APPLICATION PER CRC, RULE 29.1(F)
FOR LEAVE TO FILE AMICUS BRIEF
(AND WORD-COUNT CERTIFICATION AND REQUEST)

> Changes over the last few decades in the structure and function of the American family, as well as the relative complexity of contemporary family legal issues, challenge judges to adopt an appropriate jurisprudential philosophy that addresses these transformations. The tremendous volume and breadth of family law cases now before the courts, coupled with the critical role of the family in today's society to provide stable and nurturing environments for family members, require that judges understand relevant social science research about child development and family life. This informed perspective can assist decisionmakers to dispense justice aimed at strengthening and supporting families.
>
> Barbara A. Babb (1997) *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective* (http://www.law.indiana.edu/ilj/v72/no3/babb1.html)

Amici curiae Leslie Ellen Shear, *et al.* request leave to file the accompanying brief in this matter after expiration of the deadline, and to permit filing of a brief that exceeds the word count limitations (if the rules are construed to apply them to *amicus* briefs). There are specific and compelling reasons for the delay

1. The recent filing of the *amici* brief of Judith Wallerstein, *et al.* necessitated the filing of this brief to counter the distorted picture of the research, the law, and the real world impact of the current law on California's children. After reading the Wallerstein brief, we felt it was imperative to act on behalf of the LaMusga children, and all of the children similarly situated in our state.
2. The LaMusga children are unrepresented and entirely unprotected in this proceeding. The parents each have lawyers advocating for their respective

rights. All of the *amicus* briefs filed (other than the one filed on July 24, 2003) are by advocacy groups representing the interests of parents similarly situated to Appellant. No briefs have been submitted on behalf of the children by any person or entity whose purposes are independent.

3. Respondent's interests, and the positions he has taken in his briefs, are conservative, and do not adequately address the concerns of *amici* about the harm that the present law is doing in the live of many California children. After reviewing those briefs, it became apparent that the children of our state, who will be most affected by these proceedings, have no voice in these proceedings. Many of us, including the principal author, are regularly appointed by family law courts to represent children in custody disputes. We draw upon that experience to speak on behalf of California's children.
4. The delays in research, drafting, editing, and formatting the brief, while obtaining comment from the various *amici* and securing approval and biographical sketches of so many individual *amici* were formidable and unavoidable.
5. The Association of Certified Specialists board vote to authorize this brief was not completed on the morning of July 24, 2003. There were no regularly scheduled board meetings since the filing of the Wallerstein brief. The proposal to file an *amicus* brief was first presented to the *amicus* committee, as required. Thereafter, the question had to be presented to the board, together with a draft of the proposed brief. A poll was then conducted of the board. Because of vacation schedules and court appearances, this was a somewhat time-consuming process – a quorum had to respond.. It is extraordinarily difficult for an all-volunteer non-profit bar association to mobilize itself in 20 days to accomplish anything, much less the review of a proposed brief to the California Supreme Court.

6. The principal author of this brief is a sole practitioner. Her free time for this volunteer effort is limited. Counsel had a Reply Brief due in Case No. A100555 (Appeal from enforcement of Zimbabwe custody decree, does Hague Convention Pre-Empt UCCJEA, did Zimbabwe decree conditioning mother's custody on raising the children in Zimbabwe qualify for UCCJEA enforcement?) on July 7, 2003. Counsel had to oppose a stay and file a combined Response to Writ Petition and Respondent's Brief due on less than 30 days notice in Case No. B167799 on July 14, 2003 (Appeal and writ from denial of motion to vacate parentage judgment entered in September 2000 by stipulation of the lesbian parents of a now almost three-year-old daughter) . The Court of Appeal issued an order for a special trial court hearing on interim visitation, that counsel tried on July 9 and 10, 2003. Counsel had obligations in her trial court practice, and her time was further eaten up in the first week of the month during which she successfully appeared and opposed three separate *ex parte* applications in two different cases.

I certify that this brief contains 20,129 words, and that Appendix A contains another 2,294 words. Word count was calculated using Microsoft™ Word™ ver. 2002. The amicus briefs previously submitted exceeded the 14,000 word count. The issues in this case are complex, as is the research literature and history. To do justice to the issues and refute the claims of the Wallerstein brief required us to exceed the word count. My signature on the brief incorporates the brief, this application, and this word count certification

A*mici* have no relationship with the parties to this action and have no personal interests in the outcome. This brief is not submitted at the request of any of the parties. Rather, as those who ultimately joined this brief realized the scope of the issues this case would raise, we began efforts to organize a group of *amici* and develop a brief which would be of maximum value to this Court. A*mici* are

mindful of the impact that the *amici* briefs had in this Court's consideration of M*arriage of* B*urgess* (1996) 13 Cal.4th 51 Cal.Rptr.2d 444, 913 P.2d 473.

We do not represent a "cause" or any subset of competing interests other than the welfare of children. In recent decades, the politics of custody has become intertwined with gender politics. In our practices and research, we work equally often with mothers, fathers and children. Many of us frequently work as "neutrals" in custody disputes (for example, as child custody mediators, evaluators, minors' counsel and special masters). We are not interested in mothers' rights or fathers' rights, we are interested in the well-being of the next generation. We are more than 40 women and men representative of the legal and mental health professionals and researchers who work day in and day out with families making decisions about custody. We work with Californians of diverse economic resources, backgrounds, cultures and social settings. We work with Californians in large and small counties. We work with families with healthy children, and families with children who have special needs.

The brief is an all-volunteer effort offered as a public service to the children of the State and to this Court. The *amici* include California's Association of Certified Family Law Specialists, individual family lawyers with special interest and expertise in children's issues, former family court services personnel, and mental health professionals in private practice and research settings focusing on child custody issues. Most of us are Californians, and we come from all over the state

This brief does not duplicate the briefs of the parties or the briefs of the other *amici*.

A primary purpose of this brief is to counter-balance the assertions contained in the recently filed *amici* briefs in this matter, particularly that of Judith Wallerstein. A*mici* note that the lack of diversity in the *amici* briefs filed in M*arriage of* B*urgess* led to a decision that has had profoundly iatrogenic consequences for the children of this state.

This application is submitted together with the application and brief of Richard A. Warshak, *et al.* Our brief was drafted to integrate the social science issues raised by the Warshak brief with legal analysis. Many of us who are mental health professionals signed both briefs.

Most California family law judicial officers, lawyers and family law mental health professionals have been dismayed by the many iatrogenic consequences of B*urgess* for California's children. Many of the reasons for that dismay are outlined in the three *amicus* briefs filed in M*ontenegro v.* D*iaz* (2001) 26 Cal.4th 249, 109 Cal.Rptr.2d 575, 27 P.3d 289. Time and space do not permit us to repeat all of those arguments here, but those briefs are as relevant to the issues presented by this case as they were to M*ontenegro*. We hope that the Court will revisit them, as it honors its promise to consider those concerns on another day.

M*arriage of* B*urgess* (1996) has two theoretical underpinnings that were questioned by many of us in the three *amici* briefs in M*ontenegro v.* D*iaz* (2001) 26 C*al.4th* 249, 109 C*al.Rptr.2d* 575, 27 P.3*d* 289 and are unsupported by the social science research. The B*urgess* opinion adopted the claim of Wallerstein *et al.* that most children's well-being is tied to continuity of their care by a "primary" parent. B*urgess* goes on to assume that when a parent is chosen to play the larger caretaking role in early childhood that allocation of parental responsibilities will continue to meet the needs of an older child. Neither of those views is a majority view within the community of professionals who study the impact of divorce on children.

In M*ontenegro* this Court acknowledged the *amici* briefs and deferred consideration of those concerns to another day. At first glance, it did not appear that this case would be "that other day." However, upon review of the briefs of *amici* filed in recent weeks, it appears that they are treating this case as the one in which those issues will be decided. Consequently, we worked hard to prepare a

brief for filing within the timeline for the parties' responses to the brief submitted by Wallerstein *et al.*

Children are not well served if social policy is based on lawyers' opinions and judges' instincts or the views of advocacy groups, rather on the sound foundation of knowledge actually available. See Gary B. Melton, Reforming the Law: Impact of Child Development Research (The Guilford Press: 1989) for a sad account of how little social science knowledge trickles down into the public policies that are intended to benefit children.

The decision in this case, refining the definitions of "best interests" and "changed circumstances" in child custody cases, will profoundly influence the life course of half the future adult population of our state.[1] [2]

---

[1] 1998 census figures show that 28% of all children live with only one parent at any given time. Another 2% live with grandparents and no parent. This statistic also fails to include children in the care of guardians, foster homes and institutional placements. Approximately half of all married persons will divorce. A substantial number of children who were living in a marital family in 1998 will experience parental divorce during their minority. Many of the children living with two parents will experience the separation of their parents. One third of all children are born to unmarried parents.

[2] In 1960, the total number of children in the United States living absent their father was less than 10 million. Today, that number stands at over 24 million (Footnote omitted.), representing nearly four out of every ten children in the United States. And things are getting worse, not better. By some estimates, 60 *percent of children born in the* 1990*s will spend a significant portion of their childhood in a home without their father*.

"For over one million children each year, the pathway to a fatherless family is divorce.

"...The second pathway to a fatherless home is out-of-wedlock childbearing." Wade F. Horn and Isabel V. Sawhill, M*aking* R*oom* F*or* D*addy*: F*athers*, M*arriage and* W*elfare* R*eform* 1 (To Appear In: The New World of Welfare: Shaping a Post-TANF Agenda for Policy) http://www.spp.umich.edu/Conferences/Horn-Sawhill.pdf [Emphasis added.]

The organizations and individuals who submit this brief represent a broad range of experience and expertise in the legal, psychological, and practical dimensions of child custody.

This brief is offered to acquaint this court with relevant highlights of the rich body of research and experience which is available to improve our ability to help the children of the 21st century. This brief also places the issues before the Court in historical perspective. A brief review of the table of authorities will provide a sense of the scope of the research and analysis that went into this brief.

The changed circumstances test has a differential impact on poor and low income families because of the circumstances under which their initial orders are developed and the limited professional resources available to them. The impact of a parenting plan which does not reflect a poor child's best interests is greater, because such children are far more vulnerable. A*mica* Leslie Ellen Shear is court-appointed counsel for children in poor and low income families, as well as those of affluent families. A*micus* Association of Certified Family Law Specialists has an extremely active minor's counsel committee and includes many children's lawyers in its membership. The interests of the 20.3% of California's children who live at or below the poverty level and the interests of the 46% of California's children who live in low income families[3] are addressed in the accompanying brief, and are not specifically addressed in the other *amici* briefs submitted in this matter.

---

[3] "The poverty threshold for a family of four with two children was $16,700 in 1999. 20.3% of California's children live in poverty. This indicator represents the percentage of children under the age of 18 living at or below the poverty level. The percentage of children living below the poverty level remains high in California relative to other states. California's average year rank between 1997 and 1999 was 45th of 50 states and the District of Columbia. Its average year rank between 1994 and 1996 was also 45th of 50 states and the District of Columbia.

"...

"[46%] of children and young adults under the age of 19 living at or below 200% of the poverty level, or $32,900 for a family of four in 1998. California's

This brief discusses the statutory best interests mandate and the judicially created changed circumstances doctrine through the lens of therapeutic jurisprudence. The concept and implementation of therapeutic jurisprudence is an essential element for California's family courts. William Schma encourages his fellow jurists to think therapeutically,

> Q: "The role of the law in society is _____." If you thought "to heal," close this journal and go to your next. You won't find much here you haven't thought about. Everyone else, read on to explore an emerging role for courts and judges in this new millennium.
>
> The topic of this special issue of *Court Review* is "Therapeutic Jurisprudence," or "TJ" as it is commonly known. No single definition of TJ captures it fully. One author offers the following definition as best capturing the essence of TJ: "the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects." (footnote omitted) It is the study of the role of law as a healing agent, and it offers fresh insights into the role of law in society and those who practice it.
>
> TJ can be thought of as a "lens" through which to view regulations and laws as well as the roles and behavior of legal actors – legislators, lawyers, judges, administrators. It may be used to identify the potential effects of proposed legal arrangements on

---

average year low-income children rank between 1996 and 1998 was 41st of 50 states and the District of Columbia. Its average year rank between 1993 and 1995 was also 41st of 50 states and the District of Columbia."

Children Now, *State of Our Children 2000 California: How Young People Are Faring Today* http://www.childrennow.org/california/rc-2000/soc-2000.pdf

therapeutic outcomes. It is useful to inform and shape policies and procedures in the law and the legal process. TJ posits that, when appropriate, the law apply an "ethic of care" to those affected.

TJ does not "trump" other considerations or override important societal values such as due process or the freedoms of speech and press. It suggests, rather, that mental and physical health aspects of law should be examined to inform us of potential success in achieving proposed goals. It proposes to consider possible negative psychological effects that a proposal may cause unwittingly. TJ doesn't necessarily dominate, when considering a law, or a legal decision, or course of legal action.

It is important for judges to practice TJ because – like it or not – the law does have therapeutic and anti-therapeutic consequences. This is empirical fact.

William G. Schma, *Judging For the New Millennium*, 37 Court Rev. 4 (2000) http://aja.ncsc.dni.us/courtrv/review.html

The failure of various branches of the judiciary to work harmoniously towards the same goals is noted by Deborah J. Chase, Sue Alexander & Barbara J. Miller in *Community Courts and Family Law*, 2 J. of the Center for Children, Families & the Courts 37, 44 (2000),

...[F]rom a systemic viewpoint, a prominent characteristic of the majority of family law courts, just as in criminal justice, is its disarray. There is lack of coordination and fragmentation of issues related to families.

Appellate courts are too often "out of the loop" and unaware of the dramatic changes in the field of child custody both in scholarly views and in practice. They cannot rely on private counsel to have intense familiarity with the professional literature.

It is critically important that this Court consider the broadest range of views. It is particularly important that this Court compare and contrast the views expressed in this brief and that of Dr. Warshak with those whose views shaped the B*urgess* decision. We request that the Court accept this brief and that of Warshak *et al.*

The principal author of this brief, Leslie Ellen Shear[4], has been a member of the State Bar of California since 1976 and certified as a specialist in family law by the State Bar's Board of Legal Specialization since 1983. She has published numerous articles on child custody and parentage issues in peer-reviewed and professional journals, frequently lectures on those topics to professional organizations, and filed *amicus curiae* briefs in a number of appellate cases. She is a member of the Editorial Board of the Journal of Child Custody, published by Haworth Press. Ms. Shear represented the minor child before the U.S. Supreme Court in M*ichael* H. *v*. G*erald* D. (1989) 491 U.S. 110, 105 L.Ed.2d 91, 109 S.Ct. 2333. She is a present board member of the Association of Certified Family Law Specialist and the California Chapter of the Association of Family and Conciliation Courts. Ms. Shear is a member of the State Bar of California Family Law Section Children's Issues Subcommittee (South). She is a past member of the Los Angeles County Bar Association Family Law Executive Committee and the State Bar of California Board of Specialization Family Law Advisory Commission. Her practice is restricted to child custody and parentage matters, family law appeals, and family law alternate dispute resolution. She has represented numerous California mothers, fathers and children of diverse economic and social background in child custody and parentage matters.

ACFLS was formed in 1980 following certification of the first group of Family Law Specialists under the "pilot" program, now a permanent program of the State Bar. ACFLS monitors administration by the State Bar of the

[4] The author is extremely appreciative for the editorial assistance of Marjorie Fuller, J.D. in the preparation of this brief.

specialization program, legislation and court rules, develops and promotes Family Law practice skills, provides advanced educational programs for the bar, judiciary and public, and submits *amicus* briefs in family law matters of significance. In the 22 years of ACFLS' existence, membership has grown to approximately half of the approximately 1000 California Certified Family Law Specialists.

Ms. Shear and ACFLS are joined by family lawyers, mental health professionals and researchers representing a broad cross-section of the family law professional community. Names and biographical summaries of the other *amici curiae* are attached to this brief as Appendix B

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

CASES

OTHER AUTHORITIES AND SOURCES

Legal and Behavioral Perspectives, 34 Fam. L. Q. 63 ..... 31, 37

Barbara A. Babb (1997) *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective* (http://www.law.indiana.edu/ilj/v72/no3/babb1.html) 1

Roger M. Baron (Apr. 1997) *Custody Relocation Restrictions A Tool for Preventing Conflicts*, 17 FAIR$HARE 5 37

Norma Basch, Framing American Divorce: From the Revolutionary Generation to the Victorians (1999, University of California Press) 19, 53

John Bouvier, *A Law Dictionary ..., Sixth Edition* (1856 Childs & Peterson, Philadelphia) (http://members.tripod.com/~Coker_Forum/c00976.htm) 20

Braver, S. L., Cookston, J. T., & Cohen, B. R. (2002) *Experiences of Family Law Attorneys With Current Issues in Divorce Practice*, 51Family Relations 325 35

Sanford Braver, William Fabricious & Ira Ellman, *Relocation of Children After Divorce and Children's Best Interests: New Evidence and Legal Considerations* (2003) 17(2) Journal of Family Psychology 206 35

Bernardo J. Carducci, *Shyness: A Bold New Approach* (Harper Perennial, 1999) 195 43

Bernardo J. Carducci, David Henderson, Michelle Henderson, Angela Marie Walisser, Amanda Brown, and David Mayfield, *Why Shy?: A Content Analysis of Self-Perceived Causes of Shyness*, Poster Presentation at the Annual Meeting of the American Psychological Association, Washington, D.C., August 2000 (http://homepages.ius.edu/Special/Shyness/WhyShy.html) 43

Deborah J. Chase, Sue Alexander & Barbara J. Miller, *Community Courts and Family Law*, 2 J. of the Center for Children, Families & the Courts 37 (2000) (http://www.courtinfo.ca.gov/programs/childrenandthecourts/ resource/jourvol2.htm) 7, 74

Children Now, *State of Our Children 2000 California: How Young People Are Faring Today*, (http://www.childrennow.org/california/rc-2000/soc-2000.pdf) 6

Garrett C. Dailey, *Attorney's Briefcase*, Family Law Version 2003.2, Card β{CuVi 097.00} 34

Douglas Darnell, *Parental Alienation: Not in the Best Interest of the Children*, 75 North Dakota L. Rev. 323 (1999) 48

Gary A. Debele (1998) *A Children's Rights Approach to Relocation: A Meaningful Best Interests Standard*, 15 Journal of the American Academy of Matrimonial Lawyers 75 36

David J. DeWit, David R. Offord and Kathy Braun (1998) *The Relationship Between Geographic Relocation and Childhood Problem Behaviour* (W-98-17E) Working Paper, Applied Research Branch Strategic Policy Human Resources Development Canada (http://www.hrdc-drhc.gc.ca/sp-ps/arb-dgra/ publications/research/ w-98-17e.pdf) 38

Elizabeth Ellis, Divorce Wars: Interventions with Families in Conflict, Chapter 8 "Parental Alienation Syndrome: A New Challenge for Family Courts" (2000) 48

Angeles County Bar Association; The Association of Family Conciliation Courts – California Chapter, 1981 Los Angeles Biltmore Hotel 80

Mary Lund, A *Therapist's View of Parental Alienation Syndrome*, 33 Family & Conciliation Courts Rev. 308 (1995) 48

Diane N. Lye, *Washington State Parenting Act Study: Report to the Washington State Gender and Justice Commission and Domestic Relations Commission* (1999) (http://www.courts.wa.gov/reports/parent/home.cfm) ... 58

Mary Ann Mason, From Father's Property to Children's Rights: The History of Child Custody In the United States (1994, Columbia University Press) 19, 20, 21, 51, 53

Justice Michelle May (2001) *Children on the Move: Review of Relocation Cases*: 2001, Family Court of Australia Report and Papers (www.familycourt.gov.au) 37

Sara McLanahan, *Life Without Father: What Happens to the Children*? 1 Contexts (2002) 14

Gary B. Melton, Reforming the Law: Impact of Child Development Research (The Guilford Press:1989) 4

Judge Richard Montes, Harold J. Cohn, Shelley L. Albaum (2001) *The Changed-Circumstance Rule And The Best Interest Of The Child In Cases Involving the Relitigation of Custody, the Courts have Failed to Provide Clarity*, 24-DEC L.A. Law. 12 24

Kathleen Niggemyer, *Comment: Parental Alienation Is Open Heart Surgery: It Needs More Than a Band-aid to Fix It*, 34 Cal. Western L. Rev. 567 (1998) 48

Jessica Pearson, *Court Services: Meeting the Needs of Twenty-First Century Families*, 33 Family Law Quarterly 617 (1999) 67

Kyle Pruett & Marsha Kline Pruett, Eds., Child and Adolescent Psychiatric Clinics of North America: Child Custody (W.B. Saunders: April, 1998) 21

Marsha Kline Pruett and Kyle D. Pruett, *Fathers, Divorce, and Their Children*, 7 Child & Adolescent Psychiatric Clinics of North America (Child Custody) 389 (1998) 83, 84, 85

Deirdre Conway Rand, *The Spectrum of Parental Alienation Syndrome* (Part I) 15 Am. J. Forensic Psychol. 23 (1997) 48

Deirdre Conway Rand, *The Spectrum of Parental Alienation Syndrome* (Part II) 15 Am. J. Forensic Psychol. 39 (1997) 48, 49

Glenda Riley, Divorce: An American Tradition (1991, Oxford University Press) 53

Samuel Roll, *How a Child Views the Move: The Psychology of Attachment, Separation and Loss*, 20 ABA Family Advocate (1997) 37

Russell W. Rumberger, *Student Mobility and Academic Achievement, Educational Resources Information Center* (ERIC) EDO-PS-02-1 (http://ericeece.org/pubs/digests/2002/rumberger02.html) 42

William G. Schma, *Judging For the New Millennium*, 37 Court Rev. 4 (2000) (http://aja.ncsc.dni.us/courtrv/review.html).....6, 7

Elizabeth Scott, *Pluralism, Preference, and Child Custody*, 80 California Law Rev. 615 (1992).....88

Presentation, Second World Congress on Family Law and the Rights of Children and Youth, June, 1997 71

Sally Burnett Sharp (1982) *Modification of Agreement-Based Custody Decrees: Unitary or Dual Standard*? 68 Va. L. Rev. 1263.....16

Leslie Ellen Shear, *Children's Lawyers in California Family Law Courts: Balancing Competing Policies and Values Regarding Questions of Ethics*, 34 Family & Conciliation Courts Rev. 256, 261 (1996).....67

Leslie Ellen Shear, *Comment: Montenegro v. Diaz – Cal Supreme Court Quietly Changes The Child Custody Landscape While Sidestepping Central Questions*, Winter 2001 AFCC-Cal Newsletter 10 (www.afcc-cal.org, click on Newsletter).....61

Leslie Ellen Shear, *From Competition to Complementarity: Legal Issues and Their Clinical Implications in Custody*, Kyle Pruett & Marsha Kline Pruett, Eds., Child and Adolescent Psychiatric Clinics of North America: Child Custody (W.B. Saunders: April, 1998).....21, 64, 72, 89

Leslie Ellen Shear, *Life Stories, Doctrines, and Decision Making: Three High Courts Confront the Move-Away Dilemma*, 34 Family & Conciliation Courts Rev., 439 (1996) (available on-line at www.acfls.org)24, 29, 37

Leslie Ellen Shear, *Will This Child Move? The Structure of Move-Away Analysis*, Winter 2001 AFCC-Cal Newsletter 11 (www.afcc-cal.org, click on Newsletter).....61

Simpson, G.A. & Fowler, M.G. (1994) *Geographic Mobility & Children's Emotional/ Behavioural Adjustment and School Functioning*. 93(2) Pediatrics 303.....42

Arlene Skolnick, *Solomon's Children: The New Biologism, Psychological Parenthood, Attachment Theory, and the Best Interests Standard*, in Mary Ann Mason, Arlene Skolnick & Stephen D. Sugarman, All Our Families: New Policies for a New Century (2002).....81, 85

Anne Endress Skove, *Parenting Time in Knowledge Management Office of the National Center for State Courts*, Report on Trends in the State Courts (http://www.ncsc.dni.us/KMO/Projects/Trends/99-00/articles/Parent-Time.htm#Parent).....82

Stokols, D. & Shumaker, S.A. (1982) *The Psychological Context of Residential Mobility and Well-Being*, 38(3) Journal of Social Issues, 149.....42

Straits, B.C. (1987) *Residence, Migration, and School Progress*, 60(1) Sociology of Education 34.....42

Ross A. Thompson, *The Role of the Father After Divorce*, 4 The Future of Children: Children & Divorce 210, 217-218 (1994) (http://www.futureofchildren.org/ cad/index.htm).....32

Tucker, C. J., Marx, J., & Long, L. (1998) *Moving On: Residential Mobility And Children's School Lives*, 71(2) Sociology of Education 111 (EJ 568 057).....14

Richard A. Warshak, *Remarriage as a Trigger of Parental Alienation Syndrome*, 28 American J. of Family Therapy 229 (2000) (http://mysite.ciaoweb.it/ p_pace/sezioni/articoli_scientifici/articoli_internaz/pas26.htm) 49

Richard A. Warshak, *Social Science and Children's Best Interest in Relocation Cases: Burgess Revisited*, 34 Family Law Quarterly 83 (2000).....24, 37, 39

Herbert N. Weissman, *Psychotherapeutic and Psycholegal Considerations: When a Custodial Parent Seeks to Move Away*, 22(2) American J. of Family Therapy 176 (1994)..37

Mary Ann Whiteside, *An Integrative Review of the Literature Pertinent to Custody for Children Five Years of Age and Younger*, 1996, Judicial Council of California Administrative Office of the Courts, pp.13-14 (available on-line at http://www.courtinfo.ca.gov/ programs/cfcc/pdffiles/custodyexecsumm.pdf) 64, 85, 86, 87, 88

Frank S. Williams, *Preventing Parentectomy Following Divorce*, Keynote Address, Fifth Annual Conference, National Council for Children's Rights Washington D.C., (1990).....49

Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 Psychology, Public Policy & the Law 184 (1997) 90

9 Witkin, Cal. Proc. 4th (1997) Appeal, §945.....29

Wood, D., Halfon, N., Scarlata, D., Newacheck, P. & Nessim, S. (1993) *Impact of Family Relocation on Children's Growth, Development, School Function, and Behaviour* 270(11) JAMA 1334.....42

Barbara Bennett Woodhouse (1999) *Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard*, 33 Family Law Quarterly 815.....10

.

ONE CHILD AT A TIME:
COMPETING INTERESTS AND THE NEED FOR INDIVIDUALIZED CHILD CUSTODY MOVE-AWAY AND MODIFICATION DETERMINATIONS

> Children are not simply chattels belonging to the parent, but have fundamental interests of their own that may diverge from the interests of the parent.
>
> I*n re Jasmon* O. (1994) 8 Cal.4th 398, 419, 33 Cal.Rptr.2d 85

> The course of parent-child relationships is far less predictable than either the parents or the courts acknowledge.
>
> Judith S. Wallerstein, Julia M. Lewis & Sandra Blakeslee, The Unexpected Legacy of Divorce: A 25 Year Landmark Study 312 (2000)

Relocation places children of divorce at risk for developmental harm, as the *amici curiae* brief of Richard A. Warshak, *et al* compellingly describes. We join in the views expressed therein. Children's needs in relocation cases are not mere corollaries of parental desires. Each child's relocation case requires individualized assessment of the risks, benefits and consequences of the proposed move, and the possible parenting plans for the child. Shortcuts will shortchange children.

> [T]he future of custody laws lies in perfecting the best interests standard, not in abandoning it for simpler alternatives that lack a child-centered justification.
>
> Barbara Bennett Woodhouse (1999) *Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard*, 33 Family Law Quarterly 815

Relocation cases often pit the desires of one parent against the needs of the child. Both family and appellate courts are charged with protecting each child's best interests, health, safety and welfare in child custody disputes. Relocation benefits will outweigh risks for some children, while risks will outweigh benefits for others. Doctrines preventing family law bench officers from

considering the impact of events that can have a profound and lasting adverse impact on a child's development, relationships and well-being cannot find support anywhere in the Family Code. The changed circumstances doctrine was never intended to bar consideration of a child's best interests. It was intended to operate flexibly to protect a child's best interests. *Goto v. Goto* (1959) 52 Cal.2d 118, 338 P.2d 450; *Burchard v. Garay* (1986) 42 Cal.3d 531, 229 Cal.Rptr. 800, 724 P.2d 486. In *Burchard* the majority and dissenting opinions debated the question of how best to ensure that the changed circumstances doctrine does not create the anomalous situation of a trial court unable to act in a child's best interests.

If the changed circumstances doctrine acts as a bar to a best interest hearing, there is no way for a family law bench officer to learn whether the existing parenting plan, much less the much-modified plan that will be necessitated by a move, will do harm to the child. Since *Burgess*, the changed circumstances rule has been applied mechanically to prohibit introduction of evidence about the impact of the alternative proposed post-move parenting plans on the child. Thus family law judges often have no idea what the impact of a relocation order will be on a particular child's welfare. *Marriage of Rose & Richardson* (2002) 102 Cal.App.4th 941, 126 Cal.Rptr.2d 45 illustrates the difference in the proceedings (and thus the information available to the judge) when the changed circumstances doctrine is applied by contrast to when the bench officer believes that she may consider the child's best interests.

It does not appear that *Burgess* really contemplates a bar on the presentation of evidence about the impact of the proposed move on the child. *Burgess* holds that the family court has the "widest discretion to choose a parenting plan that is in the best interest of the child." (*Burgess*, *supra*, 13 Cal.4th at p. 31, quoting §3040, subd. (b)) and "must look to all the circumstances bearing on the best interest of the minor child."

It is unclear how Justice Mosk's opinion in B*urgess* would have read if the trial judge had exercised his discretion to deny the move request. That opinion conflates the two changed circumstances doctrines discussed in B*urchard* -- one based upon principles of *res judicata* and one based on continuity of the relationship with one parent (as opposed to continuity in complementary parenting, frequent care by each parent, and relationships with extended family, peers, school and community). The problem with the *res judicata* rationale is that it ignores children's changing needs and treats the parenting plan as the fruits of parental litigation rather than as created to meet the child's needs. The problem with the continuity rationale is that it singles out only one dimension of continuity at the expense of all others, and thus flies in the face of the child's actual needs and interests. This Court turned to the B*urchard* holding when explaining the changed circumstances doctrine in M*ontenegro*, *supra*. (at p. 256).

While parents in an initial adjudication of custody come into the Court as equals, a parent seeking modification of an existing parenting plan carries the burden of proving that a change in the parenting plan is in the child's best interests. Proving a change in circumstances must be part and parcel of proving that the existing parenting plan fails to meet the child's needs, not a condition precedent to a best interests hearing. The recent holding in M*arriage of* A*bargil* (2003) 106 Cal.App.4th 1294,1298-1299; 131 Cal.Rptr.2d 429 appropriately applies the changed circumstances rule to shift the burden of proof, rather than prevent consideration of the adverse impact on the child's relationship with the left-behind parent.

> As the non-custodial parent with visitation rights, Aharon carries the burden of proving Michal's decision to move is not in Yuval's best interests; the burden is not on Michal to prove the contrary.

The case goes on to review the evidence presented to the family court on the issue of preservation of a meaningful father-son relationship post-move.

Generalities about the benefits of relocating with a custodial parent don't address the particular needs of each child. Legal bars on presentation of evidence concerning the true impact of the move on the child (*Marriage of Abrams* (2003) 105 Cal.App.4th 979, 130 Cal.Rptr.2d 16; *Marriage of Lasich* (2002) 99 Cal.App.4th 702, 121 Cal.Rptr.2d 356; *Marriage of Edlund and Hales* (1998) 66 Cal.App.4th 1454, 78 Cal.Rptr.2d 671)[5] preclude trial courts from even considering such harm. In addressing the diminution of the child's relationship with his or her left-behind parent, these decisions appear ignorant of the adverse developmental consequences of the child's loss.

The post-*Burgess* cases have effectively transformed the rebuttable presumption of *Burgess* into a conclusive presumption in most family law courts. A more child-centric approach would be to allow trial courts to hear evidence about the risks and benefits of a proposed move for the particular child at issue in each case. The burden should be allocated to the parent seeking a change in the plan (not in the person assigned "custody") to show that the change is, on balance, in the child's best interests. This means that where a move necessitates a change in the parenting plan, the burden would be on the parent proposing the move.

In *Marriage of Bryant* (2001) 91 Cal.App.4th 789, 110 Cal.Rptr.2d 791, the Second Appellate District raises the daily reality faced by trial courts – application of the present doctrine often leaves children with the "second-best" option. At present a court cannot separate siblings without special findings of "extraordinary emotional, medical or educational need, or some other compelling circumstance" and, in most cases, a child custody evaluation, but is barred from considering the potentially greater adverse impact of separation of parent and child. *Marriage of Williams* (2001) 88 Cal.App.4th 808, 105 Cal.Rptr.2d 923

[5] Contrast *Marriage of Condon's* ((1998) 62 Cal.App.4th 533, 73 Cal.Rptr.2d 33) concern with protecting the child's right to frequent and continuing contact with both parents.

Any given relocation case can present risks to a particular child unrelated to (*albeit* probably exacerbated by) the impact of parental divorce. A child's resilience is also reduced by cumulative stressors. Children in custody relocation cases are already experiencing the stresses of parental divorce and post-divorce life.

Given the growing and increasingly complex and nuanced body of research about the impact of relocation on children whose parents live apart, it is unwise for this Court to make global determinations for all children. Rather than selectively adopt research findings and reify them into judicial doctrine, this Court should recognize the complexity of the issues, the differential impact of relocation on different children, and defer to the exercise of trial court discretion within the parameters of clear legislative intent.

This Court should not presume that the quality and developmental impact of the active involvement of both parents in childrearing can be preserved after a move.

Long-distance visitation does not facilitate the kind of involved parenting necessary for a distant parent to make a difference in a child's life.

> ... [M]oderate levels of visitation do not appear to help children much. What does seem to help is a close father-child relationship ...
>
> Sara McLanahan, Life W*ithout* F*ather*: W*hat* H*appens to the* C*hildren*? 1 Contexts (2002)

> [T]he developmental effects of most non-residential parents occupy too little emotional shelf space in the life of a child to provide a reliable buffer ...They are not there to protect against the day-to-day hassles of postdivorce life.
>
> E. Mavis Hetherington, <u>For Better or For Worse: Divorce Reconsidered</u> (2002) W.W. Norton and Company 133

Even one residential move has been found to have a negative impact on a combined measure of both academic and behavioral aspects of school

performance among children who do not live with both biological parents. Tucker, C. J., Marx, J., & Long, L. (1998). *Moving On :Residential Mobility And Children's School Lives* 71(2) Sociology of Education 111 (EJ 568 057).

> Most recently, a study of the impact of post-divorce relocation on college students found marked adverse effects, even when controlling for parental conflict. Sanford Braver, William Fabricious & Ira Ellman, *Relocation of Children After Divorce and Children's Best Interests: New Evidence and Legal Considerations* (2003) 17(2) *Journal of Family Psychology* 206.

This court should preserve the discretion of trial courts to consider the impact of relocation and other changed circumstances on a particular child rather than applying global precepts regardless of their "fit" with any particular case.

HISTORY, BEST INTERESTS AND CHANGED CIRCUMSTANCES: HARMONIZING STATUTES AND PRECEDENT TO SERVE CHILD-CENTRIC POLICIES

Like the common law rule that fathers were entitled to the custody of their children, relocation law often pits the rights of parents against the needs of children. This Court recently reaffirmed the primacy of the best interests standard in *Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255, 109 Cal.Rptr.2d 575, 27 P.3d 289.

> Under California's statutory scheme governing child custody and visitation determinations, *the overarching concern is the best interest of the child*. The court and the family have "the widest discretion to choose a parenting plan that is in the best interest of the child." (Fam. Code, §3040, subd. (b).) [Fn. omitted] When determining the best interest of the child, relevant factors include the health, safety and welfare of the child, any history of abuse by one parent against the child or the other parent, and the nature and amount of contact with the parents. (§3011.) [Emphasis added.]

In recent years, when presented with relocation cases, California law has shifted between an exaggerated focus on the statutory frequent and continuing contact doctrine,[6] and an exaggerated focus on the statutory right of a custodial parent to choose the child's residence. Each of those approaches restricted the discretion of trial courts to hear evidence and make decisions in each child's individual best interests.

Within a very few years, California family courts lurched from almost never permitting children's relocation (*Marriage of McGinnis* (1992) 7 Cal.App.4th 473, 9

[6] The frequent and continuing contact guarantee, coupled with the statutory mandate for custody determinations to be gender neutral and the advent of joint physical custody provided the basis for appellate decisions restricting relocation.

Cal.Rptr.2d 182, partially disapproved[7] *Marriage of Burgess* (1996) 13 *Cal.4th* 25, 51 *Cal.Rptr.2d* 444, 913 P.2*d* 473) to rubberstamping children's relocation without consideration of the impact of the move on the child *Marriage of Abrams*, *supra*.; *Marriage of Lasich*, *supra*.; *Marriage of Edlund and Hales*, *supra*. Neither extreme can serve the best interests of individual children. Only the exercise of the broad judicial discretion mandated by Family Code §3040(b), and recognized in *Burgess*, in which the impact of the particular proposed move on the particular child is considered on a case by case basis, is consistent with the best interests standard. Restrictions on the power of California's family courts to make best interests determinations in custody cases do not protect California's children, and thus must be construed consistently with the overarching best interests mandate.

Until *Montenegro v. Diaz*, each swing of the pendulum has involved tying a particular statute to the changed circumstances doctrine for modification, and reducing or eliminating judicial discretion in judicial modification proceedings.[8]

California custody law must be read to place all of its components, both statutory and judicially created, in harmony, under the overarching umbrella of the best interests mandate. All of those components must be read as subordinate to the best interests mandate. The subordinate statutes and doctrines that have shaped California custody relocation and modification law are

1. the child's right to frequent and continuing contact with both parents (Family Code §3011(c), §3020(b);
2. the changed circumstances doctrine;

---

[7] *McGinnis* is still good law as to its procedural protections, just not as to the burden of proof. *Hoversten v. Super. Ct.* (*Hoversten*) (1999) 74 Cal.App.4th 636, 88 Cal.Rptr.2d 197.

[8] Judges preside over more modification hearings and trials than initial divorce cases. Sally Burnett Sharp (1982) *Modification of Agreement-Based Custody Decrees: Unitary or Dual Standard*? 68 Va. L. Rev. 1263, 1264 n.8

3. the right of a custodial parent to choose the child's place of residence subject to the Court's power to restrain a move that is prejudicial to the child's welfare (Family Code §7501);
4. the policy against relocation peppered throughout the Family Code (Family Code §§ 2040(a)(1), 3024, 3048, 3062, 3063, 3064;
5. the paramount weight given to the child's health, safety and welfare by Family Code §3011 and §3020 over other factors.

Each swing of the pendulum elevated one of the statutory edicts over all of the others, including the *overarching* best interests standard. They did so by manipulating the concept of "continuity" for the purposes of the changed circumstances rule.

Thus the pre-B*urgess* line of cases culminating in M*arriage of* Mc*Ginnis*, *supra*, stressed the child's right to frequent and continuing contact with both parents, and the legislative intent that parents share childrearing after separation and divorce. That line of authority went astray when it constrained the exercise of judicial discretion to approve relocation and created, unsupported by statute, the impossible burden of showing that the move was necessary, rather than showing that, on balance, the move was in the individual child's best interests. Assumptions about the impact on the child, rather than a case by case assessment, defeated the best interests mandate. B*urgess* was an over-reaction to those excesses, mirroring the very defect of that line of cases..

B*urgess* and its progeny emphasized continuity of care by one parent and tied it to Family Code §7501 -- a nineteenth century code section enacted (before California had the best interests standard) to protect the right of a child's *legal* custodian to control his or her place of domicile, while reserving the discretion of the court to override such decisions where relocation would prejudice the child's welfare. F*amily Code* §7501 (*former* C*ivil Code* §213) *was enacted for the express purpose of creating, not delimiting, judicial discretion to restrain moves that do not serve children's interests.*

B*urgess* entirely misread the legislative intent in a misguided effort to follow the social agenda of the *amici curiae* advocating for the mother's move, rather than consideration of the children's best interests.

Courts must give meaning to all of the legislative mandates, not sacrifice one in service of another. Certainly appellate courts must give greater weight to contemporary legislative acts intended to address the specific issue before them than they do to artifacts of a the defunct common law rule that fathers control their children's fates after their death.

Family Code §7501 (derived from former Civil Code §213) was adopted as part of California's 1872 Field Code. Former §213 was copied directly from New York's Civil Code, as were many provisions of the Field Code. The annotation following the New York code section is a reference to W*ood v.* W*ood* (1842) 6 Paige 596. New York adopted its statute allowing a custodial parent to control the child's place of residence subject to judicial discretion to restrain a move prejudicial to the child's welfare to codify the W*ood* holding.

In W*ood* a deceased father's will appointed his male executor (and one of his heirs) as the testamentary guardian of his young children (all under age seven[9]) and directed that a portion of the estate be used for the expenses of his widow in moving with the children from New York to Ohio. The widow refused to move. The Court restrained the guardian from separating the children from her and taking them to Ohio, even though she was merely a non-custodial parent. The reference to custody in Family Code §7501 is to modern "legal" custody, not "physical" custody. The testamentary guardian in W*ood* engaged in a decisionmaking and supervisory role, he was not the children's daily care giver.

---

[9] Children typically entered the labor force at age 7 as apprentices and were treated in many ways as quasi adults (while retaining a dependent legal status). Philippe Aries, Centuries of Childhood: A Social History of Family Life (New York: Vintage Books, 1962)

Wood involved a common law testamentary guardianship, not a divorce. Common law testamentary guardianship laws permitted a father to control the lives of his children from the grave. Mothers did not receive custody of their children upon the death of the father because women occupied a dependent social status similar to that of children.[10]

As the *Wood* case illustrates, the right to control the child's domicile was intrinsic to the rights of a father or guardian to enjoy the fruits of the child's labor, and to apprentice or indenture the child. (Mr. Wood wanted his children moved to Ohio so that they could learn to farm. His intent was to provide for their economic future, not their psychological well-being.)

In 1836, the concept of custody was shifting from an emphasis on *control* (embodied in the paternal presumption) to an emphasis on *care* (embodied in the soon to emerge maternal presumption). The person with custody would not be the person wiping noses, changing diapers, and tucking very young children into bed. The historians cited above make clear that the word custody didn't mean the day to day care of the child. Rather, it meant control of the child's care, labor and income. In other words, custody at the time was a broader version of what we call legal custody. It embodied directing physical custody rather than actually changing the diapers and raising the children. Mrs. Wood was treated like her own children's nanny.[11] [12] The Wood children were left in what we would call the

---

[10] See Mary Ann Mason, *From Father's Property to Children's Rights: The History of Child Custody In the United States* (1994, Columbia University Press). pp. 59-64. See also Debra Friedman, *Towards a Structure of Indifference: The Social Origins of Maternal Custody* (1995, Walter de Gruyter, Inc.); Norma Basch, *Framing American Divorce: From the Revolutionary Generation to the Victorians* (1999, University of California Press); Glenda Riley, *Divorce: An American Tradition* (1991, Oxford University Press).

[11] "More generally, this history of child custody will reveal that children have always been important to adults, and have often been the subjects of custody disputes, but not always for the same reasons. For most of our history, well into the twentieth century, the worth of children was seen primarily in terms of

"physical custody" of their mother, subject to the guardian's sole decision-making. But it was the guardian's "legal" custody, including the absolute right to choose the child's place of residence, that mattered. The Chancery Court acted in a revolutionary fashion by asserting discretion to check that authority.

---

economic, not emotional, value. Fathers, recognized as the economic heads of the household and supervisors of their children's labor, were granted paramount rights to custody and control of their children. Mothers, who had no economic power or responsibility, had no right to custody as long as the father was alive. Custody disputes, which usually occurred only if the father died, were often determined practically by considering who could support the child (mothers often could not) or, sometimes, which relative most needed the child's labor." Mary Ann Mason, F*rom* F*ather's* P*roperty*, *supra*. at p. x.

[12] The rights of the testamentary guardian apparently supercede all other custody rights.

"Guardians have also been divided into guardians by nature; guardian's by nurture; guardians in socage; testamentary guardians; statutory guardians; and guardians *ad litem*.

" - 1. GUARDIAN BY NATURE, is the father, and, on his death, the mother; this guardianship extends only to the custody of the person; ... and continues till the child shall acquire the age of twenty one years....

" - 2. GUARDIAN BY NURTURE, occurs only when the infant is without any other guardian, and the right belongs exclusively to the parents, first to the father, and then to the mother. It extends only to the person, and determines, in males and females, at the age of fourteen. This species of guardianship has become obsolete.

- 3. GUARDIAN IN SOCAGE, has the custody of the infant's lands as well as his person. The common law gave this guardianship to the next of blood to the child to whom the inheritance could not possibly descend. This species of guardianship has become obsolete, and does not perhaps exist in this country; for the guardian must be a relation by blood who cannot possibly inherit, and such a case can rarely exist....

- 4. TESTAMENTARY GUARDIANS; these are appointed under the stat. 12 Car. II., above mentioned; they supersede the claims of any other guardian, and extend to the person, an real and personal estate of the child, and continue till the ward arrives at full age."

John Bouvier, A L*aw* D*ictionary* ..., S*ixth* E*dition* (1856 Childs & Peterson, Philadelphia)
(http://members.tripod.com/~Coker_Forum/c00976.htm)

See also, James Kent, C*ommentaries on* A*merican* L*aw* (1826)
http://www.constitution.org/jk/jk_000.htm

By 1872, a new emphasis on the role of nurture was coming to the fore[13], and thus the New York Chancery Court and the New York and California legislatures continued the doctrine of judicial discretion for the protection of nurturing relationships that the courts had pioneered. The W*ood* decision is thus a hybrid of the common law focus on father's rights and children as economic units and the new social values about the role of mothers as nurturers.

Mrs. Wood refused to move with the children to Ohio. The guardian of the estate appointed by the father proposed to take the children (all under age seven) to Ohio as provided by the will over their non-custodial mother's objections. The New York Court of Chancery restrained the testamentary guardian from removing the children to Ohio,

> This court has the same jurisdiction over a testamentary guardian as it has over a guardian in socage, or any other guardian; and in this case it would be improper to permit the testamentary guardian to take the infant complainants from their mother and carry them among strangers, several hundred miles from her residence, at their present tender ages. He must not take them from her, therefore, without the further order of the court; which order he is at liberty to apply for whenever it may be proper. As the third of the estate was given to him, charged with the education and support of the infants during their minority, or with so much of such expense as the income of their share of the estate falls short of that object, if he accepts the legacy to himself, he must apply so much thereof, from time to time, for their support and maintenance as may be necessary in addition

[13] See Debra Friedman, T*owards a* S*tructure of* I*ndifference… supra*. at pp. 37-58; Mary Ann Mason, F*rom* F*ather's* P*roperty… supra*. at pp. 49-84; Leslie Ellen Shear, F*rom* C*ompetition to* C*omplementarity*: L*egal* I*ssues and their* C*linical* I*mplications in* C*ustody*, Kyle Pruett & Marsha Kline Pruett, Eds., Child and Adolescent Psychiatric Clinics of North America: Child Custody (W.B. Saunders: April, 1998).

> to the income from their own property; but the whole of such expense is not to exceed what it would have cost for their maintenance and education in the manner contemplated by the testator in his will. And as the testator has directed that his sons be educated for farmers, the court will so far regard his wishes, in this respect, as to require that they be put to that employment, either by or under the direction of their testamentary guardian, as soon as they are old enough; and that they shall be kept at farming during those seasons of the year when it is usual for farmers to keep their children so employed.[14]

This history makes it clear that Family Code §7501 was enacted to recognize, rather than to constrain, the discretion of the court to prevent moves that are not in children's best interests.[15] What was revolutionary about the W*ood* decision was the trial court's assertion of the power to override the guardian, not the guardian's underlying authority to make the decision. Thus it is the second half of the sentence of the statute that carries its purpose, not the first.

Clearly neither the New York, nor the California legislature, had children's post-divorce nurturing relationships with two living parents in mind when they enacted former Civil Code §213.[16] In fact, it took 63 years for a California court to

---

[14] W*ood* is an early example of the exercise of judicial discretion to reject the common law and serve what was then perceived to be the child's best interest of leaving children of "tender years" in the care of their mother. At the same time, it reflects the focus in the first half of America's history on children's economic role. Nurturing appears only to be important until the children are old enough to start farming. California's legislature did not abolished the tender years doctrine until1980, when the provision that now appears in Family Code §3040 ("shall not prefer a parent as custodian because of that parent's sex.") was added.

[15] The phrase "best interests" was just entering the lexicon in 1872 and was not part of California's statutory scheme. See historical authorities cited herein.

[16] Divorce remained relatively rare in nineteenth century America, and the concept of frequent and continuing contact with both parents had rarely been considered

cite the statute in a child custody dispute arising from divorce or separation. Civil Code §213/Family Code §7501 was not used in divorce cases from its 1872 enactment until 1934, when it was used as the basis for resolving an interstate custody jurisdictional dispute.

It took 82 years for California appellate courts to apply Civil Code §213/Family Code §7501 in the context of divorce for the purpose for which it was enacted – to assert judicial discretion to restrain parental relocation decisions. Appendix A to this brief is a table of all reported decisions[17] citing Civil Code §213/Family Code §7501 from its enactment to the B*urgess* decision. Review of that history reveals that B*urgess* summarily discarded more than a century of jurisprudence

- establishing a flexible changed circumstances doctrine,
- recognizing the discretion of trial courts to restrain or permit moves based upon consideration of all of the consequences including the adverse impact on parent-child relationships and other factors,
- considering the motivation and prior pattern of conduct of the parent proposing relocation,
- requiring full evidentiary hearings as the basis for the exercise of discretion, and
- not creating a bright line between custody and visitation,
- requiring a case by case determination of the impact of a proposed move on each individual child.

---

by any one with the possible exception of the novelist Henry James (W*hat Maisie* Knew, 1897), whose novel describes a case from the child's perspective in which the parents had joint custody because neither parent really was committed to undertaking true responsibility for raising Maisie.

[17] Per Westlaw ™ citing reference search.

All of those child-protective doctrines were discarded by B*urgess* and its progeny. Consequently, B*urgess* was met with considerable criticism.[18]

The statute was cited occasionally through 1950 only to preclude courts from giving custody to non-parents rather than allowing parents to take child out of state or to resolve interstate custody jurisdictional issues.

Finally, in 1953 the California Supreme Court used the statute (G*udelj v*. G*udel*j (1953) 41 Cal.2d 202, 259 P.2d 656) to support the exercise of trial court discretion to restrain removal of a child because of the potential impact of such removal on the child's relationship with the other parent. In every instance from 1953 until the B*urgess* decision, Family Code §7501 and the changed circumstances rule were applied in the context of a full evidentiary hearing on the risks and benefits of the proposed move. B*urgess* silently overruled G*udelj*, while citing it as authority for the deferential abuse of discretion test. All expressions of legislative intent between 1953 and 1996 clearly articulated the policy that children's best interests generally require preservation of their relationships with both parents. The legislature took no actions justifying a 1996 reinterpretation of the statute or of the flexible changed circumstances test, The B*urgess* court, in the absence of *amici* briefs reflecting mainstream social science research, adopted the social

---

[18] See, *inter alia*, Richard A. Warshak, *Social Science and Children's Best Interest in Relocation Cases*: B*urgess Revisited*, 34 Family Law Quarterly 83 (2000); Marion Gindes (1998) T*he Psychological Effects Of Relocation For Children Of Divorce*, 15 Journal of the American Academy of Matrimonial Lawyers 119; Leslie Ellen Shear, L*ife Stories, Doctrines, and Decision Making*: T*hree High Courts Confront the Move-Away Dilemma*, 34 Family & Conciliation Courts Rev., 439 (1996) (available on-line at www.acfls.org); Joan B. Kelly and Michael E. Lamb (2003) D*evelopmental Issues in Relocation Cases Involving Young Children*: W*hen, Whether, and How*?, 17 J*ournal of Family Psychology* 193; Jennifer Gould (1998) C*omment*: C*alifornia's Move-Away Law*: A*re Children Being Hurt By Judicial Presumptions That Sweep Too Broadly*? 28 Golden Gate U. L. Rev. 527; Judge Richard Montes, Harold J. Cohn, Shelley L. Albaum (2001) T*he Changed-Circumstance Rule And The Best Interest Of The Child In Cases Involving the Relitigation of Custody, the Courts Have Failed to Provide Clarity* 24-DEC L.A. Law. 12;

agenda of a few individuals who mounted an organized campaign on behalf of maternal entitlement to relocate with children. B*urgess* reverses each of the principal holdings of G*udelj*.

Judicial expansion of the non-statutory changed circumstances doctrine far beyond its original intent[19] has now restricted judicial discretion to act in children's best interests – to the collective detriment of California's children and (in relocation cases) in contravention of the legislative intent of Family Code §7501. In M*ontenegro v*. D*iaz*, *supra*, this Court recognized that a less restrictive application of the changed circumstances doctrine may be required to serve the best interests of each child whose parenting plan comes before the courts. That view is in harmony with the historical origins of the doctrine.

Originally, this Court saw the changed circumstances doctrine as one factor to be considered in a custody modification case, not as a complete bar to consideration of the particular child's best interests. The common sense goal was to discourage revolving door litigation, rather than to reify all initial allocations of parental responsibility as virtually immutable.

> It is well established that in divorce proceedings the court has the power to vary and modify its decree as to the custody of the minor children from time to time as circumstances change. The court, in revising and modifying its decree, proceeds upon new facts

[19] In their amicus brief filed in M*ontenegro v*. D*iaz*, Harold Cohn and Shelley Albaum detailed the history of the judicially created changed circumstances doctrine and its recent expansion far beyond its original scope to virtually swallow the statutory best interests mandate in modification and relocation cases. Cohn and Albaum cite G*oto v*. G*oto* (1959) 52 Cal.2d 118, 122-23, 338 P.2d 450, which holds that the changed-circumstances rule should not be applied where the result of applying it would be contrary to the best interest of the child and that, in such a case, custody should be decided on the basis of the best interests test and other similar authority, such as W*ashburn v*. W*ashburn* (1942) 49 Cal.App.2d 581, 122 P.2d 96, M*unson v*. M*unson* (1946) 27 Cal.2d 659, 166 P.2d 208, and F*oster v*. F*oster* (1937) 8 Cal.2d 719, 68 P.2d 719.

considered in connection with the facts formerly established, the change of circumstances, the conduct of the parties, and the best interests of the child. T*he good of the child is regarded as the controlling force in directing its custody, and the courts will always look to this, rather than to the whims and caprices of the parties.* The morals of the parents, their financial condition, their subsequent marriage, the age of the child, and the devotion of either parent to its best interests, are all factors to be weighed and considered by the court. All such applications are addressed to the sound legal discretion of the court below, and its conclusion will not be disturbed here, except it should clearly appear that its discretion has been abused.

C*rater v*. C*rater* (1902) 135 Cal. 633, 634-635, 67 Pac. 1049
[Emphasis added]

The good of the child must be the controlling force in every decision made by California's family courts. This Court reaffirmed the broad discretion of family courts to modify custody under circumstances not unlike those of the L*a*M*usga* family in G*oto v*. G*oto supra*. In that case, the children's emotional needs as they grew older were going unmet, one child was in therapy, and the children were exposed to derogatory remarks about their father, characterizing him as a "rat." Those facts were held to constitute a change of circumstances. This Court recognized that the risk of estrangement between father and children itself constituted a change of circumstances. I*d*. at p. 123. As it had in C*rater* in 1902, 1959 this Court still saw the determination of whether the facts amounted to a change of circumstances in the lives of the children at issue as one for the sound discretion of the trial court after hearing all of the evidence.

M*arriage of* C*arney* (1979) 24 Cal.3d 725, 157 Cal.Rptr. 383, 598 P.2d 36 was the first case to define an entire type of circumstance as out of the ambit of the changed circumstances doctrine. There the trial court had abused its discretion by

finding a sole custody father's physical disability sufficient change of circumstances in the children's lives to transfer custody to a mother who had not seen the children in years. This Court found that there was no *nexus* between the father's physical disability and the children's welfare. Since C*arney*, trial courts are barred from considering a parent's physical disability when awarding custody.

M*cG*i*nnis* used the changed circumstances doctrine of C*arney* in conjunction with Family Code §3020(b) to require that a parent seeking to relocation that would adversely impact a custodial arrangement predicated upon the active involvement of each parent in childrearing must prove the necessity of the move.

Reacting to the overreaching of the M*cG*i*nnis* court's necessity doctrine, this Court paired the changed circumstances doctrine with Family Code §7501 to create a rebuttable presumption in favor of relocation by a custodial parent in M*arriage of* B*urgess*. While there is no *nexus* between a custodial parent's physical disability and his child's welfare, there is a substantial *nexus* between relocation and a child's welfare. Relocation will impact different children differently. Consequently, trial courts must have the broadest possible discretion to make individualized best interests determinations in relocation cases.

B*urgess* does not actually hold that the relocation itself is not a change of circumstances, although it has been interpreted to do so. [Citation] B*urgess* holds that relocation is only a changed circumstance where the relocation would harm the child. The key passage is,

> 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.'"

This passage focuses on the impact of the proposed relocation on the particular child. It is a reaction to the chain of cases that presumed such harm, rather than hearing evidence about harm. B*urgess* requires that the parent opposing his or her child's move present evidence showing that this particular move will harm this particular child. Gary LaMusga established by quite compelling evidence that his children's relocation would have adverse consequences for them. The trial judge concurred. Various *amici* and the children's mother have asked this Court to substitute their views[20] about the global interests of children in such cases for the trial court's determination of the particular needs of the LaMusga children.

The trial court found per Family Code §7501 that the move would be prejudicial to the welfare of his children. There is no basis for concluding that the trial court abused its discretion.

This Court's holding in B*urgess* reined in the excesses of the intermediate courts of appeal and reaffirmed what had long been the law – that the parent seeking modification has the burden of proof. In P*routy v*. P*routy* (1940) 16 Cal.2d 190, 193,105 P.2d 295, this Court held, "It must be borne in mind that in every proceeding to modify a provision for the custody of a minor child the burden is on the moving party to satisfy the court that conditions have so changed as to justify the modification." B*urgess* upholds a trial judge's conclusion that the father did not meet his burden to establish that the move justified a shift in the allocation of the role of custodial parent.[21]

---

[20] The views expressed by those *amici* do not represent the majority views of child custody professionals, including researchers, judges, lawyers, evaluators and mediators. Rather, they are the views of a vocal minority who equate children's interests with mothers' interests.

[21] The sad irony of B*urgess* remains that the actual parenting plan for the Burgess children fell within the parameters of the Footnote 12 joint custody exception to its holding. The schedule of parental responsibility had both parents actively involved in the children's daily care, had only a slight differential in "timeshare," and was delicately balanced to maximize the time that the children

B*urgess* is best read as a case upholding the exercise of trial court discretion and requiring the parent seeking modification to carry the burden of proof. Most of the pronouncements of B*urgess* are *dicta*[22], since they are not necessary to the result. All that is necessary to support the result in B*urgess* is rejection of the intermediate appellate courts' "necessity doctrine" as a limitation on trial court discretion to assess the impact of a proposed move.

Since Ms. Burgess' motivation for the move, and the claims she made about how the move would benefit the children were all in evidence in the Bakersfield trial proceedings, influenced the trial judge's exercise of discretion to grant the move and discussed in the Supreme Court opinion, the discussion in B*urgess* about prohibiting examination of the reasons for the move is clearly *dicta*. Affirming the trial court did not require a holding that the trial court should have excluded evidence about the mother's reasons for the move, or failed to weigh them when deciding to approve the move. Similarly, the issue of what Ms. Burgess would have done if her request for the children to move was denied was not an

---

spent in parental care, rather than in a professional child care setting. The 40 mile move precluded that level of co-parenting and involved fathering. The Court focused on the label in the interim order, dubbing the mother the "sole" custodian of the children and labeling the more than 40% time that the children spent in their father's care visitation. A*mica* Judith Wallerstein ignored the actual facts of the case in her B*urgess* briefs and substituted anecdotes about other families based upon her contacts with mothers and children, but not fathers. See Leslie Ellen Shear, L*ife Stories*, D*octrines and* D*ecisionmaking*: T*hree* H*igh Courts* C*onfront the* M*ove-away* D*ilemma*, *supra*, for excerpts from the trial court's findings, a critique of Dr. Wallerstein's brief and analysis of the B*urgess* doctrine compared and contrasted with move-away decisions from Canada and New York.

[22] "The *ratio decidendi* is the principle or rule that constitutes the ground of the decision, and it is this principle or rule that has the effect of a precedent. It is therefore necessary to read the language of an opinion in the light of its facts and the issues raised, to determine (a) which statements of law were necessary to the decision, and therefore binding precedents, and (b) which were arguments and general observations, unnecessary to the decision, i.e., dicta, with no force as precedents." 9 Witkin, Cal. Proc. 4th (1997) Appeal, § 945, p. 986

issue that influenced the trial court decision affirmed by this court, so the musing on that topic must also be read as dictum.

Common sense requires that a decision-maker, whether parent or Court, considering the risks and benefits of a proposed move for the child, take into consideration the purpose of the move. Only by considering the purpose of the move can one engage in a meaningful comparison of the alternatives. Motive also communicates a great deal about parental judgment. Did the parent recognize and consider the potentially adverse impact of the move on the child, how did the parent compare that impact against the importance of the move. Not all motives are equally worthy of deference, when a court determining custody is assessing the quality of parental decision-making. Trial courts cannot meaningfully engage in the statutorily mandated Family Code §3040 analysis of "which parent is more likely to allow the child frequent and continuing contact with the non-custodial parent, consistent with Section 3011 and 3020" without looking at the weight each parent gives the child's frequent and continuing contact with the other parent in comparison to the weight that parent gives his or her own wishes. The ability to recognize children's needs and give them high priority is an essential component of good parenting. Without knowing why the parent has made the decision to ask to move, one cannot consider whether a significant element of the decision to move is just not for the stated reasons, but at least in part to diminish the children's relationship with the parent to be left behind, or the need for the moving parent to actively collaborate and co-parent with the child's other parent. Only by considering the purpose of the move, and the alternatives available to (and considered or not considered by) the parent proposing a move, in the context of the history of that parent's conduct and evidence of that parent's attitudes, can a trial judge determine motive. No sane parent proposing relocation is going to tell the court or an evaluator that he or she is leaving to reduce the children's opportunities to experience the other parent's care. Thus consideration

of improper motive can have no meaning except in the context of considering the weight of the motive.

Subsequent appellate cases, relying on passages of B*urgess* that are *dicta*, have held that harm to children that is generic in nature to all moves including reduced or less frequent time in the care of one parent, cannot be considered in relocation cases – regardless of the actual harm to be suffered by the particular child at issue in the individual case. This result was not intended by this Court in B*urgess* and defeats the best interests mandate. There are no generic children, and no generic parent-child relationships. Relocation will impact different children differently, at different points in their lives, and in the context of each child's unique family and life circumstances. William G. Austin (2000) A F*orensic* P*sychology* M*odel of* R*isk* A*ssessment for* C*hild* C*ustody* R*elocation* L*aw* 38 Fam. & Con. Ct. Rev. 192; William G. Austin (2000) R*elocation* L*aw and the* T*hreshold of* H*arm*: I*ntegrating* L*egal and* B*ehavioral* P*erspectives* 34 Fam. L. Q. 63.

> The changed circumstances doctrine was intended to serve a flexible gatekeeping function to deter interminable and vexatious relitigation of custody by dissatisfied parents, not to restrict the discretion of trial courts to address the changing best interests of children. F*oster v. F*o*ster* (1937) 8 Cal.2d 719, 726-727, 68 P.2d 719

In 1937 this Court clearly did not intend the changed circumstances doctrine to create an ever-expanding class of cases in which family courts are deprived of discretion to hear evidence and act in an individual child's best interests. F*oster* upheld the discretion of a trial court in a relocation case to modify or refuse to modify the custodial arrangements contained in a divorce decree. This Court observed in F*oster* (at p. 728),

> We do not wish to be understood as holding that "the change of circumstance" rule is an absolutely iron-clad rule, and that there can be no possible exception to it. It is perhaps possible to conceive of a

> case in which, despite the fact that there was apparently no change of circumstances, nevertheless, the welfare of the child might require that the previous order of custody be changed.

The Court went on to find, as it did in B*urgess*, that the trial court had not abused its discretion in the particular case reviewed,

> An application for a modification of an award of custody is addressed to the sound legal discretion of the trial court, and its discretion will not be disturbed on appeal unless the record presents a clear case of an abuse of that discretion. [Citations] An examination of the record in the instant case does not reveal an abuse of discretion on the part of the trial court, but demonstrates beyond a shadow of a doubt that this is merely a case of a conflict in the evidence.
>
> I*d*. at p. 730

Legislative recognition of the child's right to frequent and continuing contact with both parents reflected the growing social science recognition that each parent makes a unique and irreplaceable contribution to a child's development, and that children, in general, do better after divorce when both parents are actively involved in their care. Both adjectives – "frequent and continuing" are critically important in this statute, and in the lives of children. Most children do not have a primary parent, they have multiple attachments. Ross A. Thompson, T*he* R*ole of the* F*ather* A*fter* D*ivorce*, 4 The Future of Children: Children & Divorce 210, 217-218 (1994) http://www.futureofchildren.org/cad/index.htm [Emphasis added] (See *amici curiae* briefs of Leslie Ellen Shear and Mary Duryee in M*ontenegro v*. D*iaz* for an extensive discussion of the primary parent fallacy.) Positive influence on development requires actively involvement in the child's

daily life and the child's school life, and authoritative (as opposed to permissive or authoritarian parenting) [23] Distance makes that role almost impossible.

[23] NICHD Early Child Care Research Network Rockville, Maryland F*actors Associated With Fathers' Caregiving Activities and Sensitivity With Young Children* (2000) 14 Journal of Family Psychology 200; J. Aldous, G. M. Mulligan. & T. Bjarnason, (1998). F*athering Over Time: What Makes the Difference*? 60 Journal of Marriage and the Family 809-820; Paul R. Amato and Frieda Fowler (2002) P*arenting Practices, Child Adjustment, and Family Diversity*, 64 Journal of Marriage and Family 703

FAMILY COURTS NEED DISCRETION TO WEIGH RISKS AND BENEFITS OF RELOCATION (AND ALTERNATIVES TO RELOCATION) FOR EACH CHILD OF DIVORCE OR SEPARATION

Relocation cases pit the constitutionally [24] [25] and statutorily [26] protected liberty interests of a child and one parent in the continuity of their meaningful and involved parent-child relationship against the constitutionally and statutorily protected liberty interest of the other parent to travel and choose his or her place of residence without giving up his or her meaningful and involved relationship with the child. Resolution of such cases requires balancing those competing interests in individual cases, based on the unique facts and circumstances of each child's life rather than pretending that those interests are always aligned.

Some children should move with a parent. Some children should move from the custody of one parent to another (or from joint custody to the custody of the nonmoving parent) in the wake of a move. Some custodial arrangements

---

[24] Children have a constitutionally protected privacy interest in preserving their parent-child relationships. A*merican* A*cademy of* P*ediatrics v.* L*ungren* (1997) 16 Cal.4th 307. Parents have a fundamental and compelling interest in the companionship, care, custody, and management of their children. (S*tanley v. Illinois* (1972) 405 U.S. 645, 651.) "[T]he state also has an urgent interest in child welfare and shares the parent's interest in an accurate and just decision. [Citation.]" (D*avid* B. *v. Superior* C*ourt* (1994) 21 Cal.App.4th 1010, 1018.)

[25] "[M*arriage of* C*iganovich* (1976) 61 Cal.App.3d 289, 132 Cal.Rptr. 261]is often cited for the proposition that the federal constitutional right to travel among the States protects the custodial parent's conduct in most situations. Such a citation is at best based on dicta-and is simply inaccurate-as the matter was remanded for a retrial which would give due consideration to W's frustration of H's visitation rights. The appellate court did not even mention the right to travel except in one sentence, in which the court was pondering the trial court's motivation. The Court of Appeal stated that it would not speculate on the outcome of the matter on retrial." Garrett C. Dailey, Attorney's Briefcase, Family Law Version 2003.2, Card β{CuVi 097.00}.

[26] Family Code §§ 3011, 3020, 3040, 3100

should be conditioned upon abandonment of a planned move.[27] Some cases will be very close calls. It is the duty and purpose of the court to weigh and balance the competing factors for the individual child's protection.

While young children's developing relationships are particularly vulnerable to relocation generally, children who are separated from one parent at any age are disadvantaged, (Joan B. Kelly and Michael E. Lamb (2003) *Developmental Issues in Relocation Cases Involving Young Children: When, Whether, and How?* 17 *Journal of Family Psychology* 193)

> Children who are deprived of meaningful relationships with one of their parents are at greater risk psychosocially, even when they are able to maintain relationships with their other parent (Amato, 2000; Hetherington & Stanley-Hagan, 1997, 1999; Lamb 1999; McLanahan & Sandefur, 1994; McLanahan & Teitler, 1999). Children growing up in fatherless families are disadvantaged relative to peers growing up in

---

[27] "From the perspective of the child's interests, there may be real value in discouraging moves by custodial parents, at least in cases in which the child enjoys a good relationship with the other parent and the move is not prompted by the need to otherwise remove the child from a detrimental environment. And other recent data (Braver, Cookston, & Cohen, 2002) suggest that these conditional orders would in fact prevent the move in up to two thirds of the cases." Sanford Braver, William Fabricious & Ira Ellman, *Relocation of Children After Divorce and Children's Best Interests..., supra* at p. 216.

Braver, Cookston & Cohen surveyed family lawyers about what their clients would have done if faced with a conditional change of custody order. They distributed a survey to 90 Arizona family law attorneys representing a total of 3,860 clients over the past year. Some 4.2% of cases handled by the attorneys surveyed were relocations in which their client desired to move. The parent seeking to move was victorious in 68.3% of cases by stipulation or litigation. (Arizona law still has a presumption against moves so the burden is still on parent wishing to relocate.) Of the lawyers' unsuccessful move-away cases, 54% of the parents did not move away without the child. The lawyers estimated that in 63% of the cases, those who won would not have moved if they lost the move-away case. Braver, S. L., Cookston, J. T., & Cohen, B. R. (2002) *Experiences Of Family Law Attorneys With Current Issues In Divorce Practice*, 51Family Relations 325.

> two-parent families with respect to psychosocial adjustment, behavior and achievement at school, educational attainment, employment trajectories, income generation, involvement in anti-social and even criminal behavior, and the ability to establish and maintain intimate relationships. Stated differently, there is substantial evidence that children are more likely to attain their psychological potential when they are able to develop and maintain meaningful relationships with both of their parents, whether or not the two parents live together. Thus, if the parents lived together prior to the separation, and the relationships with both parents were of at least adequate quality and supportiveness, young children are likely to benefit when they maintain both of these attachments after separation/divorce.
>
> I*d.* at 195

The importance of independently and objectively analyzing the unique interests of each child – including, for example, psychological interests, emotional interests, and educational interests – and how these interests will be impacted in a move is a common theme in the professional literature,

> If we indeed are to protect the best interests of the child in any relocation disputes [sic], the child must be recognized as an individual with legal interests separate from the parents and any other adults involved in the dispute. These often unique interests of the child must be elevated to the paramount consideration in these matters.
>
> Gary A. Debele (1998) A C*hildren's* R*ights* A*pproach to* R*elocation*: A M*eaningful* B*est* I*nterests* S*tandard* 15 Journal of the American Academy of Matrimonial Lawyers 75, 78

Courts must have the broadest discretion to make a parenting plan decision that protects each child's best interests. Family Code §3040(b) says that the law "allows

the court and the family the widest discretion to choose a parenting plan that is in the best interest of the child." The post-B*urgess* cases are inconsistent with the clear legislative directive of §3040(b).

A child's best interests are not necessarily the same as the desires of the parent who cares for her more hours each week. California's courts are mandated by statute to base *all* decisions relating to a child's custody on that individual child's best interests. Many children's interests are not served by moves that separate them from an involved parent. Many children's interests are not served by moves that disrupt their relationships with extended family. Many children's interests are not served by changes of school, peer groups, or community,

Relocation is a huge change in the life of a child that has profound consequences for his or her future welfare and development. Richard A. Warshak, *Social Science and Children's Best Interest ...supra.*, Marion Gindes (1998) T*he Psychological Effects Of Relocation For Children Of Divorce, supra.*; Leslie Ellen Shear, L*ife Stories, Doctrines, and Decision Making...supra.*; Samuel Roll, H*ow a Child Views the Move: The Psychology of Attachment, Separation and Loss*, 20 ABA Family Advocate (1997); William G. Austin, Ph.D., A F*orensic Psychology Model of Risk Assessment for Child Custody Relocation Law, supra.*; William G. Austin, R*elocation Law and the Threshold of Harm...supra.*; Herbert N. Weissman, P*sychotherapeutic and Psycholegal Considerations: When a Custodial Parent Seeks to Move Away*, 22(2) American J. of Family Therapy 176 (1994); Jonathan W. Gould, Conducting Scientifically Crafted Child Custody Evaluations, 1998, Sage: Thousand Oaks, CA, 140-144.); Justice Michelle May (2001) C*hildren on the Move: Review of Relocation Cases*: 2001, Family Court of Australia Report and Papers (www.familycourt.gov.au); Roger M. Baron (Apr. 1997) C*ustody Relocation Restrictions: A Tool for Preventing Conflicts*, 17 FAIR$HARE 5; Steve Leben and Megan Moriarty (1998) A K*ansas Approach To Custodial Parent Move-Away Cases* 37 Washburn L.J. 497.

Excluding relocation from the factors that may comprise a change of circumstances triggering a second look at a child's best interests is a legal fiction that betrays the best interests mandate.

The genius of the best interests doctrine, as reflected California's statutory best interests mandate, is its focus on individualized decisions about each particular child's best interests, rather than reliance on changing global social attitudes about what is best for children in general. Each child is a unique individual, in a unique family. Each child has a different temperament, history, developmental status and enjoys different relationships with family, peers and community.

As the Warshak brief demonstrates, mainstream research simply does not support the premise that children's well-being after parental separation or divorce is tied to the continuity of care by a "primary" caretaker. Children do best with the active involvement of both parents in the details of their daily lives.

Relocation affects children of different ages differently. Relocation affects children in different life situations differently.[28] Trial courts must have broad discretion to make individualized decisions for each child or the promise of the best interests mandate goes unfulfilled.

> The literature also reveals, however, that the impact of relocation on children is dependent on several factors. Thus, it is unlikely that any specific test or standard can do justice to a decision as complex as relocation. Instead of forcing every family into the same mold, we can serve children's best interests by tailoring relocation decisions to fit the circumstances and needs of each individual family as determined by all the available evidence.

---

[28] David J. DeWit, David R. Offord and Kathy Braun (1998) T*he Relationship Between Geographic Relocation and Childhood Problem Behaviour* (W-98-17E) Working Paper, Applied Research Branch Strategic Policy Human Resources Development Canada http://www.hrdc-drhc.gc.ca/sp-ps/arb-dgra/publications/research/w-98-17e.pdf.

Richard A. Warshak, *Social Science and Children's Best Interests in Relocation Cases: Burgess Revisited* (2000) 34 Family Law Quarterly 83, 84

Current appellate cases also lump relocations to the next suburb in the same class as overseas relocations. Gindes[29], *supra* at pp. 123-124, describes "the continuum of distance" and its real worlsd impact on children,

> Relocation can be viewed in terms of a continuum of distance between the noncustodial or nonresidential parent and the child. The implications for visitation between the nonresidential parent and the child change significantly with the distance. Eleanor Maccoby and Robert Mnookin found that as distance increased, the children in their sample saw their noncustodial parents less. [Fn. omitted.]
>
> Living a few minutes apart enables the nonresidential parent to continue to be involved in the children's lives in a more spontaneous way. The parent can attend school functions as well as pick children up at school. Older children may be able to visit on their own, and "dropping by for a visit" is also possible. Children can have the same friends, whether they are with their mother or father. The natural flow of the child's life does not have to be further disrupted. Where the child and residential parent stay in the same community, as described above, one might consider this as a residential move but not a relocation.
>
> According to Leslie Ellen Shear, once a child lives more than twenty minutes away from the nonresidential parent, sustaining the relationship between them necessitates fragmenting the child's life and activities. [Fn. omitted.] A move that results in a new town, a

[29] Gindes' article is essential reading on the complex issues presented by relocation cases, the need for individualized determinations, and the factors to be considered in those determinations.

new school, and an hour or more of traveling time, produces yet another qualitative shift in the impact of the move. Brief visits are no longer possible. The child has a different life, one in which the nonresidential parent is now an outsider, no longer sharing the same experiences or even the same environment.

Spending time together requires serious planning and interferes with the child's routine. Moving to a new town certainly constitutes a relocation, but day visits may still be feasible, depending on the distance. For most people, the term relocation evokes the image of moving three thousand miles across the country. Whenever a move necessitates overnight visitation, extensive travel time or expense, the potential for significant psychological repercussions is magnified.

Relocation cases can be further divided into those where weekend visits are possible and those that require an even greater span of time. When children spend one or two weekends a month away from their primary residence, their own social networks may be disrupted. They cannot join the soccer team that has practice on Saturday or go to a friend's birthday party. When the distance is too great to permit weekend visits, children may spend their holidays and vacations away from their residential family and friends. By a certain age, most children do not want to spend the bulk of their weekend or vacation time with either parent but prefer to spend it with peers. One thirteen year old boy succinctly told his residential mother that he did not want to spend a month with his father or a month with her only. He just did not want to spend that much time with either parent and not with his friends.

Greater physical distance also imposes increased financial

demands. Travel (and lodging expenses, if the parent travels) need to be considered in planning visits for the child and nonresidential parent.

Children's needs are best assessed and met one child at a time when relocation or other changes in their lives are being considered.

RELOCATION AND RISK: WHY THE COURT CANNOT ASSUME THAT MOVES WITH A CUSTODIAL PARENT ARE BENIGN

Relocation has been recognized as a potential major stressor for children with adverse psychological, social and academic consequences -- even when it occurs outside the context of parental separation or divorce.[30] [31] Some children have particular traits, temperaments and histories that make them particularly vulnerable to the adverse consequences of a move. Shyness provides an excellent example of one of the many variables that can intertwine with parental divorce in

---

[30] Russell W. Rumberger, *Student Mobility and Academic Achievement*, Educational Resources Information Center (ERIC) EDO-PS-02-1 (http://ericeece.org/pubs/digests/2002/rumberger02.html); Stokols, D. & Shumaker, S.A. (1982) *The Psychological Context of Residential Mobility and Well-Being*, 38(3)Journal of Social Issues, 149; Holmes, T.H. & Rahe, R.H. (1967) *The Social Readjustment Rating Scale* 11Journal of Psychosomatic Research 213; Fried, M. (1963) "Grieving for a Lost Home" in L.J. Duhl (Ed.), *The Urban Condition*, (1963, Basic Books) 151; Lacey, C. & Blane, D. (1979). *Geographic Mobility and School Attainment – The Confounding Variables*, 21(3) Educational Research 200; Straits, B.C. (1987) *Residence, Migration, and School Progress*, 60(1) Sociology of Education 34; van Vliet, W. (1986). *Children Who Move. Relocation Effects and Their Context* 1(4) Journal of Planning Literature 403; Simpson, G.A. & Fowler, M.G. (1994) *Geographic Mobility & Children's Emotional/ Behavioural Adjustment and School Functioning*. 93(2) Pediatrics 303; Astone, N.M. & McLanahan, S.S. (1994). *Family Structure, Residential Mobility, and School Dropout*: A *Research Note* 31(4) Demography 575; Wood, D., Halfon, N., Scarlata, D., Newacheck, P. & Nessim, S. (1993) *Impact of Family Relocation on Children's Growth, Development, School Function, and Behaviour* 270(11) JAMA 1334; Walker, V. & Boyle, M.H. (1995) *Residential Mobility and Child Psychiatric Disorder* (Working Paper) Canadian Centre for Studies of Children at Risk 1.

[31] Rumberger, *supra*, reports, "...[T]here is strong evidence that mobility during elementary school as well as during high school diminishes the prospects for graduation. One study that tracked children from early childhood to young adulthood found that residential mobility reduced the odds of high school graduation even after controlling for a variety of family background variables (Haveman & Wolfe, 1994). Several studies based on the same national database of over 10,000 high school students found that school mobility between the first and eighth grades increased the odds of dropping out of school during high school even after controlling for eighth-grade achievement and other factors (Rumberger & Larson, 1998; Swanson & Schneider, 1999; Teachman, Paasch, & Carver, 1996)."

custody relocation cases.[32] A child with special medical[33] and educational needs

[32] Shyness is a combination of inborn temperamental characteristics and the effects of the environment. (Henderson, L. M., Zimbardo, P. G., & Carducci, B. J. (in press) S*hyness*, In W. E. Craighead & C. B. Nemeroff (Eds.) Encyclopedia of Psychology and Behavioral Science. (3rd ed.). New York: John Wiley & Sons. http://www.shyness.com/documents/1999/SHYENC599.pdf) Moves (with both parents) and divorce have each independently been identified as high risk factors for shy children. See the brochure, P*ainful Shyness in Children and Adults*, published by the American Psychological Association and printed from their website at http://helping.apa.org/painfulshyness .

Research into the causes of shyness points to divorce, moves (including moves unrelated to divorce) and parenting practices,

> ...48% of the self-perceived causes of shyness were classified into a family factors category, which included two subcategories. The family/family lifestyles subcategory (21%) included self-perceived causes of shyness related to life organization patterns of the nuclear and extended family (e.g., divorce, birth order, family violence, family relocating). The parenting subcategory (19%) included self-perceived causes of shyness related to styles of parent-child interaction and child-rearing techniques and practices (e.g., over-protective or judgmental parent(s), parents lacking and/or failing to teach social skills).
>
> Bernardo J. Carducci, David Henderson, Michelle Henderson, Angela Marie Walisser, Amanda Brown, and David Mayfield, *Why Shy?: A Content Analysis of Self-Perceived Causes of Shyness*, Poster Presentation at the Annual Meeting of the American Psychological Association, Washington, D.C., August 2000 http://homepages.ius.edu/Special/Shyness/WhyShy.html

Divorce can exacerbate a child's natural tendency towards shyness. Relocation can be a cumulative stressor and is apt to have unfortunate and unintended consequences for children of divorce. Such children may need as many things in their lives to stay the same as possible. Such children may also have a particular need for involved fathering. In S*hyness*: A B*old* N*ew* A*pproach* (Harper Perennial, 1999) at pp. 195-196, Carducci advises,

> The Impact of Divorce
>
> Divorce is hard on children in general and can be especially difficult for a shy child, who reacts more to change, is more sensitive, and has less social support than his outgoing siblings. Even when the breakup is relatively painless for the spouses, it is a trauma that can bring about shyness in

temperamentally uninhibited children or make an inhibited child withdraw even further.

Indeed, withdrawal is merely one sign of adjustment to the new situation. To cope with their confusion about divorce, young children may also become depressed, blame themselves, develop intense fears, create reconciliation fantasies, and even become aggressive and hostile. If you divorce, keep in mind that your children will be profoundly affected by the loss. Be sure that both of you are communicating with them clearly, compassionately, and honestly.

If you do not have custody of your children, it's important to remain in the picture. Your shy child especially will need emotional stability and your reassurance that he is not to blame for the divorce. On the other hand, it's easy to feel guilty and give in to a child's withdrawal or spoil him, but constant support and communication are more constructive approaches.

You should also watch for the isolation your child may feel during periodic visits with you. Shy children can feel acutely lonely when separated from their custodial parent, friends, and neighborhood for extended periods. If your child is spending an extended time with you, it might be helpful to introduce him to your friends' children but also stay with him during playtime so he won't feel abandoned.

You might also spend time engaged in mundane activities – shopping, running errands, washing the car. At those times, you may have wide-ranging conversations and build a strong relationship despite the separation.

If you are a custodial parent who must work, be sure that your shy child isn't isolated at home with a baby-sitter or grandparent. A day care center or preschool will help your youngster socialize. It's also helpful to join a group for single parents and keep in contact with neighborhood families to receive the emotional support you need. A few families can gather at one house with the children and baby-sitters in one room and the parents in another. All members will then enjoy the benefits of being with a peer group, reducing their stress, and enjoying active social lives.

Overall, the key is to make sure that your shy child doesn't suffer emotionally or socially because of your breakup. Make sure that both of you are involved in child rearing. You

may have his or her team of mental health care, health care and special educational providers significantly and detrimentally disrupted by relocation. There are numerous reasons unrelated to divorce but tied to the fact of the move, why relocation may or may not be in a particular child's best interests. Facile solutions through the development of judicially-created presumptions based upon oversimplified assumptions may relieve caseloads in the short run, but children, and the society in which they live, are apt to pay the price in the long run. Loss of a parent's active involvement isn't just about loss of some companionship and good times, or the reassignment of fungible duties from one parent to another. Each parent makes a unique and vital contribution to the man or woman that the child will be come. One parent's strengths often compensate or buffer the other parent's limitations, and *vice versa*. Consequently two involved parents, even when their caretaking is different in terms of contact hours with the child, produce a different and healthier child than does a single parent. Similarly, the geographic proximity of two parents provides a practical safety net for the exigencies of day to day life that challenge the ability of 21st century parents to juggle all of their responsibilities. As B*urgess* itself illustrates, geographic relocation often carries with it expanded time in day care, when a parent would have otherwise been available for active involvement.

Parent-child estrangements such as those in this case can present similarly complex questions in each case. Children who are becoming estranged from one of their parents present special concerns for family courts in move-away cases. Some estrangements are motivated by poor parenting. Others are the kind of unholy alliances and polarizations that Janet Johnston (with Vivienne Roseby)

> both need to be attentive and loving because you both provide valuable lessons. All children who lose contact with one parent will feel the loss acutely.

[33] See D*ozier v.* D*ozier* (1959) 167 Cal.App. 714, 334 P.2d 957.

describes in In the Name of the Child: A Developmental Approach to Understanding and Helping Children of Conflicted and Violent Divorce (1997, Free Press).

The trial court in the L*a*M*usga* case reasonably exercised its discretion to weigh all of the evidence, including the testimony of the children's teachers and the observations and opinions of a well-respected and published expert on child custody evaluation. Trial courts must assess the dynamics, etiology and potential impact of each particular estrangement. Here relocation would interfere with the children's mental health treatment. Such treatment is important to their long-term healthy development.

Judge Robert Schnider, custody evaluators Lyn Greenberg, Jonathan Gould and David Martindale explain the impact of parental behavior like that evidenced in this case on children,

> Children who are exposed to conflicted divorce may be at risk for a variety of psychological difficulties, both at the time of the divorce and as they grow older. [Fn. omitted] While the factors influencing children's adjustment are complex, children generally have better outcomes if they (1) are able to develop and maintain quality relationships with both parents, including regular contact; (2) are not exposed to severe emotional disturbance in one or both parents; (3) are not placed in the middle of the parental conflict; and (4) learn to use direct, active coping skills to resolve relationship problems.
>
> Children who rely on avoidance or suppression of emotions tend to display less satisfactory adjustment than children who are able to face their problems and emotions and to cope with them ... Both subtle and overt parental conflict conveys important messages to the child and may suggest that a parent is unable or unwilling to tolerate the child's relationship with the other parent. In extreme

cases, the parent's hostility may be expanded to include extended-family members and friends who do not support the hostile parent's agenda.

Lyn Greenberg, Jonathan Gould, Robert Alan Schnider, Dianna Gould-Saltman, and David Martindale (2003) *Effective Intervention With High-Conflict Families: How Judges Can Promote and Recognize Competent Treatment In Family Court*, 4 Journal Of The Center For Families, Children & The Courts 1, 2 [In press for August publication.]

The authors describe the treatment goals for such children:

To establish healthy relationships as adolescents and adults, children must learn to (1) rely on their independent experiences to make decisions about relationships; (2) assert their independent feelings; and (3) effectively communicate their needs in a manner that is likely to be recognized and understood by others in their environment. Generally, this requires that children critically examine information that is presented to them and use direct, clear, verbal communication to express their needs and feelings. As described above, children need to develop these skills at a time when parents are often coping less effectively and may be modeling dysfunctional coping mechanisms or encouraging them in their children. Therapeutic intervention stressing the development of coping skills may be essential in such families for children to achieve successful adjustment.

Id. at p. 3

The *LaMusga* trial court acted to protect the children's opportunities to benefit from treatment. The trial court could also have concluded from the evidence concerning Ms. Navarro's long pattern of conduct and expressed hostility desire

to move was still consistent with a course of conduct thwarting the father's visitation rights. Courts do not have to accept parent's "spin-doctored" claims with respect to motive – when there is an evidentiary basis to do so they can go behind those motives and impute motives to parents. When a parent who has consistently demonstrated by words and deeds that he or she does not value the children's relationship with their other parent, that parents' decisions about relocation must be looked at in light of their conduct and attitudes.

California appellate courts and this Court have long considered preventing parent-child estrangement as a significant factor in child custody determinations. *Crater v. Crater* (1902) 135 *supra.*; *Marriage of Ciganovich* (1976) 61 Cal.App.3d 289, 132 Cal.Rptr. 261; *Marriage of Lewin* (1986) 186 Cal.App.3d 1482, 231 Cal.Rptr. 433; *Catherine D. v. Dennis B.* (1990) 220 Cal.App.3d 922, 269 Cal.Rptr. 547; *Marriage of Wood* (1983) 141 Cal.App.3d 671, 190 Cal.Rptr. 469; *Wilson v. Shea* (2001) 87 Cal.App.4th 887, 104 Cal.Rptr.2d 880; *Montenegro v. Diaz, supra.*

There is a growing body of research, clinical experience and theory about the causes of post-divorce parent-child estrangements and the kinds of interventions that are beneficial to children.[34] The issue of estrangement from a

[34] See, for example, Richard A. Warshak, *Bringing Sense to Parental Alienation: A Look at the Disputes and the Evidence*, 37 Family Law Quarterly (2003). Joy M. Feinberg and Lori S. Loeb, *Custody and Visitation Interference: Alternative Remedies*, 12 AAML J. 271 (1994); Richard A. Warshak (2002) Divorce Poison: Protecting the Parent-Child Bond from a Vindictive Ex; Richard A. Warshak, *Current Controversies Regarding Parental Alienation Syndrome* 19 American J. of Forensic Psychology (2001); Kathleen Niggemyer, *Comment: Parental Alienation Is Open Heart Surgery: It Needs More Than a Band-aid to Fix It*, 34 Cal. Western L. Rev. 567 (1998); Mary Lund, *A Therapist's View of Parental Alienation Syndrome*, 33 Family & Conciliation Courts Rev. 308 (1995); Stanley Clawar & Brynne Rivlin, Children Held Hostage: Dealing With Programmed and Brainwashed Children (1991); Elizabeth Ellis, Divorce Wars: Interventions with Families in Conflict, Chapter 8 "Parental Alienation Syndrome: A New Challenge for Family Courts" (2000); Douglas Darnell, *Parental Alienation: Not in the Best Interest of the Children*, 75 North Dakota L. Rev. 323 (1999); Deirdre Conway Rand, *The Spectrum of Parental Alienation Syndrome (Part I)* 15 *Am. J. Forensic Psychol.*23 (1997); Deirdre

parent after divorce and its potential impact on children is debated in scholarly journals, at conferences, and in California's courtrooms. This Court should not pick sides in that debate – it should allow research and theory to continue to develop, and encourage trial courts to look thoughtfully at each individual case. Evidence about the branches of that research relevant to a particular case is best presented to the trial court considering the needs of the child in that case.

Conway Rand, T*he Spectrum of* P*arental* A*lienation Syndrome* (Part II) 15 Am. J. Forensic Psychol. 39 (1997); Kenneth H. Waldron, Ph.D. and David E. Joanis, J.D., U*nderstanding and Collaboratively Treating* P*arental* A*lienation Syndrome*, 10 American J. of Family Law 121 (1996); Carla Garrity & Mitchell Baris, Caught in the Middle: Protecting the Children of High-Conflict Divorce (1994); Frank S. Williams, P*reventing* P*arentectomy Following Divorce, Keynote Address, Fifth Annual Conference*, National Council for Children's Rights Washington D.C., (1990); Janet R. Johnston and Vivienne Roseby, In the Name of the Child: A Developmental Approach to Understanding and Helping Children of Conflicted and Violent Divorce (1997); Anita K. Lampel, *Children's Alignment With Parents in Highly Contested Custody Cases*, 34 Family & Conciliation Courts Rev. 219 (1996); Richard A. Warshak, R*emarriage as a Trigger of* P*arental Alienation Syndrome*, 28 American J. of Family Therapy 229 (2000) http://mysite.ciaoweb.it/p_pace/sezioni/articoli_scientifici/articoli_internaz/pas26.htm; Michael R. Walsh & J. Michael Bone, P*arental Alienation Syndrome: An Age-Old Custody Problem*, Florida Bar J., 93 (June 1997); Ira Daniel Turkat, R*elationship Poisoning in Custody and Access Disputes* 13 Am. J. of Fam. L. 101 (1999); Ira Daniel Turkat, R*elocation as a Strategy to Interfere with the Child-parent Relationship*, 11 Am. J. of Fam. L. 39 (1996); Ira Daniel Turkat, C*hild Visitation Interference in Divorce*, 14 Clinical Psychol. Rev. 73 (1994) http://www.fact.on.ca/Info/ pas/turkat94.htm; Ira Daniel Turkat, D*ivorce Related Malicious Mother Syndrome*, 10 J. Fam. Violence 253 (1995) http://www.fact.on.ca/Info/pas/turkat95.htm; Ira Daniel Turkat, M*anagement of Visitation Interference*, 36 Judges' J. 17 (1997) http://www.fact.on.ca/Info/pas/turkat97.htm; Richard Gardner, The Parental Alienation Syndrome (1992).

BROAD JUDICIAL DISCRETION TO MAKE INDIVIDUALIZED DETERMINATIONS AND THE BEST INTERESTS DOCTRINE ARE INSEPARABLE

It is important for Courts making historic rulings to understand the history that precedes their decisions. The mechanism for the historic shift from custody laws based upon parental entitlement to custody laws based on children's needs and welfare is judicial discretion to make individualized decisions for each child, at the stages in that child's life when his or her parents cannot reach consensus. Such decisions must be grounded upon evidence about what matters in that child's life, and to that child's healthy development.

B*urgess* itself is part of the tradition of the exercise of trial court discretion. The most child-centered language in B*urgess* preserves trial courts' broad discretion to address children's needs in relocation cases. In upholding a trial court's exercise of that discretion, the Supreme Court held,

> At the same time, we recognize that bright line rules in this area are inappropriate: each case must be evaluated on its own unique facts. Although the interests of a minor child in the continuity and permanency of custodial placement with the primary caretaker will most often prevail, the trial court, in assessing "prejudice" to the child's welfare as a result of relocating even a distance of 40 or 50 miles, may take into consideration the nature of the child's existing contact with both parents-including *de facto* as well as de jure custody arrangements – and the child's age, community ties, and health and educational needs.
>
> B*urgess*, *supra*. at p. 39

Constricted definitions of "prejudicial to children's welfare" ignore the statutory mandate of Family Code §3020 and the unambiguous intentions of the Supreme

Court in B*urgess*. The Supreme Court specifically held that courts should consider the child's age, and the child's relationship with both parents.

Thus broad judicial discretion to make individualized determinations and the best interests doctrine are inseparable. In fact, the concept of best interests emerged when judges began exercising their equitable discretion to reject the common law in custody cases where it did not serve children well. The modern best interests standard was born out of the exercise of judicial discretion to reject the common law entitlement of fathers to custody.[35]

---

[35] See Mary Ann Mason, From Father's Property to Children's Rights: The History of Child Custody In the United States (1994, Columbia University Press). pp. 59-64. See also, generally, Debra Friedman, Towards a Structure of Indifference: The Social Origins of Maternal Custody (1995, Walter de Gruyter, Inc.).

The role of discretion to consider the child's welfare rather than enforce parental entitlement originated in 16th Century England, "Before 1763, the father's right to custody apparently had no limitation. That year, however, in R*ex v. D*elaval [Fn. omitted], Lord Mansfield cast doubt on the inviolability of paternal rights for the first time when he denied a father's writ of habeas corpus [Fn. omitted] for the return of an eighteen-year-old daughter. The young woman had been apprenticed to a musician who had subsequently delivered her to Lord Delaval for prostitution. Instead of restoring the girl to her father and mother, Lord Mansfield emancipated her. Since there was no precedent for refusing paternal custody of a minor, Lord Mansfield undertook to "clarify" the governing rule. Previous cases honoring paternal rights had been correct in result, he stated, but not in reasoning. Minors had been restored to their fathers (or legal guardians), not because the courts were bound to so deliver them, but because such a result had been appropriate on the facts of each case. The "true rule," therefore, was that "the Court are *sic* to judge upon the circumstances of the particular case, and to give their directions accordingly." Two years later in Blissets Case, [Fn. omitted] Lord Mansfield followed his clarified rule and allowed a six-year-old child to remain with her mother where the father earlier had abandoned the family. Two rationales were advanced to support the holding. The broader rationale was that "if the parties are disagreed, the court will do what shall appear best for the child." [Fn. omitted] This rule is nothing less than the modern "best interests of the child" principle. The narrower rationale was that a father who abandoned his parental duties forfeited his parental rights. [Fn. omitted] This rationale has its modern counterpart in the "unfitness" doctrine under which a parent may be deprived of

In America the equitable tradition of the chancery court was gradually extended by judges to consider the interests of the children against those of their parents, even where there was no gross abuse. The patterns of judicial decisions across the states show that judges were not simply idiosyncratic in determining the best interests of children. With some slight regional differences, judges in all parts of

---

custody because of objectionable social conduct, often without regard to the child's welfare." Ramsay Laing Klaff, T*he* T*ender Years* D*octrine*: A D*efense* (1982) 70 Cal. L. Rev. 335, 337-338

Lord Mansfield's recognition of the paramount importance of judicial discretion to protect the child's welfare was the antecedent of modern American custody law, "In this country, the tender years doctrine was introduced, along with the best interest principle, in an 1813 Pennsylvania case, C*ommonwealth v*. A*ddicks* [Fn. omitted.] The father, Lee, sought custody of two daughters, aged ten and seven, who were living with their mother and her second husband, Addicks. The mother had had a child by Addicks and had lived with him while still married to Lee, for which cause Lee was granted a divorce. Moreover, the second marriage was void because of a statute prohibiting the wife from marrying her paramour during her husband's lifetime. The father, on the other hand, had abandoned the mother and daughters four years earlier.

"The court, paraphrasing and citing Lord Mansfield's opinion in R*ex v*. D*elaval*, [Fn. omitted] held that the court was not bound to restore the children to their father and would do so only "if we think that, under the circumstances of the case, it ought to be done." [Fn. omitted] The court then ordered maternal custody: We cannot avoid expressing our disapprobation of the mother's conduct, although so far as regards her treatment of the children, she is in no fault. . . . It is to them, that our anxiety is principally directed; and it appears to us that considering their tender age, they stand in need of that kind of assistance, which can be afforded by none so well as a mother. It is on their account, therefore, that exercising the discretion with which the law has invested us, we think it best, *at present*, not to take them from her. [Fn. omitted] The principle that courts are empowered to subordinate proprietary parental interests in a child to a paramount concern for the interests of the child was rapidly adopted by other jurisdictions [Fn. omitted] and is today, as noted at the outset of this Article, the governing principle of custody law." I*d*. at pp. 339-341 [Emphasis added.] The phrase "at present" makes it clear that the Court would retain discretion to modify the custody order as the children grew older.

> the growing nation shared the same emerging middle-class values about the role of family, the need for child nurturing, and, especially, the special moral and religious capacities of women as mothers....
>
> The tradition of judicial discretion became so firmly embedded that many judges gave no more than lip service to precedent, or even to legislation in their own state, but instead sought to probe tangled fact situations to discover the best interests of the child. [Fn. omitted.] Practical, rather than legally correct results were often the consequence. One judge, challenging the paternal rights doctrine by awarding the daughter to the mother, stated that when the duties of "supporting and maintaining the child" are assumed by the mother the parents "stand upon a footing of perfect equality." In this case the mother had cared for the daughter following the desertion of the father.
>
> Mary Ann Mason, From Father's Rights... *supra*, at pp. 58-60.

The shift from the common law rule that fathers were entitled to control the custody of children – even from the grave in the case of testamentary guardianships like that in W*ood v*. W*ood*, *supra*. – to a focus on children's needs coincided with changes in social gender roles, and a shared romantic expectation that mothers, not fathers, were best suited to raise children.

In the Victorian era, courts tended to exercise their newly-found discretion in favor of the prevailing party in the fault-based divorce. Thus women who were divorced for adultery tended to lose custody while those who divorced their husbands for abandonment or cruelty won custody. Norma Basch, Framing American Divorce: From the Revolutionary Generation to the Victorians (1999, University of California Press); Glenda Riley, Divorce: An American Tradition (1991, Oxford University Press) at pp. 52, 153.

CONCLUSION

> The sobering fact of family law is that to be in the business of orchestrating parent-child relationships is to be directly influential on a particular child's developmental path.
>
> *Amici curiae* brief of Mary Duryee *et al.* in M*ontenegro v.* D*iaz,* at p. 17
>
> The task, therefore, is to make sure that once-trusted attachment figures do not become strangers to their young children, as it is extremely difficult to reestablish relationships between young children and their parents after these have been disrupted.
>
> Joan B. Kelly and Michael E. Lamb (2003) D*evelopmental* I*ssues in* R*elocation* C*ases ... supra*. at p. 195

The direction in which the changed circumstances test is evolving in California appellate courts is inconsistent with the legislative mandate that custody determinations be based upon the child's best interests. The Courts are rapidly increasing the number of children whose best interests may be ignored because the changes in their lives, and in their developmental needs, do not meet the changed circumstances standard. The Legislature did not authorize exclusion of these children from the protection of the Family Code

The same circumstances which necessitate a modification for one child, may not be as important in the life of another. E. Mavis Hetherington, Ed., Coping With Divorce, Single Parenting, and Remarriage: A Risk and Resiliency Perspective (1999) at p. x urges

> ...a keener awareness of the great diversity there is in response to experiences in different types of families and the role that risk and protective factors play in shaping these outcomes. It is the diversity, rather than the inevitability, of outcomes for family processes and the adjustment family members in divorced, single-parent, and remarried

families that is striking.

For example, residential relocation may trigger a need for modification of one child's parenting plan but not another's. Factors such as the child's developmental status, concept of time, resilience, temperament, experience of prior life stressors, adaptability, social skills, supportive relationships in the community, and myriad other factors will compel different outcomes for similar fact patterns. Deciding which facts patterns constitute a change of circumstances in the abstract ignores crucial individual differences and needs. Children are not fungible. While we, as a society, can set broad social policy goals for our children, each child's best interests can only be met if she is seen as a unique individual.

Those of us who deal with families every day "in the trenches" live with the many unintended adverse consequences of the present legal framework and witness the toll they take on children and their families that may not be visible to appellate courts. These real world consequences compromise the goal of serving children's best interests. In medicine, such consequences would be termed "iatrogenic." Considering the changed circumstances doctrine from a perspective of therapeutic jurisprudence, this Court should refine the doctrine to minimize these iatrogenic consequences.

Cases involving relocation with infants, toddlers and preschoolers are the most troubling. Young children do not have a sufficiently developed sense of time to sustain relationships with only intermittent contacts. They require extremely frequent, i.e. several times per week, caretaking experiences with a parent in order to establish and maintain attunement, attachment and a strong relationship.

The changed circumstances test encourages "allegation inflation." If the resources of the Court are only available to those who make major allegations, then parents are inclined to escalate the level of the accusations they address at one another. If the only way that one can have a chance to play a larger role in the life of one's child is to denigrate the other parent, then parents are more apt

to attack one another rather than emphasize their capacity to work in a complementary fashion.

One of the most troubling practical consequences of the growing changed circumstances doctrine is the obligation of counsel to advise clients to be wary of compromise. The changed circumstances doctrine casts a dark shadow on settlement, negating the value of many of the diversion programs. A parent who engages in compromise may well be helpless to protect a child from ongoing detrimental conduct when the promised changes are not forthcoming or the parent is better situated to undertake a larger role in childrearing.

A family lawyer cannot advise a parent to try a plan, see if it works and feel confident that there is a safety net if the child's needs are not met. Instead counsel must advise parents that they need a substantial timeshare or they risk having their child relocated with a resultant profound diminishment in co-parenting opportunities.

Recognition of the "winner-take-all" stakes of our current system leads many to litigate custody unnecessarily, or insist upon court-ordered time with children that they find difficult to exercise. Under the present state of the law, lawyers advise their clients to establish control over the children at separation and to do their best to establish themselves as primary caretakers. The present law creates great pressure fathers of all children, including infants and toddlers, to seek equal time shares as the only practical way to restrict a mother's subsequent ability to move the children to a distant community. Many who would be happy with the kind of frequent contact with a baby or toddler that many experts think best See, for example, Joan B. Kelly and Leah Palin-Hill (2002) *Model Parenting Time Plans For Parent/Child Access* posted on the Arizona Supreme Court website (http://www.supreme.state.az.us/dr/Pdf/Parenting%20Time%20Plan%20Final.pdf) to

assist parents and professionals develop child-centered and age-appropriate parenting plans. [36]

Unrepresented and under-represented litigants (and their children) are even in a worse situation. They rarely understand that the tentative compromises they reach will be etched in stone. They cannot afford a custody evaluation or a trial. They are less likely to have good information about the range of parenting plans available, the needs of children at different ages, or how to create a plan which is a good fit for their children. Under the B*urgess* doctrine, such children may well be trapped in inappropriate parenting plans because no change of circumstances has occurred which would permit a best interests inquiry.

Evaluators, mediators and parent educators are torn between an ages and stages approach to parenting, and legal system's irrational demand for a plan which requires a crystal ball and a magic wand to protect the child at all stages of development and under most circumstances. This unintended consequence of the changed circumstances rule is contrary to California's public policies that custody determinations be gender-neutral and that children enjoy meaningful relationships with both parents. The timing of the parental separation, rather than the capacities of the parent and the quality of the parent-child relationships determine the outcome.

Since biology almost always places mothers in the primary caretaking role at birth, fathers who have never lived with their children or who separate in the child's first years of life are virtually precluded from becoming custodial parents. For such families, application of the changed circumstances test amounts to

---

[36] Not only would California parents, judges, lawyers, mediators, evaluators and parent educators would find this pamphlet extraordinarily valuable if it were posted on our Judicial Council-sponsored web site, but the widespread use of such a resource could reduce the need for adjudication of many custody disputes in which the parties and their advisors have little sound information about what works for children, and what does not.

resurrection of the maternal presumption. A custodial arrangement which may have been maintained so that the child can breast feed in the first months of life ends up preserved for the next eighteen years, even if another parenting plan would better meet the child's needs. Parents of infants and toddlers who would be content with greater frequency and reduced duration while their children are little, are afraid to not to push for more, because the plan created for a toddler may be perpetuated forever.

The changed circumstances rule assumes that the original parenting plan was thoughtfully arrived at,[37]and that it protects a child's healthy attachment to a primary caretaker. Family law practitioners recognize that the best predictor of who will end up with custody of a child is who has physical possession of the child at separation. This may be the most controlling parent rather than the most nurturing parent. The process tends to reinforce the *status quo* rather than engage in a thoughtful and careful inquiry into how parental rights and responsibilities should be assigned in order to best meet the child's needs.

Expanded application of the changed circumstances rule has a disparate impact on families with limited financial resources. Upper and middle income families create their parenting plans with the assistance of certified family law specialists, therapists, private mediators, and intensive child custody evaluations. They read popular press books on the needs of children after divorce. They attend private parent education classes for divorcing parents. They are more likely to view a parent education video, such as the outstanding *Children in the Middle* and *After the Storm* videos from the University of Ohio, in the office of their lawyer,

---

[37] Diane N. Lye, *Washington State Parenting Act Study: Report to the Washington State Gender and Justice Commission and Domestic Relations Commission* (1999) http://www.courts.wa.gov/reports/parent/home.cfm) provides a more realistic view of how initial parenting plan orders are developed. Parents received little guidance or assistance in thoughtfully considering alternatives and finding the best fit for their children.

mediator or therapist. They can afford long cause hearings in which detailed evidence is presented. Some turn to private judging. Plans created with those resources are more likely to be tailored to the child's needs and less likely to need modification. These same resources are available to them when the plan needs adaptation. Should modification litigation be required, they can hire lawyers who understand and address the "changed circumstances" doctrine, and investigators and expert witnesses to develop evidence in support of the modification request. Their concerns are more likely to be taken seriously. None of these resources are available to most poor and low income parents.

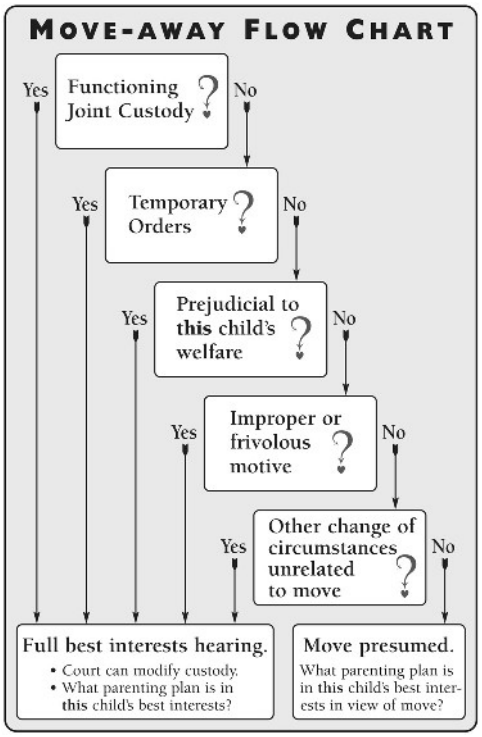
A growing body of research and practice literature is devoted to the identification, care and management of "high conflict" families. The parenting plans in such families may well need fine-tuning, albeit not for the reasons presented by the parents. There is no indication that they are deterred by the changed circumstances rule. If anything, the changed circumstances doctrine operates paradoxically to escalate conflict. As noted, if the only way to obtain review of an unsatisfactory order is to bring out the big guns, then allegations of abuse, neglect, alienation, and parental incompetence will proliferate. This phenomenon is clearly seen in the wake of moveaways – once the possibility of complementary parenting has been eliminated, desperate left-behind parents escalate their allegations against the departed parent.

Other families who do not try to fix parenting plans which no longer meet the needs of their children because power imbalances between the parents, disconnection from social institutions such as courts, or the lack of economic and/or emotional resources make the decision-making process seem more onerous than the *status quo*. Parents are afraid that raising any question about the plan, even informally, may be perceived as aggressive or trigger larger scale litigation. Some fear that revisiting the parenting plan may mean also revisiting child support. Thus children may stay in unsuitable parenting plans. The high

conflict families are making so much noise that we haven't had the time, energy or resources to look at the "conflict avoidant" families. One can only suspect that their children are at even greater risk, particularly when a controlling and abusive parent dominates a timid and passive one. Our policies and procedures should articulate some values and norms for the "do-it-ourselves" families, contain the high conflict families, and provide better resources and a less adversary decisionmaking "tone" for the "conflict avoidant" families. Normalizing the need for adaptation of parenting plans as children mature and families change might remove some of the stigma and the aura of high conflict now associated with proposing appropriate adjustments to children's custody plans.

Another unintended consequence of a rigid changed circumstances rule is an increase in self-help and abductions. One characteristic shared by many abducting parents is a sense of hopelessness about the willingness of the courts to hear and consider their concerns.[38]

[38] Linda K. Girdner & Janet R. Johnston, *Early Identification of Parents at Risk for Custody Violations and Prevention of Child Abduction*, 36 Family & Conciliation Courts Rev. 392 (1998); Geoffrey L. Greif and Rebecca L. Hagar, When Parents Kidnap: The Families Behind the Headlines (1993); Geoffrey L. Greif, *Parental Abduction Justification as Ego Defense*, 33 Family & Conciliation Courts Rev. 317 (1995); Geoffrey L. Greif, *Many Years After the Parental Abduction: Some Consequences of Relevance to the Court System*; 36 Family & Conciliation Courts Rev. 32 (1998); Ernie Alen, *The Kid is With A Parent – How Bad Can It Be?: The Crisis of Parental Abduction*, National Center for Missing and Exploited Children http://www.missingkids.com/download/crisis_of_family_abductions.pdf. Girdner and Johnston, *supra*. describe the kind of specific, strategic integrated legal and therapeutic intervention necessary to prevent such abductions in high risk families. Their research provided the basis for the newly enacted Family Code §3048.



The B*urgess* and M*ontenegro* decisions engender complex and costly litigation. In many cases there's extensive and high stakes litigation about which standard should apply, and what each standard means in the real world, and what the language of the resulting order or judgment should say. Litigation of child custody cases now requires extensive memoranda of points and authorities on the proper legal standard. See Leslie Ellen Shear, *Will This Child Move? The Structure of Move-Away Analysis*, Winter 2001 AFCC-Cal Newsletter 11 (www.afcc-cal.org, click on Newsletter) simultaneously published in the ACFLS Newsletter (the accompanying flow chart from that article illustrates the unnecessary complexity of the legal questions); and Leslie Ellen Shear, *Comment: Montenegro v. Diaz – Cal Supreme Court Quietly Changes The Child Custody Landscape While Sidestepping Central Questions*, Winter 2001 AFCC-Cal Newsletter 10 (www.afcc-cal.org, click on Newsletter) simultaneously published in the ACFLS Newsletter. Each step in this flow chart requires strategizing, and often drafting memoranda of points and authorities that have little bearing on what matters for the child.

Negotiation of parenting plans has become profoundly more complex and costly, and far less child centered. The artificial distinction between "permanent" and temporary orders creates other problems. Lawyers worry about malpractice actions and bar complaints for not securing the label of "permanent" if the plan gives their client more responsibility time, or of not securing the label temporary and thus having the client risk losing the opportunity to raise his or her children after a move, or the chance for age-appropriate step-ups.

Mr. Burgess didn't haggle about whether his children's extensive time in his care was labeled custody or visitation – he just focused on working out a schedule of care that gave his children the best each parent had to offer. What seemed to be wise and child-centered decisions in settlement turned out to have unanticipated consequences when this Court ignored the schedule and looked to the labels. Every day family lawyers tell their parent clients that if the parenting plan they negotiate doesn't have the child spending at least 40% of the time in that parent's care and label that time "custody", the parent risks having the relationship gravely diminished by a later move.

Ms. Rose (M*arriage of* R*ose and* R*ichardson*, *supra*.) evidently thought she was getting the permanent "primary custodian" status when her family lawyer drafted a stipulated judgment that didn't contain language of finality.

Decisionmakers not constrained by the risks B*urgess* creates might balance the need of an infant and toddler for maintaining attachment to his mother differently than the needs of a school age child for intellectual stimulation, developing strong values, protection from parental animosity, meaningful relationships with his siblings, and being raised by the healthier of his two parents. L*ester v*. L*enanne* (2000) 84 Cal.App.4th 536, 101 Cal.Rptr.2d 86 is troubling the Court took great pains to facilitate the opportunity for the baby to establish strong reciprocal relationships with each parent, only to fall back on the "primacy" of the maternal relationship because she had the larger timeshare, starting at birth.

B*urgess* and L*ester* now stand for the untenable proposition that in many cases mothers are entrusted with primary custody permanently, regardless of all other factors, because at birth infants have special physical and psychological needs for maternal care. Thus the maternal preference has returned, under cover of the changed circumstances rule. Since their parents may never live together, or do so briefly, children of unmarried parents are particularly at risk for loss of one parent. One third of all American children are born to unmarried parents, and

even those unmarried parents who live together when the child is born usually separate within the first five years. It is rare for a child under the age of five to be placed in the primary custody of her father. If the parenting plans established in infancy and early childhood are difficult to modify, the net effect is resurrection of the maternal preference for all children born into non-marital families. Such a policy is contrary to the statutory requirement that custody determinations not be based upon gender. Family Code §3040(1). The Legislature clearly intended that modifications are to be made when they are in a child's best interests. Family Code §3088 ("An order for the custody of a minor child entered by a court in this state or any other state may ...be modified at any time to an order for joint custody in accordance with this chapter.") encourages child-friendly modifications. Joint custody remains an option at any stage of a child's life. Similarly, Family Code §3087 places no obstacles in front of the court's consideration of whether a joint custody order should be modified to meet the child's best interests.

> The changed circumstances rule is inconsistent with the best interests standard. Apart from the dynamic nature of family life, the rule fails because it assumes that the initial parenting plan was made thoughtfully by persons who knew the family well and had great expertise in tailoring parenting plans to the needs of children. Instead most parenting plans are created by agreement of the parents relying upon perceived norms or the advice of counsel that the current dominant arrangement is most likely to be adopted if the case is litigated. Even if the original decision is made by one of the most psychologically sophisticated family court judges it is likely to be based upon very limited information. Limited family and court resources force the reduction (and distortion) of complex life stories into easily digestible fact patterns. Even if the family can afford evaluation, that evaluation is likely to be a snapshot rather than a

home video unless the family has substantial funds.

> Leslie Ellen Shear, F*rom Competition to Complementarity*: L*egal* I*ssues and* T*heir Clinical* I*mplications in* C*ustody*, 7 Child & Adolescent Psychiatric Clinics of North America (Child Custody) 311, 327-328 (1998)

In an increasing number of child custody cases, the children are under the age of six.[39] During the first few years of life, children undergo exceedingly rapid developmental changes which frequently require sensitive adaptations of their residential or visiting arrangements. These children's parenting plans must evolve with their increasing maturity. Parenting arrangements may need to be revisited at other developmental milestones, such as the start of elementary school, middle school, and, again, in adolescence. Changes in family structure, relocation, changes in parental availability, and other life changes also may trigger a need for a new plan. Relitigation is not necessarily evidence of dysfunction or high conflict.

> [T]he child needs to know that the custody and visitation decisions can be altered. A family needs to know that the decisions may need to be altered as a child's developmental needs change. We have, unfortunately, for a lot of reasons which you all understand, gotten into the assumption that once a decision is made, it's cast in concrete. Now, obviously, many of the good mediators and the good systems say, 'Come back and let's look at it again,' but what people feel primarily when they come back and look again is failure. ... I want to present it from a different point of view. That if people need to come back...it's not only because something has gone wrong, but that it's because something has gone very right, and that parents have be-

[39] Mary Ann Whiteside, A*n* I*ntegrative* R*eview of the* L*iterature* P*ertinent to* C*ustody for* C*hildren* F*ive* Y*ears of* A*ge and* Y*ounger*, 1996, Judicial Council of California Administrative Office of the Courts, pp.13-14 (available on-line at http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/custodyexecsumm.pdf).

> come aware of the changing developmental needs of their children... Children change. A five-year-old is not a ten-year-old is not a 15-year-old, and your attachments change, the qualities change, your needs change. And we ought to think about changing custody according to that ... . The issue of thinking about changes must come in if you're really thinking about a child's point of view.
>
> Dorothy Huntington, D*ivorce and the* D*evelopmental* N*eeds of* C*hildren, in* M*ediation of* C*hild* C*ustody and* V*isitation* D*isputes*, Transcripts from the California Chapter AFCC Vallombrosa Retreat (1981))

In many cases the parent seeking adaptation of the parenting plan is the parent most attuned to the child's changing developmental needs. As a society, we need to assist parents in meeting those needs, not castigate them for voicing concern. If this Court adopts the views of the Court of Appeal, courts will be prevented from revising poorly thought-through arrangements, including those drafted by *pro pers*, unsupervised paralegals and drafting services, and others who do not have adequate expertise or familiarity with the particular children. It will preclude revisiting children's needs as they mature. Children's best interests will be subordinated to other considerations. If we deny the resources of the courthouse to these families, children's best interests will be ignored.

The U.S. Commission on Child & Family Welfare P*arenting* O*ur* C*hildren*: I*n the* B*est* I*nterests of the* N*ation*: A R*eport to the* P*resident and* C*ongress* 18 (1996) at p. 37 found the need for periodic adaptation of children's parenting arrangements so compelling, that it came close to recommending periodic court reviews in every case,

> The Commission debated whether to recommend automatic, periodic court reviews of parenting plans, but decided that the initiation of such reviews should be left up to parents. Allowing parents to decide when to review the plan is more responsive to the needs of individual families and less costly to the system. Some parents may never feel

the need to review their parenting plan, while others may require frequent scrutiny of the plan. Parents should specify in the initial parenting plan those events that would trigger reviews. At the same time, the plan should provide that returning to court for further dispute resolution efforts when parents do not agree on particular changes remains an option as well.

This Court should adopt the Commission's recommendation that parenting plans be reviewed in response to parental request. Implicit in the child-centered, needs-based best interests standard is the promise of individualized determinations. The maternal preference represented society's global assessment that children's needs would be best met by their mothers except in extraordinary circumstances. T*he best interests test promises each child that her parenting plan will look to her unique needs and her parents' unique capacities and limitations, and will recognize the changes in the child and her world which influence what parenting plan is in her best interests at any given point in time.*

Refining the changed circumstances rule will not result in an exponential expansion of caseloads. Fixing small problems before they escalate is far less time consuming. Moreover, expansion of court-connected and private services for separating and separated parents and their children[40] serves the gatekeeping function once fulfilled by the changed circumstances test. Most parenting plan issues are resolved outside the courtroom. "Interventions for divorcing families developed and adopted on a more wide-scale basis in the past 10 years offer positive alternatives to families going through the divorce process..." Joan B. Kelly, C*hildren's A*d*justment in C*o*nflicted* M*arriage and* D*ivorce*: A D*ecade* R*eview of* R*esearch*, 39 J. of the American Academy of Child & Adolescent Psychiatry 963 (2000).

[40] See Family Code §§3111, 3051, 3160 *et. seq.*, 3190. Many counties have also created local rules and programs for parent education.

Parent education, mediation, evaluation and therapeutic interventions are available both at the courthouse and in the community in a broad variety of models. Such programs are successful in diverting substantial numbers of families from the courtroom. Parents who are unable to develop a parenting plan by consensus may be able to do so with professional assistance (advice of counsel, appointment of minors' counsel,[41] parent education programs, mediation, and evaluation) offered through the Court's Family Court Services Offices and by private practitioners. Although the quality and models of such interventions vary, some form of professional assistance is available to all parents. To the extent that the programs are adequately funded so that experienced and well-trained professionals can spend enough time with the family for an effective intervention, they serve a highly effective gatekeeper function, reducing the number of cases which must be litigated to those which really need a judge to make a careful decision. See Jessica Pearson, *Court Services: Meeting the Needs of Twenty-First Century Families*, 33 Family Law Quarterly 617 (1999). All of these services are far less costly than extra courtrooms.

The sophistication, variety and availability of services for separated and divorced families has increased over the years but failure to adequately fund them seriously compromises their effectiveness in performing a gatekeeper function,

[41] "A lawyer is often appointed for a child as a means of diverting the case from trial. The Court hopes that he or she will be effective in developing a parenting plan, or will propose resolution of various issues as they arise, that wins acceptance by the adult parties. Although the child's counsel does not have the formal powers of a special master, the role itself, and often the personal characteristics of the lawyer who has been appointed, carries considerable persuasive force." Leslie Ellen Shear, *Children's Lawyers in California Family Law Courts: Balancing Competing Policies and Values Regarding Questions of Ethics*, 34 Family & Conciliation Courts Rev. 256, 261 (1996) for a discussion of the role of minors' counsel in dispute resolution.

and in assisting families in developing appropriate parenting plans.[42] Abbreviated interventions are less likely to produce a carefully considered plan, and thus increase the likelihood that subsequent modifications will be necessary to serve the children's best interests.

This Court has an opportunity to refine the changed circumstances doctrine so that it is consistent with the best interests mandate. The doctrine should protect parenting plans in which the child is flourishing and encourage modifications of parenting plans which do not meet the children's needs. Thus the rule would look to the individual child's needs and well-being, rather than to external events, in deciding whether modification is appropriate. A parent (or minor's counsel) seeking modification would have to show that the plan is not meeting the child's needs, rather than pointing to a discrete and dramatic event.[43]

---

[42] In Los Angeles County (which represents one third of California's family law filings according to the 2001 report of the Judicial Council), the birthplace of mandatory custody mediation, the original model offered each family up to six "marathon" bargaining sessions. Mediators saw two families each day, incorporated lawyers and extended family into the process. Former Conciliation Court director Hugh McIsaac counseled that whoever was left out of the process would sabotage the process. Today families wait six or more weeks for a single 90-minute session. Mediators' sophistication suffers from the superficiality of these sessions. Without in-depth interaction with separated and divorced families, they have little opportunity to learn from experience. Abbreviated evaluation models, such as "fast-track" evaluations have also increased in popularity throughout the state. The reliability of such evaluations is reduced, because the recommendations are based upon very limited data and analysis. (Jonathan W. Gould, Keynote Address at Los Angeles County Family Section and Los Angeles County Superior Courts Family Law Departments Annual Child Custody Colloquium (1999).)

[43] Harold Cohn and Shelley Albaum argued persuasively in their *amici curiae* brief to this Court in M*ontenegro* that the prior order should be presumed correct, and that the party seeking modification has the burden of showing that the child's best interests are not served by the existing arrangement. This allocation of the burden of proof serves a gatekeeper function while not abandoning children's welfare.

Changes in children's lives and welfare which necessitate modification of a parenting plan are often incremental and cumulative, rather than dramatic and discrete. Best interests determinations are complex and multidimensional. The party seeking a modification should have the burden to establish that the change is likely to produce material improvement for the child. The passage of time, occurrence of identifiable events or child's failure to flourish under the plan could all be grounds for modification. Modification proceedings, like initial OSC's and trials, should keep a clear focus on children's needs rather than parental desires. The need to show a *nexus* between the child's well-being and the proposed orders will preclude applications by parents who just have a different point of view than the trial judge did. A rule which focuses on children's needs and parental capacity to meet those needs, coupled with the gatekeeping provided by parent education, mediation, therapeutic interventions, and evaluation services, would effectively limit litigation to those cases which truly need a judicial determination.

Most families make adaptations and adjustments to their parenting plans over time without recourse to the court. A small percentage of families need the assistance of the court. For such families, a request for modification can be a warning sign of problems which must be taken seriously.

Restrictions on custody modifications have been highly criticized by Wallerstein, despite the position she urges this Court to adopt,

> It is in fact misguided to expect that arrangements made at the time of the breakup will effectively shape the child's future. What influences the child are the long-term circumstances of life during the postdivorce years. As couples exit the courthouse steps, profound changes in parent-child relationships lie ahead. Parenting in the postdivorce family is far less stable than parenting in the functioning intact family. Visiting or custody arrangements that work immediately after the divorce when both parents are single often collapse when a

new wife or husband has priorities that may not include time or sacrifices on behalf of children from the former marriage. Everything changes when a second marriage fails, or when the individual circumstances of each parent zig and zag, or when the child gets older and has different needs plus a mind of her own. ... The course of parent-child relationships is far less predictable than either the parents or the courts acknowledge.

To help parents and children in divorcing families, our courts and mental health professionals associated with the legal system need a more realistic view of the postdivorce family. Parent educators should address the long-term needs of children and help parents anticipate the changes and stresses ahead as they try to meet those challenges. Although discouraging conflict is important, parent education courses should prepare mothers and fathers for the long haul. They will be coparents for many years, meeting the challenges of sole or joint custody, visiting and myriad financial and emotional crises that inevitably arise until the child becomes an adult.

... Courts are guilty of one other unforeseen consequence stemming from their rigid policies. Children locked into inflexible, court-ordered visiting arrangements until age eighteen grow up rejecting the parent who insisted on the plan....

...[J]oint custody is helpful to some children and detrimental to others. It can help some at one age and be harmful at a later age. ...

Finally, judges, attorneys, mediators, and the mental health professionals who work in the courts should consider building in means to follow up their actions. For example, when young children are required to fly unaccompanied to maintain visiting, both children and parents should be expected back in court one year later to

> review the impact of the traveling on the child's feelings and general adjustment. Unlike the fields of medicine and psychology, courts have no built-in review processes at their disposal. Flawed court orders or mediated agreements remain hidden because their results are not regularly held to the light and examined. Rulings in family law – with their long-term consequences for children – have a complexity that requires an assessment that goes beyond questions of following laws appropriately. It would be very helpful and reassuring to parents, to the courts themselves, and to society as a whole if court polices and related practice had a built-in, regular review process. Such assessments might lead to important changes that would greatly improve the quality of the children's lives.[44]
>
> Judith S. Wallerstein, Julia M. Lewis & Sandra Blakeslee, The Unexpected Legacy of Divorce ... *supra*, at pp.311-313 (2000)

Wallerstein often says that children can outgrow their parenting plans at about the same rate that they outgrow their shoes.[45] Divorce is not a discrete event, but a process which has a different impact on children and their parents at

---

[44] A*mici* do not propose that the courts institutionalize periodic reviews in most cases. However, application of a rigid changed circumstances test would preclude such court-ordered reviews where appropriate and necessary. Many families enter into flexible arrangements and make informal adaptations on their own. Many others could, if adaptation of existing parenting plans was seen as normal and healthy, rather than as always necessitating a battle. Parents should be encouraged to review their plan at intervals, and mediation and other dispute resolution services should be offered to provide assistance with adaptation and implementation of the parenting plan. Similarly, asking a Court to resolve a parental disagreement about which plan would be best should not be seen as a vicious contest, but a reasonable approach to resolving different perspectives.

[45] Presentation, Second World Congress on Family Law and the Rights of Children and Youth, June, 1997; Judith S. Wallerstein & Julia Lewis, T*he* L*ong-Term* I*mpact of* D*ivorce on* C*hildren*: A F*irst* R*eport* F*rom a* 25-*Year* S*tudy*, 36 Family & Conciliation Courts Rev. 368, 382 (1998)

different ages and post-divorce stages. Only a dynamic, rather than static, view of children's needs can meet the best interests standard.

Social changes and greatly increased research and experience have dramatically changed the role of family courts in child custody matters. Framing custody decisions as a forced choice between parents exaggerates competition rather than complementarity.

> Realizing the promise of the best interests standard requires a rethinking of other characteristics of custody law. (Footnote omitted.) A child-centered custody paradigm cannot assume that one custodial arrangement is best for all, or even most children. Children's needs are not best met by a model that posits a competition between parents and other caretakers for custody rather than emphasizing the potential for complementary child-rearing. The assumption that there is a large and important difference between custodial care and visitation does not reflect the reality of many children's lives. Treating custody determinations as final, absent a dramatic change of circumstances, ignores the ongoing changes in the child's developmental needs, the capacity and availability of parents to meet those needs, the family structure and other factors. A child-centered model would provide substantial resources to assist collaborative decision making, and would frame litigation as an exploration of alternate parenting plans rather than as a battle. Finally, a child-centered model includes collaboration between the legal and mental health professions in considering what is in a child's best interests.
>
> Shear, F*rom Competition to Complementarity...*, *supra*. at 312.

The more permanent the order, and the brighter the line between custodial and noncustodial parents, the more adversarial custody disputes become. The changed circumstances rule escalates the stakes entailed in custody decisions and

thus polarizes the parents. All economic and emotional resources must be marshaled for an early battle. Yet those experienced in ADR know that compromise and settlement are cumulative and progressive. Studies of the divorce process show that emotional intensity and distrust are at their peak at separation, when custody decisions must be made. If parents can make short term, tentative, collaborative decisions they build confidence and experience in cooperation, and are likely to never need judicial intervention. If they are forced by legal doctrines into armed camps, the opportunity for such baby steps is foreclosed.

In considering the "permanence" of custody orders one must look at the circumstances under which they are made. Family courts are not funded in proportion to their caseloads, or to the complexity, importance, or longevity of the cases they decide. This year's drastic budget cuts are causing "furlough" days in Los Angeles' family courts, increasing the caseload on other days. The family law case load has grown incrementally, not just in size but complexity. Unfortunately, few family lawyers are appointed to the bench and family law is unrepresented in the appellate courts so the trial judge is often learning on the job. The problem is compounded by rapid rotation of judicial officers out of family law assignments. Judicial training budgets are used to present "Custody 101" to new classes of bench officers most of whom will never remain in the assignment long enough to return for more advanced training. "Custody 101" simply does not equip a judge to make wise choices in these complex cases.

Family law judicial officers must learn a specialized area of the law, psychology, accounting, business valuation, and (in order to make realistic attorneys fees awards) the economic realities of family law practice. They must make quick assessments of credibility and parental functioning. Most decisions are made on the fly. A couples' assets, obligations, future support arrangements and parenting plan are all at issue in the "average" dissolution proceeding. Family law judicial officers carry far heavier and more complex caseloads than their

colleagues. Family law cases have long lives. Not only do children's needs require periodic review and adaptation of parenting plans, but support and retirement plan issues may cause reopening of dissolution files decades after the original judgment was entered. Consequently, statistics compiled by number of filings alone fail to reflect the true workload of a family law courtroom.

A typical California family law judicial officer greets a calendar of 30 to 75 cases each morning. Children wait months and months (while custody evaluations get stale) for a hearing to determine their parenting plans. Each of those cases presents complex issues of great importance to the family, and often to society. Deborah J. Chase, Sue Alexander & Barbara J. Miller, *Community Courts and Family Law*, 2 J. of the Center for Children, Families & the Courts 37 (2000) http://www.courtinfo.ca.gov/programs/childrenandthecourts/resource/jourvol2.htm. California's children are shortchanged by a series of shortcuts designed to accommodate the overcrowding of family courts. Children's futures, particularly in modification proceedings, are decided based only on declarations in thousands of cases, as trial courts use *Reifler v. Superior Court* (1974) 39 Cal.App.3d 479, 114 Cal.Rptr. 356 to support use of truncated procedures which would not be tolerated in other litigation of far less complexity and social significance. Cross-examination is rare in family courts, as are opportunities for judicial officers to judge witness credibility or parental traits by observing demeanor. See *Lammers v. Superior Court* (2000) 83 Cal.App.4th 1309, 100 Cal.Rptr.2d 455 [Modified 10/17/00] and *Marriage of Dunn* (2002) 103 Cal.App.4th 345, 126 Cal.Rptr.2d 636. Expansion of the changed circumstances test is yet another shortcut, designed to accommodate the failure of the State and individual courts to adequately fund family law departments. The U.S. Commission on Child and Family Welfare (*Parenting Our Children..., supra.* at pp. 31-32) expressed dismay at the failure of the States to adequately fund family law courts, and staff them with judicial officers who have sufficient expertise.

If the State is serious about meeting the needs of children, its response to the increasing number and complexity of family law issues cannot be to slam the door of the courthouse in the face of parents. While some modification proceedings are manifestations of parental discontent unrelated to the children's well-being, a substantial number signal real trouble with the plan and a need for intervention. Experienced and cross-trained judges would not have a great deal of difficulty telling the difference. Waiting until difficulties cause more severe harm to the child in order to meet a "changed circumstances" threshold is poor public policy. Instead of beefing up the changed circumstances rule, the judicial system must turn to a reallocation of court resources, which recognizes the societal importance of what happens in family law courtrooms, and the true percentage of the case load which family law represents. Properly staffed and funded, parent education[30] and family court services programs would provide a far more effective and child-centered gatekeeper function than is offered by the changed circumstances doctrine. Expanded judicial education, recruitment of judicial officers with substantial family law experience, allowing the accumulation of wisdom and experience rather than rotating judges in and out of family law courtrooms, and increasing the availability of staff attorneys to assist judicial officers all would better serve the families of this state.

One proposed justification for the broadened changed circumstances test is the notion that children are best protected from the deleterious effects of parental conflicts by preventing relitigation. That notion is an oversimplification. It is *unresolved* parental conflict which threatens children's well-being. Joan B. Kelly, *Children's Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research*, 39 J. of the American Academy of Child & Adolescent Psychiatry 963 (2000). "Research indicates that the intensity and frequency of parent conflict, the style of conflict, its

[30] See the Special Issue of Family Conciliation Courts Rev. (Volume 34, No. 1, 1996) entitled *Parent Education In Divorce and Separation*.

manner of resolution, and the presence of buffers to ameliorate the effects of high conflict are the most important predictors of child adjustment."

> The manner in which parents resolve their conflict has been determined to affect the impact of high conflict on children's adjustment. Chronic, unresolved conflict is associated with greater emotional insecurity in children. Fear, distress, and other symptoms in children are diminished when parents resolve their significant conflicts, as opposed to no resolution, and when parents use more compromise and negotiation methods rather than verbal attacks (Cummings and Davies, 1994). The beneficial effects of these more resolution-oriented behaviors have been reported whether occurring behind closed doors or in front of the child.
>
> I*d*.

Family courts are society's legitimate forum for peaceful, child-centered parental dispute resolution with professional assistance. Family courts have the opportunity both to resolve parental conflicts and to put buffers in place to ameliorate the adverse effects of high conflict on children. Children are best protected from unresolved conflict when society provides meaningful opportunities for child-centered dispute resolution.

Courts should be respectful of parents' concerns about their children. Failure to assist families with their disputes about their children's care perpetuates those disputes within the family, feeds resentment, and is likely to ensure that the children experience chronic unresolved conflict, rather than seeing their parents use society's processes to resolve the dispute. Children may absorb parental bitterness towards societal institutions, a sense of powerlessness, resentment and futility. When we ignore the plight of these children, we place them at serious

risk.[46] Hearing modification requests on the merits does not mean that all modification requests should be granted. In those cases where the Court declines to otherwise modify the plan, therapeutic interventions should be considered. (Family Code § 3190 *et. seq.*)

> The data suggest that even families experiencing chronic and severe post-divorce problems can be assisted by therapeutic intervention. Styles of therapeutic intervention can be designed to meet the specific problems of the children and families. Within a therapeutic environment parents do have some capacity to develop more trust, empathy, and tolerance for existing differences. They also have the ability to develop the specific behavior and cognitive strategies necessary to assist their children in working through specific problems of divorce.
>
> Anita K. Lampel, *Post-Divorce Therapy with Highly Conflicted Families*, 6 Independent Practitioner (1986)

When Courts ignore the post-judgment difficulties parents and children encounter they ignore the "overarching" statutory best interests mandate.

Marriage of Burgess, supra., is part of the line of cases that refined the definition of best interests under California law. (*Marriage of Carney, supra.*; *Burchard v. Garay* (1986) 42 Cal.3d 531, 229 Cal.Rptr. 800, 724 P.2d 486). Together *Carney*, *Burchard*, and *Burgess* are best read for the proposition that courts must protect the continuity of children's healthy psychological attachments and pattern of high quality care. The cases define best interests in the context of asking, "What constitutes a material change of circumstances?" The answer to that question is "A change which impacts on the child's best interests." This is a shift of focus from the nature of the circumstances to the nature of their effect on the child. To define the role of changed circumstances, these courts had to define the heart of best interests. The courts recognized that the reality – including the quality, of

---

[46] For example, divorce increases the risk of teen suicide. Madelyn S. Gould, *Separation/Divorce and Child and Adolescent Completed Suicide*, 79 J. of the American Academy of Child & Adolescent Psychiatry 490 (1998) http://www.findarticles.com.

children's relationships and care – not the timeshare, matter most when courts decide children's futures. While such relationships and patterns of care may often track the custody schedule, they do not necessarily do so.

> Courts and legislatures, in attempting to balance the child's need for a consistent relationships with the primary caregiver, the child's need for significant relationships with both parents, and the rights and obligations of parents to raise and support their children, have sometimes sought refuge from the complexity inherent in these decisions by taking a formulaic approach. The formulas adopted have changed with the times.
>
> Alicia F. Lieberman & Patricia Van Horn, *Attachment, Trauma, and Domestic Violence*, 7 Child & Adolescent Psychiatric Clinics in North America (Child Custody) 423, 438 (1998)

Writing in the Journal of the Center for Families, Children & the Courts, a physician and a California Superior Court Judge urge replacement of a focus on attachment with the concept of "reciprocal connectedness."

> ...[O]nce it is clearly understood that children can, do, and should have relationships with more than one caregiver or sets of caregivers, (Footnote omitted.), "[t]here is a need both to consider dyadic relationships in terms that go beyond attachment concepts, and to consider social systems that extend beyond dyads.
>
> Modern attachment theory addresses the dyadic nature of relationships but excludes the wider system of relatedness in which most children participate. It draws on historical and experimental psychological theory as its basis. Forensic mental health professionals, however, have extended the concept of attachment beyond its scientific and theoretical basis. When testifying about attachment, experts may thus inadvertently give the false impressions that their subjective clin-

ical impressions possess scientific validity. For example, the authors have heard experts declare that because a child was bonded to her foster mother, she could not be bonded to her psychological mother.

This position assumes that a child bonds exclusively with one adult, that such bonds admit no degrees, and that the existence and intensity of bonds do not change as the child develops. All of these assumptions are dangerously misguided.

David E. Arredondo & Leonard P. Edwards, *Attachment, Bonding, and Reciprocal Connectedness: Limitations of Attachment Theory in Juvenile and Family Court*, 2 J. of the Center for Families, Children & the Courts 109, 110 (2000)

Arredondo and Edwards explain,

In a forensic setting, attachment theory is critically limited because it describes attachment in terms of *categories* instead of more accurately conceptualizing interrelatedness as a *spectrum* of continuously distributed variables. (Footnote omitted.) The concept of reciprocal connectedness openly acknowledges the difficulty of categorizing human relationships. Instead, it points to a *spectrum* of relatedness.

Supra. at 111.

Thus the changed circumstances doctrine, as interpreted in recent years, is based upon the most oversimplified and constricted view of an obsolete psychological construct.

"Reciprocal connectedness" paints a more comprehensive and subtle picture of relationships than do "bonding" and "attachment." In the context of decision making in the family court setting, we can define it as a mutual interrelatedness that is characterized by two-way interaction between a child and an adult caregiver and by the caregiver's sensitivity to the child's developmental needs. The concept is more useful than "attachment" to courts because it describes a child's

> requirements for healthy neurobiological, social and emotional development and distinguishes them from simple dependency (security-seeking). It more closely approximates the knowledge necessary for a judge to make decisions about the neurobiological best interest of the child.
>
> *Supra*. at 112.

Shortly after the decision in *Carney*, Justice Stanley Mosk gave an address at Los Angeles' annual Child Custody Colloquium. He was asked whether the changed circumstances test was intended to bar modifications based upon incremental changes such as age, stage of development or family dynamics. Justice Mosk said "no."[47] Alas, *Carney's* descendants have produced a result that their originator probably could not have countenanced.

It was natural in 1979 for this Court to turn to the new concept of the psychological parent[48] in a case where the children's attachment to their mother had atrophied over years of abandonment. However, subsequent research has not supported the notion that children have a single, psychological parent.

> The notion that children have only one psychological parent has been thoroughly discredited by a large body of evidence that has demonstrated that infants normally develop close attachments to both of their parents, that this occurs at about the same time (approximately 6 months of age), and that they do best when they have the opportunity to establish and maintain such attachments (Biller, 1993;

---

[47] Plenary session, *Fifth Annual Family Law Colloquium: The Child, the Family and the Legal System*, sponsored by the Family Law Department of the Los Angeles Superior Court, the Family Law Section of the Los Angeles County Bar Association; The Association of Family Conciliation Courts – California Chapter, 1981 Los Angeles Biltmore Hotel (question posed by Leslie Ellen Shear)

[48] Joseph Goldstein, Anna Freud & Albert Solnit, Beyond the Best Interests of the Child (1973).

Lamb, 1997; Parke, 1981; Warshak, 1992)

> Richard A. Warshak, B*lanket Restrictions*: O*vernight Contact* B*etween* P*arents and* Y*oung C*h*ildren*, 38 Family & Conciliation Courts Rev. 422, 427 (2000)

In the decades since B*eyond the* B*est* I*nterests* there have been major developments in the study of parent-child relationships in infancy and later on. As noted earlier "psychological parent" is a legal term, not a psychological one. Similar to the way "insanity" is a legal term that maps into the psychiatric concept of psychosis, psychological parenthood corresponds to the psychological concept of attachment. In both instances, however, the fit between the terms is not exact.

> Arlene Skolnick, S*olomon's C*h*ildren*: T*he* N*ew* B*iologism*, P*sychological* P*arenthood*, A*ttachment* T*heory, and the* B*est* I*nterests* S*tandard*, in Mary Ann Mason, Arlene Skolnick & Stephen D. Sugarman, All Our Families: New Policies for a New Century (2002) at 245

The world of custody decision-making has changed dramatically since this Court decided C*arney*. Court orders no longer award custody, they create detailed parenting plans. The professional community realizes that the original parenting plan must be adapted over the life of the child, even though the Fourth District does not. Most parents accomplish these adjustments without a return to Court. The courthouse must welcome parents who recognize that a plan created for their two-year-olds makes no sense when their child is seven or eight. If the changed circumstances rule is permitted to preclude most post-judgment modifications children, and, consequently, society, will suffer.

Understanding of the unique contributions that each parent makes to a child's development has exploded since C*arney*. The Legislature established social policy in express recognition of this growth in knowledge through the frequent and continuing contact amendment (Family Code §3020 and Family Code §3040), and with the introduction of joint custody (Family Code §3080 *et. seq.*). The task of

the family (and the court where the parents need assistance) shifted from choosing between the parents to developing, implementing and adapting a comprehensive parenting plan in which each parents' strengths and limitations balance out the other parents' strengths and limitations. The bright line between custody and visitation vanished. "Visitation" has come to be seen as a demeaning mark of second-class parenthood and a threat to parental identity.[49] [50]

Unfortunately B*urgess* has been read as an extending the application of a legal-psychiatric construct – the psychological parent – from application to children who only had one meaningful parent-child attachment to most children who have two homes. Subsequent appellate decisions ignored the theoretical underpinnings of C*arney* and B*urgess*, i.e. that best interests requires preservation of children's critical relationships, and started classifying families as sole or joint custody based upon the percentage of time share. B*rody v.* K*roll* (1996) 45 Cal. App. 4th 1732, 53 Cal.Rptr.2d 280; M*arriage of* W*healon* (1997) 53 Cal. App. 4th 132, 61 Cal.Rptr.2d 559; and M*arriage of* B*iallas* (1998) 65 Cal. App. 4th 75 , 76 Cal.Rptr.2d 717. This focus on timeshare ignored the issues of attachment and complementary parenting in a futile quest for a bright line standard. There is no factual or psychological basis finding a direct correlation between timeshare and the strength or importance of each attachment. Custody negotiations have come to be shaped around the percentage of timeshare and the discussion has devolved into debate about how to count time children spend asleep, in school, with a nanny, in the custody of one parent who is traveling on business, in day

[49] In this context, it is important to distinguish between those families who seek court assistance in developing parenting plans, and those who do not. While most research finds that primary maternal custody is the predominant parenting plan, families who come to court usually involve two motivated parents each of whom desperately fears the loss of the opportunity to raise the child.

[50] Anne Endress Skove, P*arenting* T*ime* in Knowledge Management Office of the National Center for State Courts, Report on Trends in the State Courts http://www.ncsc.dni.us/KMO/Projects/Trends/99-00/articles/Parent-Time.htm#Parent

care, etc. The red herring of timeshare distracts parents from the practical aspects of planning for their children's care. Statistics dominate the debate, which should be focused on the meaningful dimensions of children's lives, relationships and experiences. In applying B*urgess*, the state's appellate courts strayed far from the child-centered policies of C*arney*.

> Owing to the multiplicity of child needs and caregiving responsibilities, it is often difficult to distinguish after the earliest period which of two involved parents the child experiences as the primary caregiver at any given time. Both parents assume different but equally valuable responsibilities in the upbringing of their children. Traditional role differences between mothers and fathers have blurred in response to changing attitudes about how important it is to children and their parents that both parents be engaged in nurturing activities. Pleck (Endnote omitted.) argues that fathering more than mothering is shaped by contextual forces in the family and society and, as such, fluctuates its behavioral norms more with historical changes.[51]
>
> Marsha Kline Pruett and Kyle D. Pruett, F*athers*, D*ivorce*, *and* T*heir* C*hildren*, 7 Child & Adolescent Psychiatric Clinics of North

[51] In considering what weight to give Wallerstein's conclusions about the primacy of maternal care, one should recall that the S*urviving the* B*reakup* families she has studied for 25 years represent the last group of fathers who were not present in the delivery room and taking an active involvement in childrearing and the last of the nonworking mothers. The experiences of these families (which were a clinical, not a randomly selected, sample) are not always consistent with the experiences of families in 21st Century courtrooms. Constance Ahrons is completing analysis of the data from a 20-year follow-up of the children in her randomly selected binuclear family study. She presents a far different picture of the longitudinal experience of divorce and the roles of each parent. Constance Ahrons, *Young Adults Speak Out Twenty Years Later: Preliminary Findings From the Binuclear Family Study*, presented at Do Great Work – See Great Works, AFCC California Chapter Conference February 3, 2001, Pasadena, California.

America (Child Custody) 389 (1998) 392

Most children whose cases come before family courts have a strong, important and unique relationship with each of their parents.

> We can say that both parents contribute distinctively to their child's welfare. And during different developmental stages a child may relate better to one parent than the other, or rely on one parent more than the other. But most children form strong attachments to both parents in the first year of life and maintain important ties to both parents throughout their lives. By rank ordering the importance of parents, we dismiss children's own experiences of their parents' value, reinforce gender stereotypes, and perhaps discourage fathers from assuming more parenting responsibilities.
>
> Richard A. Warshak, T*he* P*rimary* P*arent* P*resumption*: P*rimarily* M*eaningless* (1996) (http://home.att.net/~rawars/PPP.htm) [A version of this essay was published as Chapter 28 (pages 101-103) in 101+ Practical Solutions for the Family Lawyer, Gregg M. Herman, Ed., American Bar Association (1996)

Protection of one parent-child relationship at the cost of the other does not promote a child's best interests. Distinctions between primary and secondary parents may satisfy courts, but they deny the realities of the child's emotional world.

> Caretaking is not necessarily parenting; quality matters more than quantity. In divorce cases, when a "primary caretaker" standard is used by the court, caretaking is often evaluated by counting the number of hours spent in the home with the child, or the number of routine tasks undertaken by each parent – preparing meals, bathing, and dressing. The assumption is that these activities are likely to indicate which parent is closer to the child. A parent, particularly a mother, who works full time and uses a nanny or day care, may be

judged an inadequate caretaker by these standards.

> ... [W]e know from the research literature that it is the emotional quality of the interaction that has significance for the child, not the quantity of time. It is the give and take reciprocity of interaction, attention to what the child is feeling or trying to communicate, and being in touch with the child's interests and concerns, that create a strong adult-child bond.

Arlene Skolnick, *Solomon's Children..., supra*. at pp. 250-251

Since *Carney*, understanding of the importance of children's multiple relationships has burgeoned. The concept of a sole psychological parent has proved not to be a good fit in custody cases[52], as fathers in the last two decades assumed a greater interest and participation in child-rearing and mothers entered the workforce in large numbers. Like the *Burgess* children, the children in most

---

[52] "One specific proposal to reduce indeterminacy of the best interests standard was posited by Goldstein, *et al* in *Beyond the Best Interests of the Child*, their book pertaining to child custody and placement issues. (Endnote omitted.) The authors propose that decisions be made swiftly with regard for a child's sense of time and with finality to preserve caretaking continuity and a child's sense of security. The goal of custody is to preserve and protect the child's relationship with his or her psychologic parent. The proposal has received broad clinical support, being challenged with regard to custody following divorce. The main controversy surrounding the authors' ideas is the establishment of a primary caretaker when parents cannot cooperate, leaving the survival and continuity of the relationship between the child and the noncustodial parent to the primary parent's discretion. While the proposal makes intuitive and clinical sense insofar as it introduces a clarity and a clean break from the divorce for the custodial parent, it seems less appropriate when the child has two psychologic parents. Supporting the child's continuity with one psychologic parent requires, with some high-conflict couples, supporting permanent discontinuity with the other psychologic parent. This component is applied more flexibly in the book's most recent revision, (Endnote omitted.) possibly because of useful accumulated experience and discussion in the intervening era."

Marsha Kline Pruett and Kyle D. Pruett, *Fathers, Divorce, and Their Children, supra*. 389, 391

families who litigate have more than one actual or potential psychological parent. Disengaged parents, who are not attached to their children, are often not prone to come to court or to oppose relocation by a true primary parent. Thus broad national samples of post-divorce parenting arrangements offer little insight into the families before the Court. Custody law premised on the notion that most children have a single permanent primary psychological parent does not meet the needs of most families who seek judicial or court-connected assistance with their parenting plans.

> The "best interest of the child" implies attention to what is the best result for the child from the child's perspective. This necessarily involves attention to child development principles.
>
> David E. Arredondo & Leonard P. Edwards, *Attachment, Bonding, and Reciprocal Connectedness... supra.* at p. 122

> Parents and other caregivers constitute the parenting environment, which is at the core of the young child's world. There is a web of interactions affecting the child, including levels of parental involvement with the child and the emotional quality and parenting styles characterizing the relationships. The relationships among the caregivers also affect the parenting environment, as does the psychological adjustment of each caregiver, and the caregivers' abilities to see beyond their own needs and put the child's needs first.
>
> Mary Ann Whiteside, *An Integrative Review of the Literature Pertinent to Custody for Children Five Years of Age and Younger*, 1996, Judicial Council of California Administrative Office of the Courts, pp.13-14 (available on-line at www.courtinfo.ca.gov).

In *Carney* this Court held that although the custodial father had become a quadriplegic, there was no change of circumstances supporting a new best interests determination because the heart of best interests was found to be

continuity of intangible emotional attachments and guidance, not the physical caretaking. In B*urchard*, continuity of emotional attachments outweighed the greater physical caretaking availability of a full time, stay-at-home stepmother. Finally, in B*urgess*, the Supreme Court held that a move by a child's primary caretaker that disrupts emotional attachments does not constitute a change of circumstances affecting the child's best interests. While the three cases are most often cited in the context of the changed circumstances rule, their deepest significance is the recognition that a best interests determination entails preservation of continuity of actual close bonds and active caretaking, not a particular percentage of physical caretaking. M*arriage of* B*irnbaum* (1989) 211 Cal.App.3d 1508, 260 Cal.Rptr. 210 underscored the lack of importance of the details of the schedule, noting that no change of circumstances is required for a rearrangement of the residential schedule.

Childhood, and family life consist of constantly changing circumstances which both discretely and cumulatively impact custody issues as profoundly as does the occasional dramatic change. There are almost always changed circumstances, and many of the changes are important. Children develop and their needs differ at different ages and stages. Relationships are dynamic. We must expect parenting plans to be adapted over time and not view every request for modification as evidence of pathology.

In C*arney* stability meant continuity of the children's healthy attachments to their sole caretaker. For many, if not most, 21st Century children, stability[53] means

[53] In her full report to the Judicial Council to assist family courts in understanding the needs of the young children whose futures they shape, Whiteside, *supra*., describes the kind of stability needed by infants, toddlers and preschoolers whose parents live apart,

[C]hildren in each of these age groups need stability. We may define stability with reference to several factors

continuity of their attachments with both parents, siblings and other family members, continuity of schooling, continuity of peer relationships and enrichment activities; and continuity of their relationships with their communities.

Stability is but one of the many dimensions of a best interests determination. Legal doctrine should not break out one component of best interests and allow it to preclude consideration of all other factors. See Mary Ann Whiteside, E*xecutive* S*ummary*, *supra*. for a discussion of the multiple factors which influence the outcome of custodial arrangements for children.

Experience and research have taught us what the best interests paradigm requires for its purposes to be served. However, the law retains artifacts of the prior paradigm. While parents were the focus of the discarded parental preference standards, children must be the focus of best interests analyses. Application of the best interests doctrine requires a shift of focus from who wins custody to what plan meets the child's needs. It recognizes that children have multiple attachments, that families are dynamic, that children's needs change at each developmental stage, that educational and therapeutic interventions often should be attempted before more drastic measures, and that mothers and fathers make unique contributions to childrearing. (See also Elizabeth Scott, P*luralism*, P*reference*, *and* C*hild* C*ustody*, 80 California Law Rev. 615 (1992) arguing that child custody determinations should preserve complementary roles for parents rather than choosing between them.)

---

continuity of relationships (children need to maintain ongoing, frequent contact with primary attachment figures);
the number and significance (to the child) of changes at any given time to which the child must accommodate (the more simultaneous significant changes, the more likely is the child to be overwhelmed); and
• the degree of regularity and predictability within the child's daily and weekly schedule (children feel more secure when they are able to learn and predict their routines at mother's house, father's house, and their weekly schedule).

For all of the reasons stated herein, the best interests standard requires individual, case by case determinations, rather than global formulas. Shear, F*rom Competition to Complementarity...*, *supra*. at p. 312. Table 1, compares two paradigms:

Parental Rights/ Preference	**Best Interest**
Global determination that custody should be awarded to a parent of a particular gender, absent special facts.	Case by case, individualized determinations of the needs of each particular child.
Award of custody to one person.	Development, implementation and adaptation of a detailed parenting plan.
Clear differentiation between custody and visitation.	Continuum of residence with varying allocations of "timeshare."
Permanent decision absent major change of circumstances. Static model of family relationships.	Adaption in response to developmental needs and family changes. Dynamic model of family relationships.
Adversary litigation model.	Multiple modes of dispute resolution.
Judges rely on moral imperative.	Expanded collaboration of legal system and social science.

L*aMusga* provides an opportunity for the Supreme Court to begin the 21st Century with a modern best interests paradigm, reflecting the rapid expansion of expertise and interventions developed in the post-C*arney* decades. By reframing and refining the changed circumstances test to reflect children's multiple attachments and the dynamic nature of family life, this Court can further the evolution of the best interests doctrine.

> A sensitive policy analysis of law should seek to measure and weigh all of the various costs and benefits of legal rules. One important but previously neglected aspect of this policy calculus is the therapeutic impact of law. Therapeutic jurisprudence accordingly calls for a systematic study of law's therapeutic or antitherapeutic effects. These are not the only effects worth studying, but they should not be

> ignored. Therapeutic jurisprudence thus is largely a form of consequentialism. (Footnote omitted.) Although law is designed to serve various normative ends, scholars should study the extent to which these ends actually are furthered in practice. Once it is understood that rules of substantive law, legal procedures, and the roles of various actors in the legal system such as judges and lawyers have either positive or negative effects on the health and mental health of the people they affect, the need to assess these therapeutic consequences should not be neglected. Accomplishing positive therapeutic consequences or eliminating or minimizing antitherapeutic consequences thus emerges as an important objective in any sensible law reform effort.
>
> Bruce J. Winick, T*he Jurisprudence of Therapeutic Jurisprudence*, 3 Psychology, Public Policy & the Law 184 (1997)

The changed circumstances test is a judge-made rule which must be subordinated to the statutory "best interests" mandate, which it purports to help define. Judges are well able to use their discretion to reject unnecessary modifications or those which are disguised appeals. The emotional and economic costs of litigation act as a sufficient deterrent in most cases. In those where they do not, there is often an underlying problem which requires intervention for the protection of the children.

Every parenting plan is speculative by nature. Parents, lawyers, mental health professionals and judges make a prediction about what will work best, but our predictive abilities have limits. Sometimes we are wrong. Many families have little or no information about children's needs after divorce when they develop their parenting plans. Childhood is, by definition, a set of constantly changing circumstances. Children's needs, relationships, family configurations,

understanding of the concept of time, activities, and capacities are always changing.

This Court should adopt a child-centered changed circumstances doctrine which is part of a best interests analysis, rather than a prelude to it. All parenting plan decisions must be guided by the child's best interests. Instead of looking to external events, family courts should look to the child's experience and needs. Such a standard can make it clear that returns to court will be judged based upon how the child is doing under the existing parenting plan and whether the proposed modification represents a significant improvement for the child. Modifications should also be permitted where logistics or other factors make continuing the existing plan infeasible or burdensome to child and family.

The state has a duty to protect its children, for their own sakes, and so the society they people as adults will flourish. Damaged children are apt to become damaged adults, weakening rather than strengthening their communities. Many of the children whose best interests are ignored in Family Court will next be the subjects of Juvenile or Criminal Court proceedings. Doctrines implementing the best interest mandate must reflect society's best knowledge of children's needs and the real life circumstances of 21st Century children.

A*mici* hope the Court finds this brief helpful in the development of doctrines that respect the complexities of children's lives and needs, and that treat each child as an individual.

RESPECTFULLY SUBMITTED,

Dated

ORIGINAL SIGNATURE APPEARS ON FOLLOWING PAGE

LESLIE ELLEN SHEAR

Attorney for Amici Curiae

APPENDIX A: CASES CITING FAMILY CODE §7501 (FORMER CIVIL CODE §213)

Year	Case	Trial Court Discretion	Discussion
1892	*Luck v. Luck* 92 Cal. 653 28 P. 787	Discretion affirmed. (Evidentiary hearing on best interests.)	First divorce case related to former Civ. Code §213 issues. M leaves marriage and removes kids to another county. M's attempt to divorce F for fault is denied and M must remain married to F. While denying divorce, Ct. may award custody to "faultless" F despite residence in an adjoining county since, under former Civ. Code §156, F is the head of the family, and may choose any reasonable place or mode of living. Although a M is naturally and presumptively entitled to the custody of minor children, especially girls of tender age, it is for the trial court to say upon all the evidence, in divorce, whether she is in fact more worthy of their custody than the F. No citation to former Civ. Code §213.
1924	*Harlan v. Industrial Acc. Commission* 194 Cal. 352 228 P. 654		Is child decedent's household member for purposes of workman's comp death benefit?
1933	*In re Casella's Guardianship* 133 Cal.App. 80 23 P.2d 782	Juris. issue.	No juris. for juvenile court in one county if kids reside in M's custody in another county.
1934	*Titcomb v. Superior Court* 220 Cal. 34 29 P.2d 206	Juris. issue.	Used §213 for interstate custody juris. issues, pre-UCCJA/UCCJEA.
1940	*In re Chandler* 36 Cal.App.2d 583 97 P.2d 1048	Juris. issue.	Cal cannot compel F, who relocated with kids before M filed divorce, to return with kids. Cal has no juris. over custody. Finding of contempt reversed.
1944	*Roche v. Roche* 25 Cal.2d 141 152 P.2d 999	Discretion to restrain removal and award custody to non-parent reversed.	*Equivalent of modern rule that detriment is required for award of custody to a nonparent.* Award of "legal custody" to parents and physical custody to grandparents improper – parents choose child's place of residence not grandparents.
1945	*Heinz v. Heinz* 68 Cal.App.2d 713 157 P.2d 660	Discretion to restrain removal and award custody to non-parent reversed. (Evidence of prejudice to child's welfare not offered.)	*Equivalent of modern rule that detriment is required for award of custody to a nonparent.* Need evidence of specific "prejudice to child's welfare" to restrain geographic removal resulting in non-parent custody (trial court awarded custody to a nursery school) because F might go into military for WW II. Custody to M not at issue.

1947	E*x parte* B*auman*, 82 Cal.App.2d 359 186 P.2d 154	Orig. writ proceeding.	Noncustodial parent's removal of child from state in vio. of orders doesn't constitute basis for custody mod. to the parent who wrongfully removed child.
1948	S*ampsell v. Superior Court* 32 Cal.2d 763 197 P.2d 739		§213 used in pre-UCCJA/UCCJEA custody case to support F's claim establish California juris. over custody because based on father's domicile. M had obtained custody per a Nevada divorce, remarried and moved to Utah with the child. Supreme Ct. resolves by holding custody never final and Cal has broad power to modify Nevada order.
1950	S*hea v. Shea* 100 Cal.App.2d 60 223 P.2d 32	Discretion reversed. Full evidentiary best interests hearing.	E*quivalent of modern rule that detriment is required for award of custody to a nonparent.* D*istinguishes between pure "best interests" and prejudice to children's rights or welfare*. Trial Ct. can't restrain relocation of child with parent where effect would be to give *de facto* custody to non-parent GP's with whom children had been living rather than other parent although court finds that the best interests of the children would be served by leaving the children in the state, it does not find the affirmative fact that removal would prejudice their rights or welfare.
1953	G*udelj v. Gudelj* 41 Cal.2d 202 259 P.2d 656	Discretion affirmed. Evidentiary best interests hearing.	M & F share "joint custody," child with F at reasonable times + 1 day per week, remainder with M. Restriction on removal of child by M from county for more than 5 days upheld over her objection that it fails to provide for the possibility of her being compelled to move to another county for the health of the child or for her personal convenience. Supreme Ct. stresses broad trial court discretion. Evidence M had threatened to remove the boy from the state and to change his name, thus defeating F's visitation rights supports geographic restraint. Supreme Ct. notes trial court maintains continuing juris. of the matter and, in the future, if circumstances should arise of the kind suggested by M appropriate mods. of the custody provisions may be made.

1957	*Ward v. Ward* 150 Cal.App.2d 438 309 P.2d 965	Discretion affirmed. Full best interests hearing with psychiatric eval. of M – 2 days of testimony.	Joint custody by stip. Child with M when school in session and F when no school – discretionary mod. to restrain geographic removal based on approved despite M's invocation of §213.
1957	*Cal-Farm Ins. Co. v. Boisseranc* 151 Cal.App.2d 775 312 P.2d 401		Joint custody child resides more than 50% with F – whose homeowners insurance covers child's tort?
1959	*Dozier v. Dozier* 167 Cal.App.2d 714 334 P.2d 957	Discretion to restrain relocation affirmed. (Full evidentiary best interests hearing.)	Child's health (acute asthma requiring warm, dry climate) and continuity of relationships with F and family sufficient to support order restraining relocation of child by M from Cal to Connecticut for M career goals.
1959	*Turner v. Turner* 167 Cal.App.2d 636 334 P.2d 1011		Annulment of marriage of minor when parental consent based on fraud.
1960	*Rosin v. Superior Court* 181 Cal.App.2d 486 5 Cal.Rptr. 421	Discretion affirmed.	§213 not defense to contempt -- where divorce decree gave custody of children to F for 26 weekends and four weeks in summer of each year plus right to call children by telephone daily, M, who had custody of children for remainder of year, was guilty of contempt in removing children to Florida with intent and effect of depriving F of exercise of his part-time custody and visitation rights. Order did not specifically restrain removal but relocation made custody schedule impossible. Holds §213 "has no direct application to divorce and should not be held controlling in the face of a divorce decree which specifies what the future relationship shall be in the given instance." Says prior cases "deal with questions of what the court may do in the way of affirmatively forbidding removal from the state; they do not hold that §213 governs the rendition of a divorce decree; nor do they decide that the parent is entitled to determine, contrary to express or implied terms of the decree, what is best for the child."

1961	*Milne v. Goldstein* 194 Cal.App.2d 552 15 Cal.Rptr. 243		Stay pending appeal from order permitting removal of kids to South Africa for 6 weeks per year visits with F based on claimed risk children will not be returned. (Pre-Hague Convention on the Civil Aspects of International Child Abduction.)
1961	*Wiedmann v. Superior Court* 191 Cal.App.2d 548 12 Cal.Rptr. 832		*Pre*-UCCJA/UCCJEA *juris. case.* Cal trial court erroneously grants *ex parte* order changing custody from M to F after F fails to return children to M in Arizona following visit. However, Cal has mod. juris. because children have been in Cal 2 yrs. M took no action 'til 1 yr after Cal changed custody.
1961	*Stack v. Stack* 189 Cal.App.2d 357 11 Cal.Rptr. 177	Discretion to modify custody based in part on relocation affirmed. (Full evidentiary best interests hearing.)	Holds "Each case must be determined upon its own facts." Holds that change of circumstances so flexible that it is no longer a rule, citing numerous cases. Mod. of custody from M to F where M intended move that would deprive child of visitation with F particularly where other factors affecting the welfare of the child point to the same result. Notes child "would be among strangers, removed from contact with the relatives of both her father and mother, who had had much to do with her upbringing, again transferred to a different school, and living with a new stepfather, with whom she had been associated for only a short time, and whose marriage to her mother was of at least doubtful validity." Cites 7 prior cases approving discretionary rejection of relocation.
1964	*Forslund v. Forslund* 225 Cal.App.2d 476 37 Cal.Rptr. 489	Discretion not to modify affirmed. (Full evidentiary best interests hearing with child custody eval./ probation report)	Pre-UCCJA/UCCJEA mod. juris. case. Cal has juris. to modify custody even when children domiciled elsewhere. Fact of move by custodial parent without evidence of adverse impact on children not enough to require reversal of trial court that denied mod. request. *Good discussion of Goto and Foster exceptions to the rigid changed circumstances test. Cited in Marriage of Cignanovich.*

1966	*Walker v. Superior Court* 246 Cal.App.2d 749 55 Cal.Rptr. 114	Affirmed discretion to permit relocation. (Full evidentiary hearing.)	Trial Ct. may grant custodial F leave to take children on temporary basis to Canada with him while F working in Canada (Ct. ordered F to post bond to secure return) where no showing of harm other than interruption of visitation with M who had surrendered custody of all 3 children to F before divorce filed.
1971	*Jolicoeur v. Mihaly* 5 Cal.3d 565 96 Cal.Rptr. 697 488 P.2d 1		Registrars of voters refused to register unmarried minors on the ground of failure to register at their parents' address. U.S. and California law require treating all citizens 18 years of age or older alike for all purposes related to voting.
1976	*Marriage of Ciganovich* 61 Cal.App.3d 289 132 Cal.Rptr. 261	Exercise of discretion to deny mod. reversed. (Full evidentiary hearing.)	"In this case there is not the slightest doubt as to the mother's motivation. She went to Reno, had no job or other preexisting reason for going there, concealed her whereabouts and that of the children, even going to the extent of using a "blind" address. Her entire course of conduct was one of concealment of the children. Yet the trial court ignored this conduct as a ground for mod. of the decree. The court referred to the mother's constitutional right of "freedom of movement" but failed to recognize the well-established rule that removal of the children with the objective of frustrating visitation rights offends the court, offends the interests of the noncustodial parent and offends the welfare of the child." Holds: No showing of change of conditions necessary when parent seeks court aid in remedying a frustration of his visitation rights. (*Fay v. Fay*, 12 Cal.2d 279, 282.) After acrimonious divorce and custody battle M bounces between Cal and Nevada with kids, sometimes concealing them from F. "The events are typical of a frequent, unpleasant and perplexing syndrome of family dissolution in a, mobile society. After awarding custody of children to the mother, a judicial decree professes protection of the father's paternal interests by a visitation provision which is reduced to empty pomposity when the mother moves the children to another region. The mother's move may be motivated by her own legitimate needs or by a vengeful desire to demolish the paternal relationship. Regardless of the mother's good or ill motives, the father's inability to spend time and money on travel may effectively damage or destroy his legitimate paternal aspirations... Confronted with such a situation, a trial court should be concerned with the child's welfare as the paramount consideration. The court should bear in mind that preservation of parental relationships is in the best interest of the child as well as the parent. (*Friedland v. Friedland*, 174 Cal.App.2d 874, 879; *Dozier v. Dozier* 167 Cal.App.2d 714, 720.) The court should also bear in mind that a

			custodial parent's attempt to frustrate the court's order has a bearing upon the fitness of that parent. (*Moniz v. Moniz*, 142 Cal.App.2d 527, 530.)"
1982	*People v. Lortz* 137 Cal.App.3d 363 187 Cal.Rptr. 89		Whether defendant F had a right to choose the residence of his child was irrelevant since issue in child stealing prosecution was whether he concealed the baby with intent to deprive M of a right to visitation.
1986	*Guardianship of Donaldson* 178 Cal.App.3d 477 223 Cal.Rptr. 707		M had right to remove kids from state to live with maternal GP's after F's death – thus Cal doesn't have juris. over guardianship dispute between maternal and paternal relatives.
1991	*Marriage of Carlson* 229 Cal.App.3d 1330 280 Cal.Rptr. 840	Discretion to restrain move affirmed. (Full evidentiary best interest hearing.	Affirms power of court to restrain move to protect frequent and continuing contact. Court may consider effect which M's contemplated move would have on F's exercise of visitation was properly considered in deciding whether M should be restrained from moving children to different geographical area. Restricting relocation of children was not abuse of discretion. Restricting relocation of children was not *per se* invalid infringement of M's federal constitutional right to travel. Purpose behind changes in statutes amended to declare it to be state policy to assure minor children of frequent and continuing contact with both parents after marriage dissolves and to authorize court to require notice to noncustodial parent of custodial parent's intent to change child's residence is to ensure that every reasonable effort, under circumstances of each case, will be made to preserve child's relationship with both parents. "A rule declaring the noncustodial parent's practical inability to maintain effective contact with the child to be irrelevant would annul this public policy." Noncustodial parent's ability to exercise visitation is not the sole or preeminent factor in cases such as this but is one of the significant considerations the trial court must take into account in evaluating the best interests of the child in light of all the evidence before the court.

APPENDIX B: NAMES AND BIO-GRAPHICAL SKETCHES OF AMICAE CURIAE JOINING THIS BRIEF

Marjorie G. Fuller, J.D. is a former trial attorney with a practice now limited to civil writs and appeals. The primary focus of her practice has been family law matters, with considerable experience in child custody cases. A 1974 graduate of the University of Southern California law school, Ms. Fuller has served as president of the Orange County Bar Association Family Law Section, and has been named Attorney of the Year by the Orange County Women Lawyers Association. She has been the principal attorney and author of more than 300 completed appeals, writ petitions and petitions for review, with 30 cases published in California official reports, and has authored numerous articles in her field. As indication of her reputation and expertise in child custody matters, the Orange County Superior Court appointed her to represent the children of O.J. Simpson in the 1996 guardianship proceedings.

Nancy Williams Olesen, Ph.D. is a licensed psychologist who has worked with divorcing families for more than twenty years. She conducts custody evaluations, trains professionals in the best methods of evaluating divorcing families, and serves on a variety of professional boards and advisory committees. She is on the Board of directors of the Judith Wallerstein Center for the Family in Transition, and the Board of the California Chapter of the Association of Family and Conciliation Courts. Dr. Olesen has been invited to speak on topics regarding custody evaluation at many national and international conferences.

Pamela Panasiti Stettner, JD, CFLS is a certified family law specialist.She has been in practice since 1977. Approximately half of her practice is the representation of children in the family law courts in Los Angeles and San Bernardino Counties. She has been representing the interests of children for the past approximately 20 years. In 1994 she assisted in the drafting of Senate Bill 1528, carried by then Senator Cathy Wright, a Republican, and nearly identical Assembly Bill 3041, carried by then Assemblyperson Julie Bornstein, a Democrat. Those bills dealt specifically with the problem of move-aways. Both died in committee despite widespread support from the bench and bar. The language of the intended statutes was specifically intended to prevent thwart the presumptions that make the B*urgess* decision so problematic and prejudicial to the interests of the children whose interests are supposed to be the focus of the court in all custody cases.

Michael E. Lamb, Ph.D. is head of the Section on Social and Emotional Development at the National Institute for Child Health and Human Development (National Institutes of Health/Department of Health and Human Services) and was previously Professor of Psychology, Psychiatry, and Pediatrics at the University of Utah. He has published more than 30 books and approximately 500 peer-reviewed articles and chapters on parent-child relationships, child development and adjustment, and forensic interviewing of allegedly abused children. In recognition of his scholarly contributions, he has received a number of awards including an Honorary doctorate from the University of Goteborg, Sweden, and the James McKeen Cattell Award from the American Psychological Society.

Dawn Gray, JD, CFLS, has been a family law attorney for over 19 years and a family law specialist for 12 years, both in private practice and as a research attorney with California Family Law Reports, Inc. Her practice is currently limited to contract research and writing on complex family law issues. She has authored numerous articles on family law-related topics for various publications, prepared many continuing education programs on family-law related topics for practitioners, and currently serves as the President-Elect for the California Association of Certified Family Law Specialists.

Joan B. Kelly, Ph.D. is a researcher and forensic psychologist and for 18 years was mediator and Director of the Northern California Mediation Center in Corte Madera, CA. Her research and practice has focused on children's adjustment to divorce, custody and access issues, child development issues in parenting plans, and divorce mediation. She has published more than 70 articles and chapters in these areas of interest, and her book, *Surviving The Breakup: How Children and Parents Cope with Divorce*, coauthored with Dr. Judith Wallerstein, remains a classic. Joan received the Distinguished Mediator Award from the Academy of Family Mediators, the Stanley Cohen Distinguished Research Award and Meyer Elkin Award from the Association of Family and Conciliation Courts, and is a Fellow of the American Psychological Association.

Lawrence E. Leone, JD, CFLS is a Certified Family Law Specialist, graduate of UCLA, magna cum laude, 1973 and Loyola Law School, 1977. A Board of Trustees member for the Los Angeles County Bar Association and former Chair of its Family Law Section (2002-2003). He is the author of more than twenty articles and three books relating to Family Law and the current Editor of News and Review, the LACBA Family Law Section publication. He is the Chair of the LACBA Technology Committee 2003 and a Contributor & Editorial Board California Family Law Monthly 2003.

William G. Austin, Ph.D. is a practicing clinical and forensic psychologist in Northwest Colorado. He is the author of numerous articles on forensic methodology for conducting child custody evaluations that are research based with practical applications. He has developed forensic models of risk assessment for child custody evaluation for the two instances of relocation and domestic violence. These models are currently being widely applied by custody evaluators across the country. Dr. Austin provided the scientific and technical basis for the Colorado Senate Judiciary Committee on the change in the Colorado relocation statute from a presumption in favor of relocation by the residential parent to a best interests of the child standard.

Constance R. Ahrons, Ph.D., MSW, is Professor Emerita of Sociology, former director of the Marriage and Family Therapy Doctoral Program at the University of Southern California (USC) and is currently senior research scholar at the Council on Contemporary Families. She is the principal investigator of The Binuclear Family Study, a 20-year longitudinal investigation of postdivorce families, funded by the National Institutes of Mental Health and the Center for Families and Children, Judicial Council of California. She is the author of The Good Divorce, Divorced Families, the forthcoming Divorce and Remarriage: The Children Speak Out and has numerous articles published in professional and academic journals.

Harold J. Cohn, JD., CFLS was appointed by State Bar of California to grade first Family Law Specialization Examination; Appointed by State Bar of California to grade subsequent examinations to date; Appointed by State Bar of California Board of Governors to Family Law Section Executive Committee, 2000-2003; Appointed by State Bar of California Board of Governors to Family Law Advisory Commission, 1997-2000; Former Co-Chairman State Bar of California Standing Committee South on Child Custody and Visitation; Immediate past Chair, Executive Board, Los Angeles County Bar Association, Family Law Section, 1999-2000; Board of Directors Levitt & Quinn Family Law Center, Inc. a non-profit law firm; Executive Board Member, Beverly Hills Bar Association, Family Law Section, 1985-1999; Secretary, Executive Board Beverly Hills Bar Association, Family Law Section, 2000-2001. Amicus co-author in *Montenegro v. Diaz* (2001), 26 Cal.4th 249; 109 Cal.Rpt.2d 575

Sanford L. Braver, Ph.D. is Professor of Psychology at Arizona State University, where he has been for over 30 years. For over 20 years he has explored the dynamics of divorcing families with the support of 15 peer-reviewed Federal research grants, totaling almost $15 million. He has published nearly 80 peer-

reviewed professional articles and chapters and has written three books, including Divorced dads: Shattering the myths, and the forthcoming The Legacy of Divorce: Controversies, Clarifications and Consequences. He is in demand as a speaker and presenter, and as a consultant to numerous state and federal entities. He is on the Editorial Board of Fathering and Family Court Review, and regularly peer-reviews grant proposals for Federal grant agencies.

Frieda Gordon, JD., CFLS is the president of the Association of Certified Family Law Specialists. Southwestern University School of Law, S.C.A.L.E. Program, J.D. 1984, The Juilliard School, New York, NY and Oberlin College, Oberlin, OH. She practices in many California counties and has appeared before the California Court of Appeal and the California Supreme Court. She continues to preside as Judge Pro Tem in many of the District Court Branches of the Los Angeles Superior Court and serves as a mediator for the Los Angeles Superior Court Central District and West District. She was a member of the Executive Committee of the Los Angeles Bar Association Family Law Section from 1992 until 1995. Ms. Gordon is a member of the Beverly Hills Bar Association Family Law and Probate and Estate Planning Sections and has authored numerous articles and columns for various legal publications. She is 2003 President of the Association of Certified Family Law Specialists, having been a board member and chair of its various committees since 1990, a member of the American Bar Association Family Law Section, Custody Committee and Publications Development Board and is also an active member of the Santa Monica Bar Association, and the California State Bar Custody Committee and Editorial Board. She is a former chair of the Family Law Section of the Women Lawyers' Association of Los Angeles and former member of the Board of Directors of the Women's Legal Clinic.

James M. Hallett, JD, CFLS, CFCLS is certified by the State Bar of California, Board of Legal Specialization as both a Family Law and Criminal Law Specialist. He is a graduate of Yale University and Boalt Hall School of Law. He has been involved in well over a thousand family law cases. In the South Bay area of Los Angeles County, he has led and promoted the establishment of mediation and collaborative divorce groups . As a veteran of 20 death penalty cases and countless other criminal cases, he has extensive experience with family dysfunction and the legal system's role in addressing such dysfunction. He is a Past President of the South Bay Bar Association and a founding director of the South Regional Capital Case Panel and A Better Divorce, A Group of Collaborative Law Professionals. He is active in his local community through numerous service and church groups, and is the married father of four college graduates.

Sidney J. Brown, Ph.D. has been a psychologist in private practice in California for 22 years. For the past 15 years he has conducted numerous child custody evaluations. Currently he is on panel of custody evaluators Los Angeles Superior Court.

Lynette Berg Robe, JD, CFLS, member of the State Bar of California since 1986. Certified as a Family Law Specialist in 2001 by the State Bar's Board of Legal Specialization. Member of the Los Angeles County Bar Association Family Law Executive Committee and co-chair of the Legislative Committee. Member of the editorial board of the Journal of Child Custody, published by Haworth Press. Graduate of UCLA Law School and Member of UCLA Law Review. In 1999, awarded the State Bar of California President's Pro bono Assistance Service Award for District Seven for pro bono services to the Harriett Buhai Center for Family Law. Her practice includes all family law matters, including child custody. She also participates as a volunteer family law mediator for the Superior Court, Central District and Van Nuys, and she is on the Alternative Dispute Resolution panel.

Michael Gottlieb, Ph.D. practices forensic and family psychology in Dallas. He is Board Certified in Family Psychology and is a Fellow of the American Psychology/Law Society. He is a Clinical Associate Professor at The University of Texas Southwestern Medical School. He is a Past-President of the Dallas and Texas Psychological Associations, The American Board of Family Psychology and The Academy of Family Psychology. Dr. Gottlieb writes on applied ethics and the psychology/law interface and is a member of the Editorial Board of six scholarly journals. He has written or co-written over twenty five peer-reviewed articles and book chapters, presented over seventy-five professional papers and given over eighty-five workshops locally, nationally and internationally, including to the American Bar Association Family Law Section and the National Judicial Institute of Canada.

Tammy-Lyn Gallerani, J.D., CFLS is a family law attorney and a family law specialist certified by the California State Board of Legal Specialization. She has been practicing family law exclusively since 1987. She is currently the president of the Contra Costa County Bar Association and past-president of the Family Law Section of this county. She also sits as a Judge Pro-Tem for the family law department of the Superior Court. She has been involved in several highly litigated move-away cases since Burgess was decided.

Richard A. Warshak, Ph.D. is a clinical, consulting, and research psychologist and Clinical Professor at the University of Texas Southwestern Medical Center. He has written two books and more than forty articles and chapters published in scientific and legal journals and books, including four specifically on relocation. He serves on the Editorial Board of the Family Court Review, and is an Editorial Reviewer for two more professional journals. He directed the Texas Custody Research Project and was Co-Principal Investigator of the NIMH Stepfamily Project. His landmark custody research is cited often in the scientific literature and in courtrooms and legislatures throughout the world. He has more than a quarter century of experience evaluating and treating children, adults, and families and consulting to attorneys and custody evaluators.

Kenneth C. Cochrane, JD, CFLS is an attorney who has been practicing law for 32 years and whose practice has been limited to family law matters exclusively for 20 years. He is family law specialist certified by the State Bar of California Board of Legal Specialization. He lectures in the area of family law, including speaker/moderator for Continuing Education of the Bar, Recent Developments in Family Law, 1989-1998. He was counsel of record in I*n re* W*illiam* T. (1985) 172 Cal.App.3d 790, 218 Cal.Rptr. 420 [orders of juvenile court in dependency proceeding supersede orders in dissolution proceeding].

Neil S. Grossman, Ph.D maintains a forensic/clinical practice. He is Chair, Forensic Task Force of the Division of Family Psychology; Co-Editor, Special Issue on Family Psychology and Family Law, Journal of Family Psychology; presented many workshops and trainings in the areas of forensic psychology. Dr. Grossman is active in education, training and accreditation in psychology as: Vice President for Education, Division of Family Psychology; President, Council of Specialties in Professional Psychology; Representative, Interorganizational Council for Accreditation of Postdoctoral Programs in Psychology; and President, Academy of Family Psychology; Dr. Grossman has taught at the undergraduate, doctoral and postdoctoral levels and directed internship and postdoctoral training programs.

David R. Lane, JD, CFLS was admitted to the California bar in 1973 and certified as a specialist in family law by the State Bar of California, Board of Legal Specialization in 1980 (the initial certification class). He is a member of the Family Law sections of the California State Bar and the American Bar Association, and a member of the Association of Certified Family Law Specialists. He was formerly an associate editor of the Family Law Section of the California Bar's Newsletter. He has handled several thousand cases involving child custody, representing mothers and fathers approximately equally. In addition, he has been appointed

from time-to-time by the Superior Courts of Yuba and Sutter Counties to represent children in custody disputes. He has also represented grandparents and other relatives in custody matters.

Maureen Stubbs, JD, CFLS has been a practicing attorney, licensed in California since June, 1976, now over 27 years, during which time she has have continuously handled family law matters, including many child custody matters. She has been a Certified Family Law Specialist since 1991 and her practice since then has almost exclusively been handling family law matter. She is trained as a Mediator and is on the Los Angeles Superior Court list of approved mediators. She has also sat as a Judge Pro Tem in Family Law Departments.

Fred Norris, Ph.D. is a licensed psychologist, marriage and family therapist and educational psychologist with expertise in child custody issues. He has served as a 730 expert to complete child custody evaluations in over 150 cases. He has also conducted numerous mediations with divorcing families, been appointed as a special master in over thirty cases and been appointed to conduct court ordered therapy in over fifty cases. He has served as the president and currently serve as the ethics chairperson of the Ventura County Psychological Association, and is also a member of the California Psychological Association, American Psychological Association and the Association of Family and Conciliation Courts.

Dianna Gould-Saltman, JD, CFLS is a California State Bar Board of Legalization Certified Family Law Specialist and a Fellow of the American Academy of Matrimonial Lawyers. She is counsel to the Southern California Chapter of the American Academy of Matrimonial Lawyers and chair-elect of the Family Law Section of the Los Angeles County Bar Association. Ms. Gould-Saltman has lectured on child custody issues for the Los Angeles County Bar Association, State Bar of California, American Academy of Matrimonial Lawyers, Association of Family and Conciliation Courts, American Psychological Association and the Los Angeles County Psychological Association.

Carol Silbergeld, LCSW, BCD, received an MSS degree from the Bryn Mawr School of Social Work and Social Research in 1973. She has been on the staffs of Hahnemann Hospital in Philadelphia, Jewish Family and Children's Services in New York, the Reiss-Davis Child Study Center in L.A., and most recently, the L.A.Child Development Center. At Reiss-Davis, she directed a Children of Divorce Clinic for 19 years. In 1998, she joined the staff of the LACDC, where she directs a school-based divorce counseling program and a group counseling program for children of high-conflict parents referred by the L.A. .Superior Court. She

maintains a private psychotherapy practice in Santa Monica for adults, adolescents and children.

Susan Ratzkin, JD is a family law attorney practicing in Ventura County California who has been practicing for approximately seventeen years. A substantial percentage of her practice is and has been in high conflict custody cases. She is on the California State Board of the Association of Family and Conciliation Courts, and was President of the Ventura County Family Law Bar Association in 1993, and is currently a member of the board of that organization. She has experience as a Judge Pro Tem for the family law department in Ventura County. She was a Family Law Facilitator for the Ventura County Superior Court from 1999 - 2002.

Jeffrey M. Lulow, Ph.D. is a clinical psychologist, licensed in California to practice since 1972. He has received training in child and family psychology and has conducted evaluations with respect to custody and visitation for over 25 years. He has been retained as a Custody Evaluator on over 200 cases and has spoken on this subject at professional meetings in California and Quebec. He teaches at the HELP Group in Sherman Oaks, and holds the title of Adjunct Assistant Clinical Professor at UCLA Neuropsychiatric Institute.

Dale S. Frank, JD is a member in good standing of the California Bar and practicing attorney in California since 1986, practicing largely in the family law area; mediating family law cases for over ten years; member of the Los Angeles County Bar, Family Law Section; member of the Los Angleles Collaborative Family Law Association; member Los Angeles Superior Court Mediation Panel; member of the Los Angeles County Bar Attorney-Client Fee Arbitration panel; principal of Mediation Works, a divorce mediation partnership with Muriel Savikas, Ph.D, providing attorney-therapist co-mediation of custody disputes.

Leslye Hunter, M.A., LPC, LMFT has a private practice in the New Orleans area dedicated to marriage, divorce and child custody. She is the President-Elect of AFCC (Association of Family and Conciliation Courts). She is the Past President of the Family Mediation Council of Louisiana, New Orleans Chapter and is on their training faculty. Ms. Hunter is active with the local and state Bar Association Committees to Implement Family Courts. She co-drafted Guidelines for Child Custody Evaluators which were unanimously accepted as statewide guidelines by the Louisiana State Bar House of Delegates, and frequently lectures and teaches workshops for other mental health professionals, attorneys and judges.

Ronald S. Granberg, CFLS, is the director north-elect of the Association of Certified Family Law Specialists. He was president of the Monterey County Bar Association in 1992, and has been the legal research professor at the Monterey College of Law since 1978. Mr. Granberg's writings include "*California Legal Research*," "*You're Just Not My Phenotype*" (Family Law News, California State Bar Family Law Section, Fall 1995), "*Parents Wrangle At Their Own Risk*" (ACFLS Newsletter, Spring 2001), "*Lawyers Play Philosophy Game in Court*" (Los Angeles Daily Journal, May 3, 2002), and "*Moore-Marsden: When Cash Should Be King*" (ACFLS Newsletter, Spring 2003).

James R. Flens, PsyD., is a Forensic Psychologist and has been in private practice for the last 16 years. Approximately ninety-five percent of his practice is devoted to family law related matters. He has conducted in excess of 500 child custody evaluations, and have been involved in approximately another 500 in other capacities. He is a member of the American Psychological Association, Association of Family and Conciliation Courts, Society for Personality Assessment, and American Bar Association and is also active on the Child Custody Listserv.

Rebekah A. Frye, JD practices family law in Palo Alto, California, primarily in the counties of Santa Clara, San Mateo and Alameda. Though she has practiced family law for approximately 7 years. Her practice is focused on child and family issues, predominantly custody litigation. She represents mothers, fathers and is regularly appointed by the court to represent children in child custody matters.

Renée A. Cohen, Ph.D., has over 20 years of clinical experience. She received her
bachelor's degree from Boston University and her Ph.D. from the University of Southern California. Her post-doctoral work was done at The Reiss-Davis Child Study Center in Los Angeles. She is a former member of the faculty of the University of Southern California and Pepperdine University. Dr. Cohen's earlier training and experience as a teacher and school psychologist add another dimension to her ability to work with children and their families. Dr. Cohen has a private clinical practice and is also a forensic psychologist assisting the court as a Child Custody Evaluator.

Tracy Duell-Cazes, JD, CFLS is a member of the California State Bar Association and was sworn in as an attorney in December 1989. She is a member of the Family Law Section. She obtained her family law specialist certification in December 2002. She is also a member of the American Bar Association, including the Family Law Section. Her practice deals exclusively with family law issues (other

than dependency or delinquency) relating to all aspects of family issues that are under the jurisdiction of the family court.

Marnee W. Milner, JD. is a practicing family law attorney in Palo Alto, CA whose practice focuses on child custody, parental alienation and domestic violence litigation. She is a doctoral candidate in clinical psychology whose studies focus on neuropsychology and domestic violence offenders. She is an active member of the American Bar Association, the American Psychological Association, the Association of Family and Conciliation Courts and local bar associations.

Jacqueline Singer, Ph.D. is a licensed psycholigist in California with a forensic practice. Dr. Singer has been conducting child custody evaluations for over 11 years and has evaluated over 200 families. Additionally, she has taught at a graduate school level a course in child custody and provided training to mental health professionals on high conflict divorce. Dr. Singer has made presentations to professional organizations on child custody cases, Parental Alienation, Legal and Psychological Issues in Move Away Cases and Rorschach data in a child custody sample. Additionally she has written articles for Family Advocate, a publication of the ABA and for Fair Share: The Matrimonial Law Monthly. Dr. Singer is a Fellow of the Society of Personality Assessment.

Erica L. Hedlund, JD is a family law attorney in Palm Springs, admitted to the bar on July 1, 1987. She has been practicing as a sole proprietor since 1991, first in San Bernardino County and now mainly in Riverside County, and is active in the Family Law Section of the Desert Bar Association. She graduated cum laude from the University of Washington in 1956, and earned her Masters Degree in Education from the University of California in Santa Barbara. She taught school for about 25 years in Alaska and California. In 1966-1967 she was a Fulbright exchange teacher in West Berlin, Germany. When retirement became an option she decided to study law at the Southern California Institute of Law in Santa Barbara.

James Livingston, Ph.D., graduated from the California School of Professional Psychology in 1977 with a Ph.D. in Professional Psychology, majoring in Clinical and minoring in Developmental Psychology. He was licensed in California in 1979 and has worked in hospital, clinic and private practice settings since that time. He is a member of several professional organizations, including the American Psychological Association, and is a Fellow in the Society for Personality Assessment. He has performed psychological evaluations for Santa Clara County Juvenile Court since 1986. In addition to his private practice, he is Associate

Professor on the faculty of Pacific Graduate School of Psychology, where he teach courses in psychodiagnosis and psychological and forensic assessment. He is also an adjunct faculty member with U.C. Berkeley, where he's taught continuing education courses for psychologists.

Josephine A. Fitzpatrick, JD, CFLS is a certified family law specialist, has been in practice 24 years, is a past member of the California Bar Association Child Custody Committee, South, and is frequently appointed by the court to represent minor children in family law matters.

Michael A. Fraga, Psy.D. was one of the founders of the California Association of Batterer's Intervention Programs (CABIP), and has provided training to both the judiciary and mental health communities in this state and nationally on domestic violence, child abuse, practice, ethics and implementation of child custodial evaluations and forensic (capitol) psychological assessment. His agency is a functional member of California Psychological Internship Council (CAPIC) and provides clinical training in a variety of concentrations to both pre- and post-doctoral students.

Timothy C. Wright, JD, CFLS was admitted to the State Bar of California in June of 1970. He has been practicing family law for 33 years, and was certified by the Board of Legal Specialization as a Certified Specialist in Family Law on July 15, 1980. He was trial counsel in the case of I*n re* M*arriage of* E*dlund and* H*ales* (1998) 66 Cal.App.4th 1454, 78 Cal.Rptr.2d 671, in which both the experienced family law trial judge, and an experienced clinical psychologist stated unequivocally that changing the residence of the minor child from San Mateo County to Indianapolis, Indiana would be patently detrimental to the best interests of the minor child, and that the minor child will suffer as a result of the move, yet, because of the B*urgess* decision, the trial court must grant the mother's wish to move to Indiana.

Avery Cooper, JD, CFLS is a past President of the Santa Monica Bar Association; Past Chairman Family Law Section, Santa Monica Bar Association; Past Chairman Lawyer Referral Service Committee, Santa Monica Bar Association; Member Los Angeles County Bar Association; Beverly Hills Bar Association; State Bar of California (Family Law and Probate Sections); Association of Certified Family Law Specialists; Member Judge Pro Tempore Panel for the West District of the Los Angeles Superior Court. Mr. Cooper has published numerous Articles on Family Law and has had a major case decision published; Marriage of Lurie, Court of Appeal, 2nd District.

Lawrence W. Thorpe, JD, CFLS is a San Francisco family lawyer, whose practice emphasizes custody Law and interstate family law. He a graduate of Hastings College of Law, and was admitted to the California Bar in 1967.**:** Bar Association of San Francisco. He is a member of the State Bar of California; American Bar Association (Member, Section of Family Law), and the Association of Certified Family Law Specialists.

Trevor C. Thorpe, JD has practiced family law in California since 1998. His practice includes child custody litigation, interstate and international child custody disputes and family law appeals

Steven R. Liss, JD is an attorney with other 15 years' experience dealing in all areas of family law. Mr. Liss specializes in the adoption/surrogacy area of family law, representing adoptive parents and birth mothers.

Mark J. Warfel, JD is a sole practitioner with primary emphasis in family law. He graduated from the UCLA School of Law 1998, and has been a member of California State Bar since 1998.

John R. Schiller, JD, CFLS was admitted to practice January 5, 1968. His practice has been limited to family law for over 30 years. He is a member of the Family Law Section of the Orange County Bar; Section of Family Law of the American Bar Association serving on its Child Custody Committee; Fellow of the American Academy of Matrimonial Lawyers; member of the International Academy of Matrimonial Lawyers; board certified in family law by National Board of Trial Advocacy. He authored the CEB treatise, "Practice Under the California Family Law Act."

Mary McNeill, JD, CFLS was trial counsel in C*assady v. Signorelli*. She practices family law in Alameda, Contra Costa and occasionally San Francisco. She was the founding coordinator of the Victim Services Unit of the Family Violence Project in the District Attorney's Office in San Francisco and taught at over a dozen Bay Area Police Departments on domestic violence and at the S.F. Police Department Academy for over 9 years on Domestic Violence and other issues. She also authored a book and scholarly articles on domestic violence and sat for four years (from about 1993 to 1997) on the board of directors of :W.O.M.A.N. Inc.,," a domestic violence advocacy organization in San Francisco. Prior to her D.V. work, she did rape crisis work. Ms. McNeill has served on numerous occasions in Contra Costa County as Count Appointed Minors' Counsel.