and Request for Judicial Notice filed concurrently herewith.

In the third reading in the Senate of SB 156 as amended on September 2, 2003, the record explains:

The author states he introduced this bill in response to the acceptance by the California Supreme Court for review of an unpublished appellate decision, *In re Marriage of Navarro and LaMusga*, which might result in the Court revising the *Burgess* move-away standard. Oral argument in the *Navarro* case is expected in the fall or winter of this year.

This concern is echoed throughout prior readings of the bill in the Senate, Assembly and various legislative committees:

SENATE THIRD READING – SB 156 – AS AMENDED MAY 13, 2003:

Thus, under *Burgess*, a non-custodial parent objecting to the custodial parent's relocation has to affirmatively demonstrate ...that it will result in such a significant detriment to the child that a change in custody is warranted.

The Supreme Court accepted for review an unpublished decision, *In re Marriage of Navarro and LaMusga* (citation omitted), in which the trial court sought to lessen the standard by which a successful objection to relocation can be made. As the appellate court followed the *Burgess* analysis directly in the *Navarro* case, concerns have been raised that the California Supreme Court's decision to hear *Navarro* may lead to some type of modification of the *Burgess* standard.

Identical language is set forth in the analysis of the bill done by the Assembly Committee on the Judiciary on May 13, 2003, with these statements immediately following in the record:

In [*Navarro*], mother sought court permission to relocate to Ohio, and in response the father sought a change of custody from the mother to himself if the move occurred. The trial court held that even though the mother's desire to relocate was not motivated by bad faith, her motion to relocate was denied because the "primary importance" was to reinforce the "tenuous and somewhat detached" relationship between the father and the two children. It granted custody to the father

if the mother relocated. The appellate court reversed, reviewing the case under the *Burgess* “move-away” standard. The appellate court determined that the trial court had not adequately examined the situation and had ignored the damaging effect of removing the children from the primary caretaker they had known all of their lives, their mother. The appellate court further held that the trial court had violated the mother’s rights by conditioning her continuing custody of the children on not moving the children to another location. The appellate court remanded the case retaining permanent custody in the mother and directed the trial court to determine, in light of the mother’s presumptive right to move, whether the change of custody would be detrimental to the children.

There is not a clearer, more contemporary act intended to address the specific issues before this Court than the amendment to § 7501 of the Family Code enacted by Senate Bill 156.

RESPONSE TO WARSHAK BRIEF³

The Warshak Brief claims that the Wallerstein Brief “runs counter to the prevailing opinions of the majority of experts who conduct divorce research and of those who apply this research to their clinical and forensic practices.”⁴ Yet the Warshak Brief cites – and then both misinterprets and misapplies – much of the same research cited in the Wallerstein Brief.

The Warshak Brief’s distortion of research findings stems

³ Appellant Susan Poston Navarro is authorized to represent to the Court that this section of her brief is endorsed by Dr. Wallerstein as her response to the *amici curiae* brief of Richard A. Warshak, Ph.D., Sanford L. Braver, Ph.D., Joan B. Kelly, Ph.D., James H. Bray, Ph.D., *et al.* (the “Warshak Brief”), which was submitted by Respondent in reply to the Brief of *Amici Curiae* Supporting Affirmance of the Court of Appeal’s Decision, filed on behalf of Judith S. Wallerstein, Ph.D., Paulina F. Kernberg, M.D., Joyana Lee Silberg, Ph.D., Julia M. Lewis, Ph.D., John B. Sikorski, M.D. and Stephanie Joan Dallam, RN, MSN, FNF (the “Wallerstein Brief”).

⁴ Warshak Brief at 2.

primarily from its failure to take into account the critical aspects of the “move-away” family situation that confronted this court in *Burgess*, are present here, and characterize nearly all child relocation cases. These include the following:

First, the custodial arrangement is one in which a primary custodial parent has provided most of the day-to-day care of the child. These are situations in which, by definition, the non-custodial parent has played a more limited role in the life of the child than in true joint-custody situations.⁵ As a result, while there is no question that the non-custodial parent is important in the life of the child, the households of the primary and non-custodial parent are simply not equivalent in providing ongoing child care.⁶

Second, the custodial parent has a legitimate “good faith” reason to move,⁷ such as domestic violence, remarriage, employment, educational opportunities, and the need to give to or receive support from an extended family.⁸ The Warshak Brief’s proposed policy of discouraging divorced parents from moving⁹ ignores the significant hardships imposed on any family by confining it to a limited geographical location, especially one in which opportunities may be limited in relation to the cost of living.

⁵ *In re: Marriage of Burgess* (1966) 13 Cal.4th 25, 40 n.12.

⁶ See Wallerstein Brief at 4-7, 24-29.

⁷ *Burgess, supra*, 13 Cal.4th at 38.

⁸ See Wallerstein Brief at 11-14; see also Brief of *Amici Curiae* filed by the California Women’s Law Center *et al.* in this case.

⁹ Warshak Brief at 22.

Third, the non-custodial parent is actively and openly opposing the custodial parent's decision in a lawsuit, often as just one more chapter in a saga of continuing parent vs. parent conflict. As this case illustrates, this kind of litigation is often accompanied by protracted, multi-year conflict between the parents that has been exacerbated by a move-away application to the court. The more time and resources the move-away decision consumes, the more conflict, instability, and stress the children experience.

Under these move-away conditions just described, many of the broad generalizations about parenting under more favorable conditions as recounted in the Warshak Brief that are accepted by the "majority of experts" (including the authors of the Wallerstein Brief), have limited applicability.

As the Wallerstein Brief points out, there are no published studies of children or parents involved in the *Burgess* or *LaMusga*-type move-away situations. As a result, no such research is cited in either the Warshak or the Wallerstein Brief. None of the studies of father-child relationships cited in the briefs involves families where relocation was on the agenda of either parent or where divorced parents were in conflict over their children.

Acknowledging the absence of these data, the Wallerstein Brief draws on the general body of knowledge about child development and the authors' accumulated understanding, developed from decades of longitudinal research and practice, of the psychological impact of divorce on children, most especially on

children whose parents are in sharp disagreement about plans for their children and are engaged in emotional and forensic conflict over them – the classic move-away litigation situation. In contrast, the Warshak Brief draws broad generalizations, some from research of dubious validity, that ignore the central findings of mainstream research squarely supporting the psychological pillars of *Burgess*.

I. THE WARSHAK BRIEF IGNORES CRITICAL ASPECTS OF THE POST-DIVORCE FAMILY IN EVALUATING RESEARCH ON RELATIONSHIPS WITH THE NON-CUSTODIAL PARENT.

A. Research Cited by the Warshak Brief, Like that Cited in the Wallerstein Brief, Indicates that it is the Nature of the Father-Child-Relationship, Rather than the Amount of Time Children Spend with their Fathers, that Affects the Children's Well-Being.

According to the Warshak Brief, a consensus of studies shows that the contribution of the father-child relationship is important to the child's developmental progress after divorce. The Wallerstein Brief is generally in accord: Fathers and mothers are both important to the emotional, intellectual and moral development of their children, whether the fathers reside close by or maintain their relationship at a distance.¹⁰ Thus, nothing in the Wallerstein Brief contradicts either the consensus of experts in child development or Dr. Wallerstein's earlier writings about the role of fathers.¹¹

¹⁰ Wallerstein Brief at 1.

¹¹ The Warshak Brief quotes extensively from publications authored by Dr. Wallerstein in the late 1970's, during the initial stages of her long-term longitudinal study of children of divorce. At that time the participant children were followed up to the fifth year of the parental divorce. *The Unexpected Legacy of Divorce: Report of a 25-Year Landmark Study* summarizes the children's progress including the changing course of their relationships with both parents and stepparents well into their adulthood. As

Moreover, the research cited in both briefs concludes that the strength of the father-child relationship is not affected simply by the quantity of time a child spends with her father, but rather by the *individual capacity of father and child to create a relationship that is meaningful and comfortable to both*. For example, Amato and Gilbreth, a study cited in the Warshak Brief, state: “Our meta analysis suggests that how often fathers see their children is less important than what they do with them. . . . Non-resident fathers who are not highly motivated to enact the parental role or who lack the skills to be effective parents are unlikely to benefit their children, even under conditions of regular visitation.”¹²

The additional premise of the Wallerstein Brief – that the custodial parent’s role is key in the adjustment of children after divorce – is also supported by research done by at least one author of the Warshak Brief. Warshak author Joan B. Kelly, in a major summary of research over the decade of the nineties, reports: “When custodial parents provide appropriate emotional support, adequately

expected, the long-range view provides a more informed perspective on the stability of parent-child, and especially father-child, relationships over time. None of the families described in that study was involved in relocation litigation.

¹² Paul R. Amato & Joan G. Gilbreth, *Non Resident Fathers and Children’s Well Being: A Meta Analysis* (1999) 61 JOURNAL OF MARRIAGE AND THE FAMILY 557, 569. See also Joseph M. Healy, Jr., Janet E. Malley, & Abigail J. Stewart, *Children and Their Fathers After Parental Separation*, 60 American Journal of Orthopsychiatry 531, 542 (1990) (“Findings suggest the futility of seeking simple answers to whether ongoing contact with fathers following divorce is beneficial or detrimental to children. . . . These results are consistent with those of Hess and Camara (1979) who found that the quality of father-child relationships *but not the amount of contact* was related to positive adjustment in the child” (emphasis supplied). This study is cited in footnote 11 of the Warshak Brief.

monitor children's activities, discipline authoritatively, and maintain age appropriate expectations, children and adolescents are better adjusted compared with divorced children experiencing less appropriate parenting."¹³ As to non-custodial parents, Kelly herself candidly admits: "The influence of the visiting father diminishes as a factor in the child's development after divorce . . ."¹⁴

B. Research Showing that Children Benefit from Participation of Both Parents in their Lives Deals, Without Exception, with Mothers and Fathers Who Voluntarily Agree to and Implement Cooperative Arrangements.

The Warshak Brief largely ignores the fundamental reality that the father-child relationship does not stand alone in either the intact or the divorced family. Rather, it is dynamically embedded

¹³ Joan B. Kelly, *Children's Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research*, *Journal of the American Academy of Child and Adolescent Psychiatry* 39(8), 963, 968 (August 2000).

¹⁴ *Id.* See also Lise M.C. Bisnaire, Philip Firestone & David Rynard, *Factors Associated with Academic Achievement in Children Following Parental Separation*, 60 *American Journal of Orthopsychiatry* 67, 74-75 (1990) ("the more time a child spent with the *custodial parent* the healthier was the child's attitude towards the marital breakup. . . no single factor could adequately predict a child's adjustment. Rather, specific characteristics concerning each parent and the child are important" (emphasis added)); Eleanor E. Maccoby, Christy M. Buchanan, Robert H. Mnookin, & Sanford M. Dornbusch, *Postdivorce Roles of Mothers and Fathers in the Lives of Their Children*, 7 *Journal of Family Psychology* 24, 36 (1993) ("The factors most powerfully associated with good adolescent adjustment were (a) having a close relationship with a residential parent who monitored well and remained involved in decisions concerning the young persons' life and (b) not feeling caught in the middle of parent conflict. . . for children living with their fathers, continued contact with the mother was beneficial. *For the much larger group of mother-resident children, we did not find evidence that sustaining a relationship with outside fathers made a difference in adolescent adjustment*" (emphasis added).) These studies are cited in footnote 11 of the Warshak Brief.

in the parents' relationship, and as discussed in the Wallerstein Brief,¹⁵ it is shaped by the post-divorce interaction between the parents. *All* of the studies cited by the Warshak Brief demonstrating a beneficial effect of extended contact with both parents deal with *homes where conflict between the parents is absent or minimal*. The advantage for the child of sustained contact with both parents occurs only when the parents get along well with each other. That was not the case in *Burgess, LaMusga*, or any move-away case cited or referenced by any party.

Again, this conclusion is supported by the research the Warshak Brief cites. For example, Amato and Gilbreth state:

Several studies have shown that contact with nonresident fathers following divorce is associated with positive outcomes among children when parents have a cooperative relationship but is associated with negative outcomes when parents have a conflicted relationship.¹⁶

Warshak Brief author Joan B. Kelly reports as follows: “The extent to which father involvement will impact child adjustment after divorce appears to be complexly linked to *degree of conflict, type of paternal involvement, and maternal acceptance, as well as the regular payment of child support.*”¹⁷ Thus, her work supports the Wallerstein Brief’s argument that judicially coerced co-parenting in

¹⁵ Wallerstein Brief at 6-11.

¹⁶ Paul Amato & Joan Gilbreth, *Non-Resident Fathers and Children’s Well-Being: A Meta Analysis*, *Journal of Marriage and the Family* 61, 557, 560 (1999). Amato & Gilbreth is cited at 5 & 12 of the Warshak Brief.

¹⁷ Kelly, *supra*, 963, 969.

the same community in the presence of high inter-parent conflict and negative involvement arising from a father's poor relationship with his children (the *LaMusga* case and many other move-aways) is highly unlikely to produce a positive outcome for the children.¹⁸

C. Increasing the Frequency of Children's Contact with the Non-Custodial Parent Is Not Beneficial If It Subjects Children to Conflict.

As discussed in the Wallerstein Brief,¹⁹ there is no evidence, either from research or the history of this case, that merely increasing contact with the non-custodial parent in a high-conflict situation will improve the child's welfare. On the contrary, frequent contact between divorced parents who are in conflict with each other places children in serious psychological jeopardy.

Parental conflict is frightening to children and destructive of their mental health. Continued conflict between parents may, in fact, be the gravest threat to children of divorce.²⁰ Hetherington and her colleagues found that frequent visitation complicated by appreciable conflict was correlated with poor adjustment of the children.²¹ They note that two years after the divorce, "[t]he boys from high conflict divorced families showed more problems than any

¹⁸ See Wallerstein Brief at 7-10.

¹⁹ *Id.* at 11.

²⁰ See, e.g., Andre P. Derdeyn & Elizabeth Scott, *Joint Custody, A Critical Analysis and Appraisal*, 54 *American Journal of Orthopsychiatry* 199-209 (1984).

²¹ Mavis Hetherington, Martha Cox & Roger Cox, "Effects of Divorce on Parents and Children," in *Nontraditional Families: Parenting and Child Development*, Michael Lamb, ed., Laurence Erlbaum Associates, pp. 235, 261 (1982).

of the other groups . . .”²² Similarly, the girls in high conflict families “demonstrated more attention seeking, whining and demandingness . . . , both in the home and at school.”²³ Johnston and her colleagues report parallel results. Where the courts endeavored to resolve the parental conflict by ordering joint physical custody or frequent exchanges of the child between the two homes, the psychological condition of the children seriously deteriorated. The children were more likely to be depressed, withdrawn, and aggressive, to suffer physical symptoms of stress such as stomachaches and headaches, and to have problems getting along with their peers.²⁴ They were frightened children who lived in fear of catastrophe and felt safe nowhere.

The Warshak Brief proposes that children be maintained in the same community by judicial decree whether or not the parents are in conflict. It maintains courts should force the primary custodial parent – in this case the mother – to remain in the community close to the father to enable the child to have frequent access to both parents. Yet, when there is conflict, this is exactly the arrangement, according to the research cited by the parties, that

²² *Id.* at 261.

²³ *Id.*

²⁴ Janet R. Johnston, *Research Update: Children’s Adjustment in Sole Custody Compared to Joint Custody Families and Principles for Custody Decision Making*, 33 *Family and Conciliation Courts Review* 415, 420 (1995); Janet R. Johnston & Linda Campbell, *Impasses of Divorce: The Dynamics and Resolution of Family Conflict*, The Free Press, New York, pp.127-150, 151-174 (1988).

places the children in the gravest psychological danger.²⁵

II. THE WARSHAK BRIEF FAILS TO TAKE INTO ACCOUNT THE REASONS FOR CUSTODIAL PARENT MOVES AND THE IMPACT OF THE LEGAL PROCESS ON CHILDREN OF DIVORCE.

The Warshak Brief fails to recognize the difficult situations in which many custodial parents find themselves following divorce and the complexity of the choices they must make.²⁶ It is not simply, as the Warshak Brief suggests, that “the moving parent place[s] a higher value on the anticipated gains of the move than on the nonmoving parent’s regular involvement in the fabric of the children’s lives.”²⁷ Rather, as discussed in the Wallerstein Brief, the benefits of moving for such reasons as remarriage, economic and/or

²⁵ In contrast, the Warshak Brief cites only one study that purports to show forced contact between a child and a parent improves the relationship between them. This study was funded by the American Bar Association and published as an ABA monograph rather than as a peer-reviewed article that would have been subjected to professional review before publication. (STANLEY S. CLAWAR and BRYNNE V. RIVLIN, *Children Held Hostage: Dealing with Programmed and Brainwashed Children* (ABA 1991). Its authors are not among the social scientists who have published the other studies cited by the various *amici*. As the Warshak Brief itself admits, “[The study] is heavily descriptive, and the description of procedures does not make clear exactly how the data were analyzed, and what procedures were used to ensure the reliability of the results.” (Warshak Brief at 32 n.48.) The study’s finding that fully 80% of parents studied engaged in “brainwashing” of their children (p. 180) calls into question the reliability of its other findings, including the one cited by the Warshak Brief that increasing contact with a target parent (*e.g.*, one the child had been “brainwashed” to reject) resulted in a positive change in the relationship with that parent.

²⁶ See sources cited in note 6 *supra*.

²⁷ Warshak Brief at 20.

educational advancement, or the availability of a support system, *accrue to children*, not simply to the custodial parent, and do not prevent the continuation of a meaningful relationship with the non-custodial parent.²⁸

For example, the Warshak Brief fails even to mention, let alone discuss, the impact of remarriage and the presence of a stepparent in the custodial parent's household, even though that factor is central in *LaMusga*. As discussed in the Wallerstein Brief, family income rises dramatically when a single mother remarries. As a result, children can benefit from better educational opportunities, as well as from the emotional support and guidance of another adult. In fact, children may benefit as much from good relationships with stepfathers as they do from relationships with their biological fathers.²⁹

Children are affected by move-away decisions, whatever their outcome. Once a parent is faced with a decision to move, the entire family situation changes. It can go forward, but it cannot return to the situation *quo ante*. If a custodial parent seeks to move and the non-custodial parent seeks to restrain the move, hurt feelings and anger between the parents will inevitably escalate. The increased anger between the parents is upsetting to the child and detrimental to her sense of security and well-being. It not only conjures up the ghosts of the breakup, but fosters the child's realization that she

²⁸ See Wallerstein Brief at 6-7 & n.13, 11-14, 33-37.

²⁹ See Wallerstein Brief at 12-13.

alone is the cause of the greater distress of both parents. The child may also resent the non-custodial parent for putting the custodial parent in such a difficult position.³⁰

If the court denies permission to relocate the child, the mother leaves, and the court transfers the child to the father's custody, the child inevitably feels rejected by the mother. The child thinks, "She did not love me enough to stay" and concludes, as children do, "I am not a lovable child. Had I been more lovable, or a better child, she would have stayed." As a result, the child's self-esteem plummets. Alternatively, if (as is most often the case) the mother relinquishes her plans and decides to stay, the child knows that she has stayed for him and sacrificed her own plans on his behalf. The child cannot help but think, "Except for me, my mother would be happily married" or "Except for me, my mother could live in a better house." The child's perception that "I stood between my mother and her happiness, she sacrificed herself for me" is a heavy psychological burden for a child to bear and a likely source of suffering.³¹

III. THE WARSHAK BRIEF FAILS TO PROVIDE SOUND RESEARCH EVIDENCE OF THE NEGATIVE EFFECTS OF MOVING EVEN WITHOUT CONSIDERING THE POSSIBLE BENEFITS OF THE MOVE.

³⁰ The Wallerstein Brief at 29 n.65 quotes from the court-appointed evaluator in *LaMusga* who suggested the potential negative effects of the children blaming the father for the disruption in their lives should he succeed in preventing the move.

³¹ As described in the Wallerstein Brief at 5-6 n.13), one of the case studies in Dr. Wallerstein's *amica* brief in *Burgess* was included because it clearly demonstrates this phenomenon. The case studies were included for illustration, not (as the Warshak Brief erroneously suggests) to substitute for research findings.

The Warshak Brief does not advance any new arguments against relocation, nor does the research it presents show support for what it calls the “common sense notion that children’s psychological well being is challenged by numerous changes accompanying relocation.”³²

The brief bases its arguments primarily on a single study of limited scope by Warshak Brief author Sanford Braver and his colleagues.³³ The study is discussed in detail in the Wallerstein Brief.³⁴ As the Wallerstein Brief pointed out, the Braver study provides no evidence whatsoever for a causal relationship between parental moves and poor outcomes in children of divorce. The Warshak Brief utterly fails to address the criticisms raised by Wallerstein and others.

Owing to its promotion by its authors, the Braver study has received widespread media attention. In response, two commentators – Norval Glenn, one of our nation’s leading family sociologists, and David Blankenhorn, president of the Institute for American Values – who happen to disagree on the policy issues surrounding move-aways, have published the following joint criticism of the manner in which Braver and the media have distorted the study’s findings:

³² Warshak Brief at 19.

³³ Sanford Braver, Ira Mark Ellman & William Fabricious, *Relocation of Children after Divorce and Children’s Best Interests: New Evidence and Legal Considerations*, Journal of Family Psychology, Vol. 17, No. 2 (June 2003) (hereinafter referred to as the “Braver study”).

³⁴ Wallerstein Brief at 16-18.

Evidence is thin that “moving away” hurts kids.

A few weeks ago, newspapers across the country trumpeted a new research finding: “Moving After Divorce Damages Kids.” The new study, by Sanford L. Braver and two colleagues at Arizona State University, claims that children suffer when the custodial parent, usually the mother, relocates to a new community following divorce. Even moving an hour's drive away from the noncustodial father, the report concludes, causes “significant” problems for children.

This research matters. The “move-away” issue is politically red-hot today – especially in California, where important court decisions on the issue are expected soon, but also in other family courts across the country. The debate is quite polarized, with those who support the independence of divorced mothers pitted against fathers’ rights advocates who, based partly on research showing the importance of fathers, want courts to restrict the ability of ex-wives to move away with their children after divorce.

That’s why any research on this issue needs to be solid. It’s also why newspaper stories describing the research need to be precise. Unfortunately, the episode earlier this summer failed on both counts.

The two of us disagree on the policy issues at stake here. But we agree that the Braver study is a weak one that provides no credible evidence on the effects on children of moving away after divorce.

In the fall of 2001, Professor Braver distributed questionnaires to about 2,000 students enrolled in an introductory psychology course at Arizona State. The questions covered 14 areas of personal well-being. The survey also asked students if their parents had divorced and, if so, whether both parents had remained within an hour's drive of one another after the divorce. On 11 of the 14 indicators, the move-away children of divorce fared worse than did the children of divorce whose parents did not move far apart. That was the entire study.

Academically, this is very thin gruel. First, the differences between the two groups were quite small. Moreover, in the most crucial areas – friendship and dating behavior, substance abuse, and general life satisfaction – there were no significant differences at all between the two groups.

And what caused the remaining differences between the two groups? No one knows. Certainly the researchers do not know. They did not report, and presumably did not even collect, the background information on the students that would permit even informed guesses about the reasons for the differences between the two groups.

For example, it is highly likely that the move-away parents got divorced when their children were younger, compared to the divorced parents who stayed closer. In many cases, the issue of moving away is also linked to remarriage. Remarriage, in turn, often affects the ability and willingness of noncustodial fathers, who now typically have new dependents and new expenses, to provide financial support to their original families. Similarly, mothers who remarry, or who move away to take higher-paying jobs, may receive or ask for less financial support from ex-husbands.

So what is causing these (small) differences in some of these young people's answers to this one Arizona questionnaire? It is how old you were when your parents split up? Is it whether one or both of your parents did, or did not, remarry? Is it the level of child support and alimony your mother received? Is it how much your parents fought and quarreled before the divorce, or how well they cooperated, or failed to cooperate, after the divorce? Or is it whether your mother after the divorce moved an hour or more's drive away from your father? Or is it something else entirely? Again, no one knows for sure, and on the basis of this study, no one could possibly know. To their credit, the researchers acknowledge as much in what amounts to the fine print of the study.

Which brings us to the media. The two of us have observed this scenario countless times.

A weak and limited study is reported, sometimes with appropriate cautions and sometime not, in a professional journal. (In this case, the *Journal of Family Psychology*, a respected publication.) Then the university press office goes to work. They distribute a press release with a strong headline and without any of the qualifications and attention to complexity that might have appeared in the professional journal. Then the journalists go to work. They interview the researchers, who often make sweeping statements that make the press release look tame, including expressing

their long-held views on public policy issues that are only indirectly addressed, if even that, by the study itself. Finally, the headline writers go to work. The result? In this case, lots of headlines like “Moving Away Really Hurts Kids.” The losers in this process are the public and policy makers, who are misinformed about important issues, and children of divorce, whose true interests are not served.³⁵

By continuing to place reliance on this one very limited and weak study³⁶ to advocate a case by case evaluation of every proposed move – an exercise in family micromanagement that was appropriately rejected in *Burgess* – Warshak and his colleagues consign California’s post-divorce families to the economical and emotional abyss of perpetual intrusion into their lives.

IV. THE ARGUMENTS ADVANCED IN THE WARSHAK BRIEF TO DISCREDIT THE VOICE OF THE LAMUSGA CHILDREN ARE PSYCHOLOGICALLY UNSOUND AND CONTRARY TO CALIFORNIA’S STATUTORY MANDATE.

In response to the Wallerstein Brief’s plea that the voice of the child be considered in child custody disputes, as this Court and the California Legislature have directed, the Warshak Brief presents a number of scenarios in which a child’s stated preferences should not be taken at face value.

Obviously, children’s stated preferences should be examined in light of their level of development and other aspects of the

³⁵ Institute for American Values, September 11, 2003.

³⁶ The few other studies cited in the Warshak Brief to argue that moving is per se harmful suffer from the same major flaw as the Braver study – *i.e.*, they show only a correlational relationship between frequency of moves and negative outcomes. Such a relationship may reflect a number of possible causal relationships, including the very likely possibility that stressors such as poverty or inter-parent conflict are responsible for both frequency of moves and other negative outcomes.

children's relationship with both parents. Neither California law nor child psychology suggest that a child's unguided desires should control his destiny. Such a "simplistic" approach was never advocated in the Wallerstein Brief. However, the Warshak Brief provides no evidence suggesting that the scenarios it presents are norms in move-away cases. The implication that they somehow fit the *LaMusga* case is similarly unsupported.

The Warshak brief suggests that the LaMusga children are somehow inappropriately close to their mother and that their expressed preferences reflect her wishes rather than their own. Both the Warshak Brief³⁷ and Dr. Stahl's evaluation³⁸ use the term "enmeshment" to characterize this relationship. This term does not appear in the official reference for psychiatric disorders,³⁹ nor is it uniformly presented or defined in the training of psychiatrists, psychologists, or clinical social workers. In the absence of such an agreed-upon definition, almost any behavior can be labeled as "enmeshment."⁴⁰

Furthermore, to the extent the Warshak Brief is suggesting that the *LaMusga* children are pathologically tied to their mother

³⁷ Warshak Brief at 25.

³⁸ RT 37-40.

³⁹ DSM IV-TR 2000: Diagnostic and Statistical Manual of Mental Disorders, American Psychiatric Association (2000).

⁴⁰ As the Wallerstein Brief observed (at 19-20), the same is true of Dr. Stahl's use of the term "unconscious alienation." It should be noted that the trial court did not base its decision on any evidence of either alienation or enmeshment.

or that mother and children are anxious when they are apart, the record does not support such a conclusion. In fact, everything about the children's total adjustment and behavior speaks to their age-appropriate independence. The boys attend school regularly without anxiety. They do not complain of illness or otherwise attempt to remain at home with their mother. Their learning and behavior at school and with peers on the playground are considered appropriate for their age. They are not withdrawn or fearful when their mother is away.

Even when the boys were much younger, they had no trouble separating from their mother to attend preschool, although many young children experience separation problems during these early years. These children have many age-appropriate interests which do not involve their mother, including competitive sports.

Moreover, the boys do not object to visiting with their father and go readily to his home in compliance with court-ordered visitation. They are willing to join their father in play and athletic games. They even did not object to attending the weekly therapy session with their father. In addition, there was no evidence of anxiety in the *LaMusga* children's quick, open and spontaneous response to their own attorney, Leanne Schlegel, whose report has been submitted to this Court. They joined her willingly and enjoyed reaching out to a friendly, interested new adult.⁴¹ They did not

⁴¹ See Minor's Opposition to Respondent's Motion to Stay Trial Court Proceedings Set for Hearing on August 8, 2003, filed with this Court on August 7, 2003.

hang back and cling to their mother or look to their mother for clues about what to say. There is, in fact, no indication anywhere in the record that the children's developmentally appropriate separation from their mother has been discouraged or inhibited.

When children echo the views of a parent, there is a reason. Sometimes parent and child simply agree based on common observations and experiences. For example, the *LaMusga* children and their mother may agree that the father is easily angered based on similar experiences with him. In addition, a child may sometimes feign agreement with a parent or other adult out of fear.⁴² There is, however, no indication that the *LaMusga* children are frightened of their mother. Ms. Navarro informed the evaluator early on that she firmly believes that children should be allowed to express themselves freely, and there is every indication from the children's behavior that they feel free to do so.⁴³

⁴² Children may also alter their views to conform with what the adult wants to hear because they are profoundly worried about a beloved parent and feel that they need to rescue her or him. The Warshak Brief quotes Dr. Wallerstein's example of a mother who was indeed in anguish after the father left her for a younger woman. The children, terrified at her emotional storms and imminent collapse, joined her in expressing anger at their father. The children's apprehension was prescient. The mother committed suicide. However, Susan Navarro can in no way be compared with the suicidal mother. She is happily remarried and has a young child in the new marriage. She is an energetic, well-functioning woman who shows no signs of depression, despite the trials of the last decade of her life and the acute stresses of the past year. There is no evidence that the children feel that it their responsibility to "rescue" their mother, or that they have to distort their perceptions out of love and compassion for her.

⁴³ In an attempt to suggest that the children's expressed preferences are not really their own, the Warshak Brief refers to a single isolated remark made by Garrett LaMusga, now 11, when he was 4 years old. (Warshak Brief at 42-43.) There is no evidence that Garrett was voicing an abstraction provided by his mother at that time; this incident certainly

California law, codified in Family Code § 3042 and cited by *Burgess*, requires the court to “consider and give due weight to the wishes of [a] child” who has sufficient capacity to form an intelligent preference as to custody.⁴⁴ The Warshak Brief does not bother even to cite the statute or to explain why the court was not obligated to follow it here. The children’s preferences are a further reason to uphold the Court of Appeal’s decision.

CONCLUSION

Accordingly, for the foregoing reasons, and for the reasons more fully set forth in Navarro’s Brief on the Merits and in the four persuasive *amici* briefs submitted on her behalf, the Court should affirm the decision of the Court of Appeal in its entirety.

Dated: October 17, 2003

Respectfully submitted,

Kim M. Robinson
Attorney for Appellant

carries little or no weight in determining the current nature of Garrett’s wishes. The Warshak Brief also cites experimental research on children’s testimony showing that children’s memory can be altered by external factors. However, it fails to mention the large body of research demonstrating that the same is equally true of adults. The fact that memory and perceptions *can* be altered in no way justifies an assumption that children’s expressed preferences are inherently unreliable, any more than it justifies an assumption that an adult’s expressed belief is automatically suspect. As the law requires, the evidence of both adults and children needs to be considered in light of all the circumstances for what weight it might carry.

⁴⁴ *In re Marriage of Burgess* (1966) 13 Cal.4th 25, 39.

CERTIFICATE OF COMPLIANCE

I, Kim M. Robinson, counsel of record for Appellant, hereby certify, pursuant to Rule 29.1 of the California Rules of Court, that Appellant's and Dr. Judith Wallerstein's Replies to *Amici* Briefs Submitted by Leslie E. Shear and Richard A. Warshak was produced using 13-point Century Schoolbook font for text and 13-point Times Roman font for footnotes, and contains approximately 7,593 words, which is less than the 8,400 words permitted by this Rule in the aggregate to respond to two lengthy *amici* briefs. Counsel relies on the word count of the computer program, Word Perfect 10, used to prepare this brief.

Kim M. Robinson

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 not a party to the above-entitled action. On October 17, 2003, I served copies of the following documents:

1. Appellant's and Dr. Judith Wallerstein's Replies to *Amici* Briefs Submitted by Leslie E. Shear and Richard A. Warshak
2. Appellant's Request for Judicial Notice

on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

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 October 17, 2003, at Oakland, California.

Kim M. Robinson

SERVICE LIST

Garret C. Dailey
Attorney at Law
2915 McClure St.
Oakland, CA 94609

(Attorney for Respondent)

Marci Fukuroda
California Women Law Center
3400 Wilshire Blvd., Suite 1102
Los Angeles, CA 90010

(Attorney for Amici Curiae
California Women's Law Center, et.
al.)

Joanne Schulman
Law Offices of Joanne Schulman
1390 Market St., #818
San Francisco, CA 94102

(Attorney for Amici Curiae Margaret
A. Gannon, et. al)

Tony J. Tanke
Law Offices of Tony J. Tanke
1949 5th St., Suite 101
Davis, CA 95616

(Attorney for Amici Curiae Judith
Wallerstein, Ph.D, et. al)

Carol S. Bruch
Research professor
UC Davis School of Law
400 Mrak Hall Dr.
Davis, CA 95616

(Attorney for Amici Curiae Herma
Hill Kay, et. al)

Leslie Ellen Shear
16830 Ventura Blvd., Suite 351
Encino, CA 91436

(Attorney for Amici Curiae Leslie
Ellen Shear)

Donald S. Eisenberg
6700 E. Pacific Coast Hwy.
Suite 220
Long Beach, CA 90803

(Attorney for Amici Curiae Richard
A. Warshak, Ph.D l)

Judge Terence L. Bruiniers
Contra Costa County Superior Court
751 Pine St.
Martinez, CA 94553

Leanne Schlegel
Attorney at Law
736 Ferry St.
Martinez, CA 94553

(Attorney for Minor Children)

Susan Navarro
7122 E. Medina Ave.
Mesa, AZ 85208

(Appellant)

Court of Appeal
First Appellate District - Division
Five
350 McAllister St.
San Francisco, CA 94102