IN THE SUPREME COURT OF CALIFORNIA

In re the Marriage of SUSAN POSTON NAVARRO (LaMUSGA) Appellant, and GARY LaMUSGA Respondent. _____/	Supreme Court Case No. S107355 Court of Appeal Case No. A096012 Contra Costa County Superior Court Case No. D95-01136

BRIEF OF HERMA HILL KAY SBN 30734, GRACE GANZ BLUMBERG SBN 139450, CAROL S. BRUCH SBN 56403, JANICE E KOSEL SBN 50928, FRANCES OLSEN, JOAN HEIFETZ HOLLINGER, MARY ANN MASON SBN 70327, D. KELLY WEISBERG SBN 88308, JAN C. COSTELLO SBN 91372, SHEILA JAMES KUEHL SBN 85162, JOHN E. B. MYERS SBN 91300, LISA C. IKEMOTO SBN 131396, SCOTT ALTMAN AND JANET BOWERMASTER AS *AMICI CURIAE* SUPPORTING AFFIRMANCE OF THE COURT OF APPEAL'S DECISION

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INTRODUCTION

Seven years ago, this Court articulated the standards that govern moves by California's custodial households. Its opinion in *In re Marriage of Burgess* (1996) 13 Cal. 4th 25, interpreted Family Code § 7501,[1] a venerable feature of California law, in light of contemporary custody practice. To do so, the Court was required to harmonize two distinct sources of California's custody doctrines: statutory law and common law. It did so succinctly and persuasively, and *Burgess* became a leading opinion. Its straight-forward analysis of the controlling statutory

[1] Unless specified, all statutory references are to the California Family Code.

language held that a custodial parent has a presumptive right to decide where a child shall live, although a court may deny the relocation if it would be detrimental to the child. Realistically, because the court may not prevent the custodial parent from moving, a restriction on the child's relocation means the court must be prepared to transfer custody to the other parent. To deal with cases where detriment would result from the move, *Burgess* therefore incorporated long-standing case law that deals with changes in primary custody and applies a specific version of the "best interest" test.

This common-sense test balances the alternatives: a transfer of custody may be ordered only if the benefits to the child of the new custodial household outweigh the disruption and loss to the child of being removed from his or her primary caretaker.[2] In other words, the "best interest" test in this context actually requires two steps: (i) will the move cause detriment to the child's health or welfare and, if so, (ii) is a transfer to the care of the non-custodial parent essential because the harms of that change will be less severe than the harms imposed by moving with the current custodial parent?[3] Only if this two-part test is applied can a court adequately assess the child's best interest when relocation is at issue.[4]

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[2] The Court also imposed a good faith requirement on a custodial parent's access to the statutory presumption. This aspect of the decision, which was not found in the statute itself, has proven more problematic than it appeared. *See* discussion of cases below.

[3] The policies favoring stability and continuity in child custody arrangements impose a significantly heightened burden of proof in these cases. *See* the discussions of the primary caretaker presumption and claim preclusion below.

[4] In the Court of Appeal and his Petition for Review, Mr. LaMusga argued that these authorities do not control the case. *See In re Marriage of LaMusga*, 2002 Cal. App. LEXIS 1027 at *13 (1st Dist. 2002). In his Opening Brief on the Merits at 37, however, he returned to his position at trial and conceded their application. Finally, in his Reply Brief, he changed position once more and argued that, correctly interpreted, they impose no presumption. Although we believe that the concession in his opening brief renders review by this Court unnecessary, we realize that appellate courts in many states have

In the seven years since *Burgess* was decided, the courts below have permitted some relocations, and have restrained others, in accord with the statutory command:

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

The goal of this brief is to evaluate *Burgess* by placing these cases in context and analyzing their strengths and weaknesses. We begin with a table that summarizes the post-*Burgess* decisions by the Court of Appeal that consider whether relocation should be permitted.[5] Taken together, the cases make clear that assertions by Mr. LaMusga[6] and others[7] that *Burgess* has created a "bright line" rule that forces courts to permit relocation without regard to the children's welfare are simply inaccurate.[8]

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found it worthwhile to reiterate their relocation decisions only a few years after they were entered. *See* Carol S. Bruch & Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 FAM. L. Q. 245, 247 (1996). For the following reasons, we recommend that the Court adopt this course and use this opportunity to reaffirm the basic tenets of *Burgess'* statutory interpretation. We also recommend that the Court refine certain aspects of *Burgess* and of *Montenegro v. Diaz,* 26 Cal.4th 249, 258 (2001), that have been misused to weaken or avoid § 7501. *See* the discussions below of claim preclusion and good faith.

[5] Appendix A provides a more detailed table that distinguishes affirmances and reversals of trial court decisions. It also explains how both tables were constructed and provides case citations for each entry. Finally, it distinguishes the unreported cases, first made available on October 1, 2001, from the unreported cases that are imputed for the remainder of the post-*Burgess* period.

[6] To enhance clarity, we will refer to the parties by the names they currently use – Mr. LaMusga and Ms. Navarro.

[7] *See, e.g., In re Marriage of Bryant*, 91 Cal. App.4th 789, 797 (2001) (Yegan, J. dissenting).

[8] More specifically, Mr. LaMusga argues that denials only occur in cases lacking good faith. The relevance of a custodial parent's good faith is discussed below. His rendering of the majority opinion in *In re Marriage of Bryant*, 91 Cal. App. 4th at 793,

California Appellate Relocation Decisions

April 16, 1996 - April 1, 2003

Category	Pro-Relocation	Anti-Relocation	Split
Reported	9	3	1
Unreported	25	25	1
Total	34	28	2
%	53	44	3

As these figures reveal, an accurate picture of the degree to which relocations are denied under § 7501 and *Burgess* requires attention to the unreported cases. Yet even this measure fails to reflect trial court decisions that were never appealed, some of which are recounted in appeals from later relocation disputes in the same cases.[9] Indeed, these numbers

however, is deceptive. He employs inaccurate bracketed material to introduce the quoted language and states that the court looked only to the question of bad faith; having determined that there was none, her then asserts that the court failed to make any inquiry into the most important matter – the best interests of the children. In fact, the language he quotes appears only after a page-long discussion of the children's best interests, including testimony on the impact of a custody transfer versus a relocation with their custodial parent. Similar misstatements occur in many other parts of Mr. LaMusga's papers in this Court. As the purpose of this brief is to express our views concerning the important legal issues in the case, we have not attempted to call the Court's attention to each such inaccuracy. Because their cumulative effect muddies the waters and creates the possibility of confusion as to the issues actually presented, however, we encourage the Court to give the record in this case particularly close scrutiny.

[9] *See In re Marriage of Mildred*, 2002 Cal. App. LEXIS 8226 (1st Dist. 2002); *In re Marriage of Leitke*, 2001 Cal. App. LEXIS 15459 (4th Dist. 2001). Indeed, Mr. LaMusga says that this was such a case – that the trial court restrained Ms. Navarro's proposed move to Ohio in 1996. (Respondent's Reply Brief at 5.) Ms. Navarro, in contrast, says that she voluntarily abandoned her request in light of the evaluator's opinion that the children's relationship with their father would be endangered by a move at that time due to their young ages (2 and 4). (Appellant's Answer Brief at 19.) This is a matter of some import, as Mr. LaMusga claims that Ms. Navarro has done nothing to

suggest a contrary concern – that the trial and appellate courts may be too quick to restrain moves. Given the importance to children of stability and continuity in their closest relationship and the controlling statutory language (which requires a showing of prejudice to defeat a move), we would have expected the § 7501 test authorizing restraints to be met only infrequently.

Courts, counsel and parties all benefit when the legislature and this Court clarify how hard choices must be made. That is what this Court did in its *Burgess* opinion, and this case presents the Court with an opportunity to assess the impact of its decision.

Of course, counsel cite the facts and published cases that advance their clients' causes. As scholars, our interests are different. We, like the Court, are concerned with the overall development of the law. As a result, the resolution of this particular case is most important to us because of the place it will take in that larger context. Although the posture of this case prompts us to address certain case-specific procedural issues, the bulk of the brief addresses broad questions of statutory construction and the social policies underlying *Burgess*.

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support his relationship with the children since 1996, and Ms. Navarro asserts that, among other things, she voluntarily abandoned her move for 5 years (3 years longer than the evaluator, Dr. Stahl, suggested) in order to support the relationship. (AA 224.) We read the trial court's opinion of December 23, 1996 as supporting her version of the facts. (*See* AA 82-85.) The court enters no order concerning relocation – indeed, it makes no mention at all of the issue – certainly an odd occurrence at best if there had been a pending relocation request before it. Instead, the court deals exclusively with custody and visitation, and the schedule it announces clearly contemplates that the parties will be living near one another. (AA 83.) Mr. LaMusga may also be inaccurate when he states that Ms. Navarro's October 22, 1996 pre-trial declaration proves that she did not voluntarily remain in California. (*See* RRB 5.) Her declaration focuses not on relocation, but rather on what she sees as Mr. LaMusga's insensitivity and on Dr. Stahl's recommendations concerning the possible visitation schedule. (*See* AA 47-57.) Even if she did still contemplate relocation in October, however, she apparently had abandoned the idea before the case was submitted to the court in November. (*See* AA 75-80, 82-85.)

Accordingly, after summarizing the facts, we set forth generally-controlling doctrines, then address the entire body of available post-*Burgess* case law. Our goal is to identify issues, including some that the parties have not addressed and some that are not presented by this case, which deserve the Court's attention as it crafts its opinion.

FACTS OF THE CASE[10]

When Mr. LaMusga and Ms. Navarro ended their marriage, they were the parents of two young boys, aged 2 and 4.[11] Ms. Navarro planned to move to Ohio, where her sister's family lived, to attend law school.[12] Mr. LaMusga opposed the move, and the evaluator, a psychologist, Dr. Stahl, performed the custody evaluation.[13] Mr. LaMusga blamed Ms. Navarro for the poor relationships he already had with each of his children, which included a teenaged daughter from a previous marriage, but the evaluator questioned his perceptions.[14] Dr. Stahl recommended against the relocation because he felt the children were too young

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[10] We merely summarize the facts here; fuller details with appropriate citations can be found in Ms. Navarro's Answer Brief at 17-36; we do not, however, rely on Mr. LaMusga's statements and citations to the record, as they are frequently inaccurate.

[11] AA 1.

[12] AA 224.

[13] AA 37-41, 378-95.

[14] AA 388-90: "Thus, while he frequently blamed Ms. [Navarro] for creating certain problems, he lacks his own awareness of how to deal with the boys' questions and feelings. . . . In fact, it is this examiner's observation that his projection of blame onto Ms. [Navarro for alienating [his teen-aged daughter from a prior marriage] against him is just that; *i.e.*, blaming her for alienating [his daughter] when he, in fact, is feeling guilty at detaching from [her]."

to hold on to their relationship with their father absent frequent visitation.[15] He suggested reviewing the situation in two years.[16] Ms. Navarro gave up her law school aspirations as a result of the evaluation. She also placed the children in therapy because of their difficulties with visitation and sought Mr. LaMusga's participation or cooperation in that regard.[17] Mr. LaMusga, however, refused any involvement because he feared the psychiatrist (a physician) might later provide testimony that would be disadvantageous to him.[18] Although the final custody order that was entered in December 1996 contained no travel restriction, Ms. Navarro waited more than four years before again requesting permission to move to Ohio.[19] During that period, she and Mr. LaMusga each obtained mental health counseling.[20] They also each remarried and Mr. LaMusga's new wife brought a daughter who was slightly older than Mr. LaMusga's boys to their household,[21] while the Navarros had a baby daughter in 1999.[22]

Four years after the 1996 custody dispute and the initial move request, Mr. LaMusga's

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[15] AA 394: "It is this examiner's opinion that it is important to establish a greater attachment between the boys and [Mr. LaMusga] and to stabilize that relationship prior to a move."

[16] AA 395.

[17] AA 49:16-18.

[18] AA 65:5-6: "I have a continuing concern that Dr. Gelber will be in the position of becoming an adverse witness in the child custody proceedings."

[19] *See* Ms. Navarro's Order to Show Cause filed February 13, 2001 (AA 132-36).

[20] AA 379; RT 73:17-23.

[21] AA 401.

[22] AA 227:12-14.

relationship with the boys was still very problematic.[23] In March 2000, the boys were enrolled in therapy with Barry Tuggle, MFT, at the recommendation of Garrett's teacher.[24] Mr. LaMusga began participating in the children's therapy in June 2000.[25] In December 2000, Ms. Navarro's second husband obtained an inviting job offer in Ohio, and she once again sought to move.[26] Mr. LaMusga objected. He argued that *Burgess* and § 7501 did not apply because Ms. Navarro's request was purportedly made in bad faith, which, he said, was demonstrated by her denigration of him and by her five-year-long campaign to alienate the children from him.[27] The trial court found neither denigration nor alienation,[28] but concluded that Ms. Navarro was unable to promote Mr. LaMusga's relationship with the boys because

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[23] In his February, 2001 report, Dr. Stahl described Mr. LaMusga's problems with the boys: "Mr. LaMusga is somewhat self-centered and doesn't seem to deal with the boys' feelings that well. . . . He would certainly like to have a better relationship with them, and is working positively on this in the therapy with the boys. Nonetheless, given all of the current circumstances, he is a bit detached from them and has a hard time interacting with them when they are with him, even though he tries reasonably well." AA 403.

[24] AA 225. Mr. Tuggle, who holds a masters degree, is mistakenly referred to as Dr. Tuggle throughout the record.

[25] *Id*.

[26] As the Court of Appeal correctly noted, Ms. Navarro was not required to seek the court's prior approval. *In re Marriage of LaMusga*, *supra*, at *9-10. Had she simply moved and brought a motion to modify the visitation schedule, that would have been sufficient. *See* Slip Opinion at 5-6. *See In re Marriage of Whealon,* 53 Cal. App.4th 132 (1997); *In re Marriage of Condon,* 62 Cal. App.4th 533 (1998).

[27] *See* Respondent's Petition for Review at 27; *see also id*. at 2, 7-9.

[28] The court believed that Ms. Navarro was solicitous of the boys when they complained about their father, but found neither affirmative acts of alienation as alleged by Mr. LaMusga nor "unconscious" alienation as suggested by Dr. Stahl. RT 107:23-24, 106:6-11.

she no longer believed it was in their best interests.[29] It found that the children were reacting to the conflict between their parents and termed the situation "alignment."[30] The court declined to apply § 7501, not because of bad faith, but rather because the parents were not cooperating and because there was a pending motion to modify the visitation order before the court.[31] Neither of these exceptions appears in the statute or in *Burgess*. The court stated, however, that if the presumption had applied, Ms. Navarro's move would have been authorized, and that it would have been possible to alleviate Mr. LaMusga's concerns.[32] Since the court assumed that the presumption did not apply, however, it refused the relocation upon a finding that it would probably terminate the boys' relationship with their father and would therefore be detrimental to their best interest and contrary to the statutory language concerning frequent and continuing contact.[33] It then ordered a custody transfer to Mr. LaMusga, to be reviewed in a year, if Ms. Navarro moved to Ohio.[34]

The Court of Appeal held that § 7501 as interpreted by *Burgess* should have been applied.[35] It concluded that the trial court's newly-crafted exceptions to the presumption

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[29] RT 107:17-20.

[30] RT 106:18-21.

[31] RT 106:1-3.

[32] RT 106:22-27.

[33] RT 108:4-5, 9-14.

[34] It termed this a "temporary custody order without a requirement of showing changed circumstances to effect the modification." RT 109:7-9

[35] *LaMusga*, *supra*, at **10-14.

were improper.[36] Further, in its view no substantial evidence supported the trial court's finding that the boys would lose their relationship with their father if they moved.[37] The appellate court reversed the decision and returned the case to the trial court for a new trial under the proper legal standards. In the meantime, when his daughter was 15-months-old, Mr. Navarro had accepted the job in Ohio in the hope that his household would be permitted to follow him. After a year, with the relocation question still unresolved, he quit the Ohio job and returned to his family and took a new position in the Bay Area at sharply reduced pay. This appeal followed. After the Court accepted review, Mr. Navarro received a new offer for a much more highly paid position in Phoenix.[38] Ms. Navarro's request that she be permitted to abandon this appeal was denied, and her request that the trial court authorize the children's relocation to Arizona was stayed pending this Court's decision.

DISCUSSION

We begin our discussion with issues of statutory construction and questions of appellate review that appear in this case but are not peculiar to relocation law. Their analysis therefore requires recourse to other, more general legal sources.

I. AS A MATTER OF SUBSTANTIVE LAW, FAMILY CODE § 7501 SHOULD BE INTERPRETED AS CREATING A PRESUMPTION STRONGLY FAVORING THE CUSTODIAL PARENT'S RIGHT TO RELOCATE WITHOUT FORFEITING CUSTODY

The parties' legal strategies are clear but conflicting. Ms. Navarro outlines the distinct analytical steps contained in § 7501 (as interpreted by *Burgess*) and asks the Court to apply

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[36] *Id*. at **18-21.

[37] *Id.* at **21-22

[38] AAB:16.

them to permit her move. Mr. LaMusga treats *Burgess* largely as a common law pronouncement that the Court may now revise or abandon at will.[39] His arguments therefore minimize the importance of Family Code § 7501. In fact, rules of statutory interpretation dictated the result in Burgess and do so again in this case.

A. The Statutory Text of Family Code § 7501 Clearly Recognizes a Presumption Favoring the Custodial Parent's Relocation Decision and Assigns a Heavy Burden to the Party Asking the Court to Modify Custody Due to the Relocation.

In *Burgess*, the Court reasoned that the controlling code provision provides a presumption which protects a custodial parent's relocation decision unless prejudice (detriment) to the children is shown. This reading honors the plain language of the statute, which first states the generally controlling principle (the right of a custodial parent to determine the children's place of residence), then concludes with a proviso that grants a court the power to impose an exception when necessary to protect the children from "prejudice."

Mr. LaMusga's argument that the section imposes no such presumption and no accompanying burden of proof is unpersuasive. It is inconsistent with both the structure of the sentence and the customs of drafting. If, as he asserts, the legislature had intended that courts apply an unadorned "best interests" test when parents disagree about their children's place of residence, the statutory language would have been quite different.[40] If that had been

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[39] He first discusses § 7501 in his Opening Brief, and first advances his proposed interpretation of the statute (which would do away with any presumption that a custodial parent's decision serves the children's best interest) late in his Reply Brief.

[40] The best interest test is implemented by a number of rubrics that provide guidance to courts for the specific custody questions they must address. Among these are the primary caretaker presumption, the changed circumstances rule, and the § 7501 presumption favoring a custodial parent's relocation decision, each of which is relevant to this case. Mr. LaMusga seeks application of the standard for initial custody cases in

the legislature's intention, it would naturally have resorted to language such as, "A court may authorize a parent with custody of a child to change the residence of the child if to do so will serve the best interests of the child."[41] Or, if a minimal burden of persuasion had been intended to fall on the noncustodial parent, the language might have read, "A court may enjoin a change in the residence of a child upon a showing that the move would be contrary to the best interests of the child."

Neither of these techniques appears in § 7501. Instead, the statute begins with strong language that grants the custodial parent a "right" to make the relocation decision. Only if this decision would "prejudice" the child (again a use of strong language) does the statute permit a court to override it – *i.e.*, weighty grounds must be shown to displace the custodial parent's relocation decision. Three legal techniques are available to implement this legislative mandate: (i) articulating a presumption to favor the protected behavior, (ii) placing an appropriate burden of proof on the party seeking to defeat that behavior, and (iii) defining the substantive standard rigorously enough to ensure that the legislative scheme will be honored. The Court in *Burgess* used each of the three techniques.

It began by considering what must happen to a child who is not permitted to relocate with the custodial parent. Since the custodial parent has a personal right to travel, restraints on that person would be constitutionally impermissible. Realistically, then, a court would

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which there is no primary caretaker; this is also known as the de novo standard. In this case, the Court of Appeal properly noted the trial court's application of an incorrect rubric: "[A]lthough the court referred several times during the hearing to 'best interest' as the applicable standard, its order was not truly based on that criterion as it applies in the context of this custodial parent's relocation." *LaMusga*, *supra*, at *13.

[41] This language would have placed the burden on a custodial parent to justify a move and imposed no burden on the parent opposing the move.

have to consider transferring the child's custody to the parent who opposed the move.[42] But this, too, would force a relocation of the child, albeit not the one the custodial parent planned. Instead, this alternative would entail a twofold dislocation – both from the former home and also from the child's household relationships.[43] To determine when this alternative would serve the child's welfare, as noted above, the *Burgess* Court applied the existing "best interest" rubric for custody transfers.

Accordingly, a non-custodial parent who seeks to prevent the relocation of a child with its custodial parent must be prepared to prove that "the child will suffer detriment rendering it 'essential or expedient for the welfare of the child that there be a change.' . . . The dispositive issue is . . . whether a *change in custody* is 'essential or expedient for the welfare of the child.'"[44] Under *Burgess* and in accordance with the well-established law of this state, "the interests of a minor child in the continuity and permanency of custodial placement with the primary caretaker will most often prevail," subject to the child's needs

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[42] Family Code §§ 3040-41 impose an order of preference for custody that favors parents over third parties.

[43] Although relocation with the custodial parent would require changes in the child's home and possible changes in the manner or scheduling of the child's contact with the non-custodial parent; it would preserve the child's household. In addition, either relocation (with the custodial parent's household or to the non-custodial parent's household) is likely to entail changes in schools and neighborhoods. These shifts, although often uncomfortable, are common challenges for children throughout society. Because they affect children far less profoundly than do changes in their intimate relationships, they are properly discounted as make-weights when they are asserted as grounds for transferring custody from one parent to another. An exception may apply as to older children, as articulated in *Burgess*, 13 Cal.4th at 39, and the *amici* brief of Dr. Wallerstein and her colleagues that discusses the mental health issues. *See generally* Fam. Code § 3042 (attention required to children's wishes).

[44] 13 Cal. 4th at 38 (emphasis in original).

and, if sufficiently mature, expressed preferences.[45]

As these sources make clear, the party seeking to displace the presumption bears a weighty burden of persuasion. Given the family law policies that are expressed in the section to protect the custodial household for the benefit of the children, this is as it should be. The burden and the Court's reading of § 7501 are consistent with the Evidence Code, which articulates the controlling rule.[46]

B. A Contextual Interpretation of Family Code § 7501 in Light of Civil Code § 3541 Also Favors Permitting the Custodial Parent to Relocate Without Forfeiting Custody; As a Practical Matter, a Contrary Interpretation Would Preclude Most Relocations and Thereby Violate Civil Code § 3541.

Burgess also comports with California Civil Code § 3541. This maxim of

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[45] *Id*. at 39; *In re Marriage of Carney*, 24 Cal. 3d 725, 730 (1979); CAL. FAM. CODE § 3042(a). Mr. LaMusga attempts to distinguish *Carney* by confounding geography with familial relationships. (RRB at 22.) Although this unfortunate technique is often employed at the trial court level, *Burgess* and *Carney* make clear that it is the relationship with the primary custodial parent, not "grass and trees" that are relevant to relocation law and custody law more generally. Indeed, *Carney*, in which the father had brought his young sons across the country to California as a de facto sole custodial parent, contains one of the most beautiful passages in the literature to explain what parenting can be: "[The essence of parenting] lies in the ethical, emotional, and intellectual guidance the parent gives to the child throughout his formative years, and often beyond." *Id.* at 739. In this case, it is abundantly clear that parenting in this sense occurs for these boys in their mother's household.

[46] *Id.* §§ 605, 660; *see also §* 500. *See* 7 Cal. Law Revision Com. Rep. 98-101 (1965); *see also id.* at 88-90. The § 7501 presumption is, of course, that a custodial parent's decision about where a child will live ordinarily serves the child's welfare. This is consistent with custody law more generally, which is predicated on a belief that decisions affecting children should be made by those who know them best and can be trusted to watch out for their welfare – their custodial parents. These family policies qualify, as do many others, for protection by a burden of persuasion, *i.e*., a requirement that someone who seeks to override a custodial parent's prerogatives must persuade a court by substantial proof that the step is essential or expedient for the child's welfare. Burgess, 13 Cal. 4th at 38. Indeed, that burden properly requires more than proof by a preponderance of the evidence when it strikes at the core of the custodial relationship, as it does whenever it seeks to remove a child from the care of its primary caretaker.

jurisprudence directs California courts to prefer an interpretation that gives effect to a provision over one that would render it void. Family Code § 7501 clearly intends that custodial parents be entitled to decide where their children will live in all but the most unusual circumstances; *Burgess* simply honors that rule. The revision urged by Mr. LaMusga would, contrary to this maxim, eviscerate section 7501 by divesting custodial parents of a realistic opportunity to determine where their children will reside.[47] As the Court noted in *Burgess*, almost any relocation requires adjustments to visitation schedules.[48] Section 7501 cannot have intended that these necessary consequences would prevent relocation. Nor was California's statutory direction encouraging "frequent and continuing contact" with both parents intended to curtail the scope of § 7501.[49] It is flexibly worded and easily honored in virtually any case. With increased travel opportunities, revised visitation schedules can maintain in-person contact for most families. Even when travel by children is inadvisable or impractical, non-custodial parents can do the traveling to the extent time, finances and motivation dictate. Between visits, contact is now possible in a multitude of

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[47] *See* the discussion below of the impact of delay, both as to costs and as to its ability to defeat many moves. *Accord* Amici Curiae Brief of Margaret Gannon *et al.* (discussing the implications for those in poverty).

[48] *Burgess,* 13 Cal. 4th at 40:

> Modifications of orders regarding contact and visitation may obviate the need for costly and time-consuming litigation to change custody, which may itself be detrimental to the welfare of minor children . . . . Similarly, a noncustodial parent's relocation far enough away to preclude the exercise of existing visitation rights can be ground for modifying a visitation order to allow for a different schedule for contact with the minor children, *e.g*., longer, but less frequent, visitation periods.

[49] Mr. LaMusga is mistaken when he speaks of the section as though it speaks only to visitation and when he suggests that it controls the relocation provisions of § 7501. *Burgess* discusses the statute and makes the point clear. 13 Cal. 4th at 34-35.

ways. Some are extremely inexpensive, and many now permit high quality personal interactions, as letters, telephone calls and faxes are supplemented by email, webcams and picture telephones. California appellate cases, like practice across the nation, already reveal how technology is being used to enhance parent-child contact across distance.[50]

C. The Extrinsic Legislative History Also Points to an Interpretation of Family Code § 7501 That Permits Custodial Parents to Relocate; the Legislature has Manifested Its Approval of *Burgess'* Construction of § 7501.

As this discussion reveals, *Burgess* was not grounded in this Court's perception of policy nor in its assessment of the social science literature, although it is, of course, reassuring that such factors support the soundness of the Court's reasoning. Rather, the result was driven by well-settled principles of statutory construction.[51] The Court applied these to interpret California Family Code § 7501 in light of contemporary terminology and practice.[52] In the seven years since *Burgess* was announced, the legislature has kept the section as it stood when the highly-publicized case was decided. In some cases, of course,

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[50] *See* Sarah Gottfried, *Virtual Visitation: The Wave of the Future in Communication Between Children and Non-Custodial Parents in Relocation Cases*, 36 FAM. L.Q. 475 (2002); *In re Marriage of Lasich*, 99 Cal. App.4th 702 (3rd Dist. 2002).

[51] *Burgess*, 13 Cal. 4th at 35 n.4 .

[52] Although it is not relevant in this case because Ms. Navarro has always had sole custody of her sons, *Burgess* explained who is a custodial parent for purposes of the section now that other custody forms are available. In light of the post-*Burgess* cases, we believe it would be helpful if the Court were to made clear that a parent who holds custody under an order or agreement using the term "primary physical custody" or any other language that assigns a majority of the time share to the parent, or in fact exercises such a majority, holds sole physical custody for the purposes of § 7501 and *Burgess*. *See* the discussion below of joint custody orders.

it can be dangerous to infer any intention from legislative inaction.[53] However, this is the exceptional case that involves a high profile issue. It is therefore sensible on these facts to infer legislative acquiescence from legislative silence, as did the *Burgess* Court.[54] The same principle of statutory construction supports the Court's incorporation of the established test for custody transfers in its interpretation of § 7501.[55]

D. Compelling Public Policy Considerations Also Support an Interpretation of Family Code § 7501 That Presumptively Allows Custodial Parents to Relocate Without Forfeiting Custody.

Construed in light of the context and extrinsic legislative history, § 7501 presumptively permits custodial parents to relocate. Even if there were any remaining doubt as to the proper interpretation of 7501, however, the relevant public policy considerations would dictate the resolution of that doubt in favor of recognizing a strong presumption.

As scholars in the family law field, we know that personal experience and deeply held beliefs affect an individual's views of family life and family relationships. We have all come from families, and we all have or hope to have close relationships with others. As a result, it is only natural that we should have views about what is good and natural, and what is

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[53] *Harris v Capital Growth Investors*, 52 Cal. 3d 1142 (1991) (citing *Troy Gold Industries v Occupational Health and Safety Appeals Bd*., 187 Cal. App. 3d 379, 391 n.6, 231 Cal. Rptr. 861, 868 (3rd Dist. 1986)).

[54] "Family Code section 7501 applies, on its face, to cases involving removal of a child by a parent entitled to custody. Moreover, since it was enacted in 1872, it has not been repealed or substantively amended, despite the fact that it has consistently been applied by our courts in move-away cases." *Burgess*,13 Cal. 4th at 35 n.4.

[55] This Supreme Court case law interprets a statutory command that custody be decided according to the child's best interest. *See* CAL. FAM. CODE § 3040; *In re Marriage of Carney*, 24 Cal. 3d 725, 157 Cal. Rptr. 383 (1979); *Burchard v. Garay*, 42 Cal. 3d 531, 229 Cal. Rptr. 800 (1986); *In re Marriage of Burgess*, 13 Cal. 4th 25, 51 Cal. Rptr. 2d 444 (1996).

troubled or destructive. Yet this tendency to transfer our own life experience to the lives of others can be dangerous. Particularly where the relationships of men and women and of parents and children are concerned, our personal views may interfere with our ability to recognize the diversity of the experiences and circumstances that shape the lives of others.[56]

These influences are particularly relevant to child custody law, including the matters at the heart of relocation choices. For the following reasons, we believe that the retrenchment Mr. LaMusga urges[57] would imperil a large and growing portion of this state's children.

First are the implications of their economic situations. As the *amici curiae* brief of Margaret Gannon *et al.* (discussing poverty issues) reveals, since *Burgess* many poor custodial parents have been able to move in order to improve their lives and those of their children.[58] They are able to relocate for family, economic, educational and safety reasons, free of strategic delays or costly litigation that could defeat their plans. If Mr. LaMusga's arguments prevail, however, most of these parents will simply be held in California because they are without means, even if they qualify for relocation on the merits.

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[56] Those whose views may be imposed on others guard against this danger, of course, through professional education and heightened awareness.

[57] Mr. LaMusga is, of course, concerned only with his own case. But, as always, a decision by this Court will control the cases of many others whose circumstances may be very different. *See* the letter briefs to the Court in this case and the Amici Briefs filed by California Women's Law Center *et al*. on behalf of many women's and children's organizations and Margaret Gannon *et al.* that discusses the concerns of poor Californians and victims of domestic violence.

[58] The decision in *Casady v. Signorelli*, 49 Cal. App.4th 55, 56 Cal. Reptr.2d 545 (1st Dist. 1996) (*Signorelli I*), provides unfortunate examples of judicial impatience and hostility when a welfare client attempts legal arguments *in propria persona*.

The practical impact of a rule that would require court hearings in relocation cases if any objection is raised is highlighted by a recent report from the blue-ribbon California Commission on Access to Justice. The Commission paints a stark portrait of the poverty that affects California's children. During the decade between 1990 and 2000, for example, the total number of people living in poverty in the United States jumped 30 %, with fully 24.5% of this nationwide increase occurring in Los Angeles County alone. Worse, California also accounts for 100% of the national increase in children living in poverty that has taken place since the late 1970s.[59] The result is that 19.5% of this state's children are poor, and fully 1 in 6 of this country's poor children live here.[60] In the households in which two out of three

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[59] California Commission on Access to Justice, The Path to Equal Justice: A Five-Year Status Report on Access to Justice in California (October 2002). These figures cannot be explained solely by unemployment figures and welfare rates, although California does have an unemployment rate (which peaked at 6.5% in March 2002) that exceeds the national average, and "the advent of welfare reform has transformed most legal aid clients into the working poor . . . ." *Id*. at 14-15. Poverty rates vary dramatically across the state; in March 2002, for example, Tulare Country had a poverty rate of 23.9%, the highest in the state. The federal poverty level for a family of three in 2002 was $15,020; those with no more than 125% of the federal poverty level ($18,775 for three people) were deemed "poor" and eligible for free legal services. Some funding sources allow legal assistance for families with two to three times the federal poverty level, known as "very low-income" and "low-income" households, respectively. *Id*. at 14-15 (confounding, however, standards of the U.S. Department of Housing and Urban Development and those of the U.S. Department of Health and Human Services).

[60] *Id.* at 9, *citing* California Budget Project, The State of Working California: Income Gains Remain Elusive for Many California Workers and Families 4 (2001), *available at* http://www.cbp.org/pubs2001.htm. A similar figure was reported by the National Center for Children in Poverty, "The Changing Face of Child Poverty in California" http://www.nccp.org/catext.html (2002 update) (18.6%). *See also id.,* Child Poverty in the States: Levels and Trends from 1979 to 1998 (http://www.nccp.org/cprb2txt.html) (23.3% of children in California are poor).

of this state's poor children live, at least one parent works for wages.[61]

They are not, however, the only children in California whose lives are financially difficult. The Commission reports that our state's widening gap between rich and poor and high cost of living place "many basic needs out of reach, [both for families below the state's median income line and] even for the middle class."[62]

Of course, the financial situation of the children in most, or even all, of these cases would be dramatically enhanced if their parents lived together. But that is not a matter of their own choosing, and courts generally do not attempt to punish a parent financially for deciding to live separately.[63]

The situation is much the same when it comes to children's relationships with their

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[61] National Center for Children in Poverty, The Changing Face of Child Poverty in California at 2 (2002 update). Some of these parents work part time. California Budget Project, *supra* note 60 at 11.

[62] California Budget Project, *supra* note 60 at 9. A glimpse into the costs of litigating relocation cases is provided by two of the unpublished cases. In *In re Marriage of Leitke*, 2001 Cal. App. LEXIS 459 (4th Dist. 2001), the attorney for the children was awarded $25,000 in fees that he was successful in characterizing as child support so that the obligation would survive the parents' planned bankruptcies. The couple had also incurred expenses for a "special master" in the case. *In re Marriage of Hawwa*, 2001 Cal. App. LEXIS 2186 (1st Dist. 2001), was a case with evidence of domestic violence and a trial court order transferring custody to the father unless the mother moved to his new community. Sixty thousand dollars of the mother's legal expenses remained outstanding (her total costs were not reported). In addition, although the court found that she had need and the father had the ability to pay, he was more than $11,000 in arrears on spousal support and more than $2,000 in arrears on other obligations. The contingent custody transfer was reversed on appeal, but the woman's financial claims were unsuccessful.

[63] Some relocation cases do, however, report facts indicating that the children and their custodial parents live in poverty while their non-custodial parents seem not to, and we assume that these disparities result from the courts' support orders. *See, e.g.*, the case concerning a court reporter described in the Amici Curiae Brief of Margaret Gannon *et al.*; *Hawwa, supra* (arrearages and spousal support discussion).

parents. We would wish for all children a home with two emotionally healthy parents who are readily available to them.[64] Unfortunately, that proposition does not assist courts in resolving the cases that are governed by Family Code section 7501 and *Burgess*. Nor does the social science literature cited by those who urged review in this case. The issue is not whether moving creates difficulties for children in intact or divided families. Of course it does. But as is quite clear, moving is what millions of American families do, and the question is what courts are to do when faced with this phenomenon. Similarly, the issue is not whether mothers and fathers are important to children. Of course they are. The question is whether a custodial parent – mother or father – who wishes to move with the children should be allowed to do so, and the studies cited fail to shed any light on this question.

II. AS A MATTER OF PROCEDURE, THE TRIAL JUDGE'S DECISION PROHIBITING RELOCATION CANNOT BE SUSTAINED BECAUSE THE RECORD BELOW IS DEVOID OF THE REQUISITE PROOF OF NEW CIRCUMSTANCES DEMONSTRATING THAT

[64] This, of course, is what counsel for the father in *In re Marriage of Bryant,* 91 Cal. App.4th 789 (2001), meant when he suggested that it would have been best for the children in that case if the parents had stayed married; his remarks are somewhat ironic, as it was his client who initiated the divorce, apparently despite Mrs. Bryant's wish to remain married. Just as Mrs. Bryant and the court did not have the power to give the Bryant children the home life they might have wished (the "best" choice), the court did not have the power under § 7501 to give the children what the judges individually deemed the "best" result – forcing Mrs. Bryant to remain a satellite to her former husband while suffering his rejection without the support of her family. It is worthy of note that the *Bryant* appellate court failed to appreciate that what it saw as the "best choice" was equally as unrealistic as the wish that the Bryants had remained happily married. Although "the best choice" can never be accomplished for children whose parents do not share a loving home, the least detrimental alternative can be provided under § 7501; *see* the explanatory discussion in the *Amici Curiae* Brief of Dr. Wallerstein and her colleagues. Below we address the gender implications of Mr. LaMusga's insistence that it is proper for courts to "coerce" his former wife to place his desires ahead of the needs of her current husband and their young child. The tragedy of his position in this case is that it has already deprived Mr. and Ms. Navarro's young child, Aisling, of a good life in a household with two emotionally available parents, for the important second year of her life, an option that may never have been available to the LaMusga children.

CHANGING CUSTODY IS ESSENTIAL TO THE CHILDREN'S WELFARE.

The parties disagree about the standards that control this case on appeal. Mr. LaMusga argues that the trial court's decision to prohibit the children's relocation was within its discretion and that, even if it made errors of law, the doctrine of implied findings permits an appellate court to affirm the trial court's judgment on grounds other than those the court articulated. Ms. Navarro notes that courts are less deferential to custody decisions that order a change of custody (as in this case). She also argues that the doctrine of implied findings is inapplicable to this case because it cannot be used to contradict a trial court's express findings. For the following reasons, we conclude that Ms. Navarro is correct on both of these points, and that there are additional reasons as well that defeat Mr. LaMusga's arguments.

A. Although the Trial Judge Possessed the Power to Modify the Child Custody Order, He Applied the Wrong Legal Standard When He Failed to Insist That the Party Resisting Relocation Establish New Circumstances Demonstrating That a Change in Custody Was Essential to the Children's Welfare.

Although inter-parental child custody orders are always modifiable,[65] they can be modified only in certain circumstances, and these limitations are of central importance to relocation litigation. Several applications of the best interest test (termed "rubrics" here) articulate how and when modifications are authorized. The overarching rubric in this context provides that stability and continuity in child custody arrangements serve the children's best interests. This principle finds expression, for example, in the primary caretaker presumption

[65] Indeed, the parties have no power to agree otherwise. CALIFORNIA FAMILY CODE, Division 8 (Custody of Children), Part 2 (Right to Custody of Minor Child), Chapter 1 (General Provisions) § 3022 provides, "The court may, during the pendency of a proceeding or at any time thereafter, make an order for the custody of a child during minority that seems necessary or proper."

(which presumes that children's best interests will be served by the continuation of a custodial relationship acquired de facto or by a temporary custody order) and the changed circumstance doctrine (which protects custody established under a permanent order by permitting modification only on a showing of a significant change in circumstances).

In the relocation context, § 7501 (which also maintains the stability of a child's custodial household) operates in tandem with these more general rubrics – one that applies when there is a temporary order or no order at all (the primary caretaker presumption) and one that applies when there is instead a "permanent" order (the changed circumstance rule).

This nomenclature requires that temporary and permanent orders be distinguished so that the proper best-interest rubric can be applied. In fact, of course, because courts have continuing jurisdiction to consider modification requests as a matter of law, there is no point at which parties or the court can state definitively whether an order will control the case for the remainder of the children's minority,[66] and the term "permanent order" is therefore not entirely apt. It is, however, sometimes used to distinguish temporary (*pendente lite*) custody orders[67] from those that conclude the current litigation but remain subject to possible future

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[66] The same principles and terminology apply to child support orders. Spousal support orders, in contrast, are normally modifiable, but the parties may agree otherwise. Truly final custody orders (in the sense that they are nonmodifiable) do, however exist. They establish paternity (Fam. Code §§ 7500 *et seq*.), terminate parental rights (§§ 7660 *et seq*.), and declare an adoption (§§ 8500 *et seq*.).

[67] Chapter 3 of the Family Code is titled "Temporary Custody Order During Pendency of Proceeding." The first provision in the Chapter, § 3060, provides, "A petition for a temporary custody order . . . may be included with the initial filing of the petition or action or may be filed at any time after the initial filing." As the chapter title indicates, temporary orders control during the pendency of proceedings. It is, then, not surprising that the annotations to Chapter 3 speak exclusively of *pendente lite* orders and never of final orders. *Pendente lite* orders, in the context of custody litigation, refer to orders pending a scheduled or planned hearing on a specific custody issue currently being

modification (permanent orders).[68] In practice, courts rarely refer to the modifiable custody orders they enter pursuant to stipulation or following a hearing as either "permanent" or "final." To the contrary, it is the term "temporary" (or *pendente lite*) that is always stated expressly. Where that language does not appear, orders are automatically deemed permanent. This practice is reflected throughout the California Judicial Council's forms. These forms, which can be found on the Council's self-help website,[69] provide a means to request a temporary order, but no box, blank or form that requests a permanent (or final) order. Indeed, it is the *absence* of a request for a temporary order[70] and, sometimes, the phrase "until further order of the court" or "order []after/following the hearing" that are the sole means to request the entry of permanent orders.[71] The same pattern appears in the Continuing Education of the Bar's practice book.[72] As these sources reveal, *Montenegro v.*

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litigated. *Accord* Black's Law Dictionary, *pendente lite* (7th ed.1999).

[68] *See* CAL. FAM. CODE §§ 215 (notice in modification proceedings), 3042 (definition of "child custody determination" for purposes of the Uniform Child Custody Jurisdiction and Enforcement Act), 3118(1) (evaluations of child abuse allegations), 3120 (pleadings supporting mediation).

[69] www.courtinfo.ca.gov/selfhelp, setting forth forms as revised January 1, 2003.

[70] Sometimes a temporary order may be sought by language requesting an order "until the hearing." *See id*., Form FL-311.

[71] *Compare, e.g*., Judicial Council Forms FL-300, -301, -305, -310 (may, but need not, specify pending hearing), -311 (may, but need not, specify pending hearing; may specify "after the hearing"), and -341 (may specify that attachment is to "findings and order after hearing," "judgment" or "other;" boxes permit the choices of an order of "reasonable right of visitation," "as set forth in [an] attached custody and visitation agreement," or "pending further order of the court;" the words "permanent" or "final" do not appear).

[72] CALIFORNIA CONTINUING EDUCATION OF THE BAR (CEB), CALIFORNIA MARITAL SETTLEMENT AND OTHER FAMILY LAW AGREEMENTS (as updated March 2002), § 3.22 states, "Child custody and visitation orders may be modified at any time during the

Diaz[73] and In re *Marriage of Rose and Richardson*[74] (which hold that stipulated orders and orders following trial that are not expressly final or permanent do not require application of the changed circumstances doctrine) are based on an unfortunate misunderstanding of this important feature of California child custody practice.[75]

Professor Sharp explains why modification is an integral feature of inter-parental custody orders and why it is essential that requests for modification be tested by the changed circumstances doctrine:

> First, all states agree that parties may not deprive courts of the power to provide for the welfare of children; a court may always reject, in whole or in part, the custodial provisions of a negotiated settlement. . . . Second, it is elemental that courts have continuing jurisdiction over matters affecting children, and therefore they may always modify the custodial provisions of a

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minority of the child. The parties may not agree to deprive the court of its authority to modify such orders. *However, in the absence of further agreement of the parties, a final custody determination reached by stipulation may be modified by the court only on a showing of changed circumstances* (emphasis added; citations omitted)." See also the suggested language for counseling and for mediation of future disputes, which are intended for use in lieu of or in conjunction with future modification actions, should they occur. *Id.* at §§ 6.18-6.19. These models do not imply that issues are currently in dispute. Instead they are similar in nature to a contractual arbitration clause. Just as an arbitration clause does not render a contract temporary or provisional, counseling and mediation provisions do not render the settlement agreement in which they occur temporary.

[73] 26 Cal. 4th 249 (holding that only orders that are expressly final or permanent are protected by the changed circumstances doctrine).

[74] 102 Cal. App.4th 941, 126 Cal. Rptr.2d 45 (2d Dist. 2002). The settlement agreement in *Rose* appears to be taken directly from the model for final orders provided in the CEB practice book, *supra* note 72.

[75] *Montenegro* departs from this Court's previous formulations of the changed circumstances rule. *Compare Burchard*, which states that the changed circumstance rule applies "whenever custody has been established by judicial decree" (42 Cal. 3d at 535) *with Montenegro*'s reformulation: "In *Burchard*, we held that the changed circumstance rule applies 'whenever *[final]* custody has been established by judicial decree.'" 26 Cal. 4th at __, citing 42 Cal. 3d at 535 (emphasis added).

> decree.[76] . . . [T]his power is frequently exercised[77] [but modification] is generally conditioned . . . on the moving party's demonstration of a "change of circumstance" or a "substantial change in condition' affecting the child since the entry of the decree.[78]

In *Burchard v. Garay*, this Court explained California's changed circumstances rule and its relationship to the best interest test:

> The changed-circumstances rule is not a different test, devised to supplant the statutory [best interest] test, but an adjunct to the best-interest test. It provides, in essence, that once it has been established that a particular custodial arrangement is in the best interests of the child, the court need not reexamine that question.[79] Instead it should preserve the established mode of custody unless some *significant* change in circumstances indicates that a different arrangement would be in the child's best interests. *The rule thus fosters the dual goals of judicial economy and protecting stable custody arrangements*.[80]

Indeed, as *Burgess* explains, "The showing required is substantial. . . . [A] child should not be removed from prior custody of one parent and given to the other 'unless the material facts and circumstances occurring subsequently are of a kind to rend it *essential or expedient* for

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[76] *See* CAL. FAM. CODE § 3088 (jurisdiction to modify).

[77] Sally Burnett Sharp, *Modification of Agreement-Based Custody Decrees: Unitary or Dual Standard?* 68 VA. L. REV. 1263, 1264 (1982).

[78] *Id*. at 1264; *Gantner v. Gantner,* 39 Cal. 2d 272, 276, 246 P.2d 923, 927 (1952) (Traynor, J.). *See also In re Marriage of McLoren*, 202 Cal. App.3d 108, 111 (2nd Dist. 1988) (applying the changed circumstance rule to a change in the legal custody designation alone).

[79] This is, of course, an application of claim and issue preclusion (res judicata and collateral estoppel).

[80] *Burchard v. Garay*, 42 Cal. 3d 531, 535 (1986) (emphasis added). The first goal (judicial economy) is expressed in California's doctrine of claim preclusion. It also protects custodial households from the emotional and financial costs of frivolous litigation.

the welfare of the child that there be a change.'"[81] Absent these showings, any modification constitutes an abuse of discretion and, hence, reversible error.[82]

The changed circumstance doctrine properly applies to cases like this one, where there has been a prior custody determination. Ms. Navarro, who has been the children's primary caretaker since they were born, has held a sole custody order since the initial custody trial in 1996.[83] Mr. LaMusga omits this permanent order from his Statement of the Case in his Opening Brief,[84] however, and argues in his Reply Brief that there has never been a "final judicial custody determination" in this case.[85] This argument, which seeks to avoid the changed circumstances doctrine, requires a retroactive application of *Montenegro*.[86] It relies in part on *Montenegro*'s unfortunate suggestion that subsequent modifications (in this case

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[81] *Burgess*, 13 Cal. 4th at 38 (emphasis added).

[82] *Peters v. Masdeo*, 203 Cal. App. LEXIS 782 (4th Dist. 2003).

[83] AA 82. Because this case was actually litigated and the court's order was in no sense temporary, *Montenegro* should not apply. The December 23, 1996 custody order, which was entered after trial, does not use the words "temporary" or "*pendente lite*." Although the order also does not use the words "final" or "permanent," for the reasons explained in the text, this formulation is typical of permanent custody orders. We urge the court to clarify *Montenegro* by holding in this case that custody orders following a hearing that lack the words "temporary" or "pendente lite" may not be characterized as temporary for purposes of the changed circumstances rule.

[84] Respondent's Opening Brief at 6.

[85] Respondent's Reply Brief at 26-27.

[86] Similarly incorrect is his suggestion that Ms. Navarro "seem[s] to agree" that a de novo best interest test (*i.e.*, a test in which no presumptions apply) controls this case. The rubric he suggests applies to initial custody disputes that involve neither a prior custody determination nor a primary caretaker. There can be no doubt that Ms. Navarro disagrees, as her brief discusses these two doctrines extensively.

a series of minor alterations in the details of holiday and visitation schedules [87]) are relevant to the question of whether the December 23, 1996 order was permanent when it was entered. This approach encourages non-custodial parents to churn litigation in order to avoid the changed circumstances doctrine – a result that needlessly undercuts judicial economy and the stability of custody orders.[88]

The consequences of Mr. LaMusga's reading of *Montenegro* are grave, as orders that were clearly understood to be permanent when they were entered may now, years later, be re-characterized as temporary. (This *ex post facto* rule affects all custody litigation, of course, not only relocation cases.) Further, an independent development in relocation disputes related to *Montenegro* and *Rose and Richardson* deserves the court's attention.

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[87] In none of these motions was Ms. Navarro's sole custody at issue. Each action after entry of the initial permanent order of December 23, 1996 sought a revised new permanent order; none was an order *pendente lite*. The only temporary order in this case was the November 14, 1996 order that provided for the forthcoming school holidays pending entry of the final order.

[88] Even where there is no permanent order and, thus, the changed circumstances doctrine does not apply, the primary caretaker presumption protects primary caretakers like Ms. Navarro. *Burchard* explains its operation:

> [I]n view of the child's interest in stable custodial and emotional ties, custody lawfully acquired and maintained for a significant period will have the effect of compelling the non-custodial parent to assume the burden of persuading the trier of fact that a change is in the child's best interest. That effect, however, is different from the changed circumstance rule, which not only changes the burden of persuasion but also limits the evidence cognizable by the court. . . . In most cases, of course, the changed-circumstance rule and the best-interest test produce the same result.

Burchard, 42 Cal. 3d at 536-38. *Accord*, *Carney, supra; Burgess*, 13 Cal. 4th at 37-38. In this setting there are no determined preexisting circumstances to compare to new circumstances. Courts therefore have "no alternative but to look at all the circumstances bearing upon the best interests of the child." *Burchard*, *supra*, at 534.

Although *Burgess* applied § 7501 to protect the decision of a woman with sole custody under a *pendente lite* (i.e., temporary) custody order, that holding is now in jeopardy due to a misapplication of *Montenegro*. *Montenegro* recognized settled law when it held that temporary orders do not implicate the changed circumstances doctrine.[89] This aspect of *Montenegro* was, then, no different than the law when *Burgess* was decided. Yet *Montenegro* has now been cited to justify an order restraining the holder of a temporary sole custody order from relocating pending a custody evaluation. This is, of course, both an incorrect reading of *Montenegro*, however the case is interpreted, and directly contrary to *Burgess*.[90] *Montengro* is, therefore, irrelevant to the *Burgess* Court's analysis.

This does not mean that California courts are without power to adjudicate the merits of a child custody dispute in relocation cases. To the contrary, if the custody litigation was filed in California while the child lived here or within six months after it left, California is the only state that has jurisdiction to enter a child custody order in the case – whether an initial or a modification order.[91] Further, that jurisdiction continues and usually is exclusive so long as one parent remains here.[92] Accordingly, it is California's courts that will deal with

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[89] Our concern with *Montenegro* is not with this proposition, but rather with how the case identifies which orders are temporary.

[90] The changed circumstance doctrine has remained unchanged so far as *pendente lite* orders are concerned – it does not apply. The area of uncertainty concerns whether the changed circumstances doctrine no longer applies to orders that were considered permanent until re-characterized as temporary by *Montenegro*.

[91] Fam. Code § 3421(a)(1); *see also* § 3402 (e).

[92] *Id.* § 3422. The exceptions include emergencies (when sister state courts are permitted to enter temporary orders) and cases in which there has been no contact between the child and California for a period of several years or the California court has declined to exercise jurisdiction on the basis of forum non conveniens.

post-relocation custody and visitation matters following relocation, and our courts' orders will be respected and enforced elsewhere.

As *Burgess* recognized, a rule that would require custodial parents to litigate before moving would permit non-custodial parents to frustrate moves by the mere strategy of stalling, as opportunities for education or employment may be lost if they cannot be taken up immediately. The Court's concern in *Burgess* was prescient. In a remarkable display of antagonism to *Burgess* and § 7501, trial courts have put off hearings until job offers have expired, then have cited the absence of a current offer as evidence of the custodial parent's whimsy or bad faith. In two such cases, the custodial mothers succeeded in reinstating their original offers or obtaining similar ones that would not expire before the case would be heard, but the trial judge in each case then relied upon the earlier "bad faith" holding or claimed a lack of changed circumstances – the renewed, seemingly perfected requests were also denied, although there were dramatic, even desperate, circumstances in each case. In one, the woman's mother in Florida had been diagnosed with terminal cancer, and she was the only person who was available to permit her mother to remain at home in hospice care. Because she was not permitted to relocate with her child, the woman's mother spent her last months in a nursing home, and the custodial parent and her child were unable to be with her at her death.[93] In the other, the woman's 81-year-old mother suffered nerve damage when

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[93] Account of Professor Bruch, who served as counsel for Ms. Signorelli in a further relocation effort undertaken in 1998. *See Signorelli v. Cassady*, No. S068879 California Supreme Court (filed March 23, 1998): Petition for Review at 4-5 and Appellant's Appendix in Lieu of Clerk's Transcript at 1214 (physician's statement), 1094, 1115, 1117, 1407, 1441 (job offers), 1442 (subsidized housing), 1583, 1586 (projected income), 1406 (court's criticism of this request) (hereafter *Signorelli* or *Signorelli II*). An earlier relocation request was denied at trial and affirmed by the Court of Appeal in *Cassady v. Signorelli, supra*.

she was thrown through a windshield in a car accident, and the woman herself went through bankruptcy and had been given notice that she must vacate her California office within six months.[93a] These women's cases were unreported, although we believe that they are of tremendous interest and concern. They contrast dramatically with the treatment afforded custodial fathers, who have been allowed to relocate without surveillance of their employment plans or opportunities.

Such tactics are cruel to women who have succeeded in obtaining professional offers elsewhere. They signal a death knell for the chances of women who, as a practical matter, must make their moves first, then search for employment.[94]

As this discussion reveals, Mr. LaMusga's reading of *Montenegro* would require the Court to renounce doctrines that have long protected children and provided guidance to California courts.

B. <u>In the Instant Case, the Trial Judge's Decision Cannot be Affirmed on an Alternative Ground Because There is a Strong Possibility That the Judge Would Have Reached a Different Result, Permitting Relocation, if He Had Applied the Correct Legal Standard.</u>

In this case the trial court announced its relocation decision from the bench, and neither party requested a Statement of Decision.[95] Mr. LaMusga correctly points out that

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[93a] *See In re Marriage of Postma & Hasson (II)*, No. A098969, 2003 Cal. App. Unpub. Lexis 43 (1st Dist. Jan. 6, 2003).

[94] *See* the *Amici Curiae* Brief of Margaret Gannon *et al.* that discusses the concerns of poor custodial parents *passim*. There is an additional reason that women may not look for employment until after their move; a job search would have been premature in *Rice v. Reiland*, 2001 Cal. App. LEXIS *35 (2nd Dist. 2001), where the woman had a masters in counseling and was qualified to substitute teach, but was caring for an infant full-time and planned to return to work only some time later.

[95] RT 105:22-109:14.

appellate courts must affirm such decisions if they are correct on any basis, whether or not that basis was invoked by the trial court. More precisely put, however, in the child custody context the court must uphold the trial court ruling only "if the trial court could have reasonably concluded that the order in question advanced the best interest[s] of the child[ren]."[96] Ms. Navarro is also correct when she points out that, consistent with its solicitude for continuity in a child's custodial relationship, courts are less reluctant to review and reverse decisions like this one, in which a child's custody is transferred. Ultimately, "[a] reversible error only exists when it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of that error."[97]

In this case there is no such probability that the court's decision would have been entered if the trial court had applied the correct legal test.[98] The decision – to deny relocation and transfer custody to Mr. LaMusga for at least one year[99] if Ms. Navarro moved – required proof that the move would cause them detriment and that changing custody was essential for the children's welfare despite the loss to them of the primary care of their long-term custodial

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[96] *Bryant*, 91 Cal. App. at 794 (citing *Burgess*, 13 Cal. 4th at 32). We note that "best interest" in this context is the best interest rubric that applies in relocation cases.

[97] *Mike Davidov Co. v. Issod*, 78 Cal. App. 4th 597, 606 (2000).

[98] As discussed above, the best interest rubric that applies to relocation cases requires several steps: 1) would the proposed move be prejudicial (detrimental) to the children and, if so 2) would a move instead from their primary custodian's household to their non-custodial parent's custody be less detrimental to them, and, if so 3) would such a custody change be essential or expedient to their welfare.

[99] The court may have intended to avoid the changed circumstances doctrine when it called its order "temporary." But family law judges know that for young children, a year is an eternity, and it is therefore highly unlikely that a court will disrupt a custodial relationship after that length of time. *See* JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 40-45 (1973).

parent. The trial court did not and could not make these findings, as it clearly realized.[100] Because there were no express findings to support the order under the correct legal test, Mr. LaMusga relies instead upon the doctrine of implied findings. Here, too, his argument fails.

C. In the Instant Case, the Trial Judge's Decision Cannot be Affirmed Under the Implied Findings Doctrine Because to Do So Would Contradict Express Findings Made by the Trial Judge.

Mr. LaMusga correctly states the rule that courts of appeal must presume the trial court made all findings necessary for the judgment for which there was substantial evidence when, as in this case, no statement of decision was requested. He does not, however, deal with two exceptions to the rule, each of which removes this case from its scope, nor with the fact that implied findings cannot avoid express findings unfavorable to his case. First, the doctrine does not apply when the trial court did not engage in the analysis required under the controlling law – here, application of the § 7501 presumption favoring Ms. Navarro's decision, an evaluation of the claimed prejudice to the children's welfare in light of that presumption, and a finding that it was essential or expedient for their custody to be changed

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[100] The court expressly held that the § 7501 presumption, if applied, would have authorized Ms. Navarro's move. To prevent the move, the court articulated and applied instead an improper legal test. First, it asked Dr. Stahl to assess whether the proposed move to Ohio would be in the children's best interests without directing his attention to the specific questions that control relocation and change of custody cases. Ms. Navarro quite correctly (but without success) objected to the best interest standard that was set forth in the proposed order. The court made clear that it did not intend to apply § 7501 and *Burgess* when it persisted over her objection in its request for the kind of best interests test that is applied in a de novo custody hearing. Its opinion from the bench implemented this decision by devising two novel theories to exclude the case from § 7501and *Burgess*: 1) a rule that because the court was considering a request to modify visitation it need not apply § 7501, and 2) a rule that a lack of cooperation between the parents rendered § 7501 inapplicable. Neither has any basis in the law, and the Court of Appeal properly held that each was legally insufficient to avoid § 7501 and *Burgess*.

to Mr. Navarro because that would be less detrimental to their welfare than losing Ms. Navarro's care.[101] Second, the doctrine does not apply in cases of exceptional circumstances.[102] Relocation cases, including the one, meet this test. Waiting for a statement of findings can delay an appeal by weeks, while employment or other opportunities are lost.[103] Finally, implied findings cannot be used in any event to ignore, avoid or override express findings that the trial court actually made.[104]

The doctrine therefore does not permit Mr. LaMusga to use implied findings to bolster the evidence supporting the trial court's finding of detriment.[105] Even if implied findings were available, the express findings of the court exclude the implied findings Mr. LaMusga seeks. First, he asserts that Ms. Navarro has persistently denigrated him and attempted to

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[101] *See, e.g., Clothesrigger, Inc. v. GTE Corp.*, 191 Cal. App.3d 605, 611 (4th Dist.1987) (superior court made erroneous legal assumptions and did not engage in the analysis required by controlling federal and state case law). As stated in *Marriage of Bryant*, "What is determinative is the best interest of the children, *given that one parent is moving and the other is not*." *Bryant*, 91 Cal. App.4th at 794 (emphasis in original).

[102] *In re Marriage of Ramer*, 187 Cal. App.3d 263 (1986).

[103] *See, e.g., Postma v. Hasson,* 2002 Cal. App. LEXIS *93 (1st Dist. 2002). In the case at bar, California Rules of Court, Rule (2)(c)(2), which authorizes appeals from a minute order that does not direct the preparation of a written order, allowed an immediate appeal – a matter of great importance to the family, which was separated during the appeal because Mr. Navarro went ahead to take up the Ohio job in order to preserve the possibility that the family could join him there.

[104] Ms. Navarro puts it succinctly: "The doctrine [of implied findings] does not . . . apply to errors of law appearing on the face of a court's decision. [Citation omitted.]" (Appellant's Answer Brief on the Merits at 46.)

[105] The court's directions to the evaluator and its opinion both indicate that the court did not believe that the facts of the case justified a restraint under § 7501. Thus, it is clear that its use of the word "detriment" was not used as a term of art (to reflect the statutory requirement of prejudice), but rather to describe a less serious harm. *See* our discussion of detriment in the text below.

alienate the boys from him, and that this supports the trial court's order. The trial court heard and was unpersuaded by the evidence he cites, however, expressly finding that no denigration or alienation was occurring.[106]

Mr. LaMusga is also mistaken when he argues that the trial court's order is supported by substantial evidence that the children would *probably* lose their already tenuous and detached relationship with him if they moved to Ohio.[107] First, there was no evidence whatsoever that the children would lose their relationship with their father. The only relevant testimony was from Dr. Stahl, who said that it was *possible* that the relationship might either improve or worsen if the move took place (just as either might occur if they were moved into their father's care).[108] He also stated clearly that there was no way to predict the outcome.[109] The Court of Appeal was, therefore, correct when it said that the trial court's assertion of detriment based on the probable loss of the children's relationship with their father was not supported by substantial evidence.

The trial court applied the wrong legal standard, and it is clear that the detriment to which it referred does not satisfy § 7501. The relevant finding was that of loss. There are two grounds on which this finding is irrelevant. First, in reaching this conclusion the court

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[106] RT 106:6-11, 107:21-25. The Court was surely aware that if it had agreed with the evidence Mr. LaMusga now cites, it could simply have entered a finding that Ms. Navarro was engaged in deliberate efforts to interfere with the father-child relationship and refused relocation under *Burgess*' "bad faith" exception to § 7501.

[107] RT at 107-08.

[108] AA 413.

[109] This conclusion is unsupported by substantial evidence, as there was no evidence that such a loss would probably occur. "[I]t's difficult to predict how [the boys] will deal with the changes." AA 410 (Stahl's Report dated June 29, 2001).

exaggerated the evidence as to the likelihood that the father-child relationship would be harmed and also as to the potential degree of harm – possible deterioration of the relationship was turned into a probable total loss of the relationship. Second, this potential loss was not found to be worse for the children than the harms caused by separation from their long-term primary caretaker and being placed in the care of their father, with whom their relationship was tenuous "at best".[110] Indeed, the court completely failed to consider the relationship that should have been of primary concern – that of the children and their primary caretaker, and it never tried to compare this harm with the need to reinforce their relationship with their father.[111] It simply concluded, "[t]he primary importance . . . is to be able to reinforce what

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[110] AA 410.

[111] Nothing in the record supports the conclusion that possible deterioration in their attenuated relationship with Mr. LaMusga would be more harmful to the children than being removed from the care of their primary custodian, Ms. Navarro. Without such evidence, there can be no implied finding that a change of custody is essential. No testimony was even given on these topics during the trial. Similarly, although brief mention is made in Dr. Stahl's report to the court of possible harm to the children if they were separated from their mother, there was no comparison of the two harms. Rather, most of Dr. Stahl's report details what might happen to the children's relationship with their father if they move to Ohio. He concludes that the children would not lose their relationship with their father, although it might suffer. He then notes that this potential harm "must be balanced with the potential losses that the boys might experience if their mother moves, and they stay. They have been in the primary care of their mother since their parents' divorce and they will likely have a significant loss if she moves without them. They also have a very close relationship with their sister Aisley, as well as Todd, and they will feel these losses as well. Third, they certainly have their own desire to move . . . rejecting their desire to move will increase their anger and frustration. On top of that, they're likely to blame dad, potentially increasing their rejection of dad if forced to stay in California." He does not, however, undertake that balancing, and the report contains no comment on whether a loss of the boys' custodial relationships would be more or less serious to their welfare than the possible deterioration in their relationship with Mr. LaMusga if they move to Ohio.

is now a tenuous and somewhat detached relationship with the boys and their father."[112] The trial court's failure to apply the proper analytical steps requires reversal.

The conclusion that possible deterioration of a remote and tenuous relationship is so harmful that it is essential to remove these children from their long-term custodial parent lacks support not only in the record, but also in common sense. Mr. LaMusga suggests that having less frequent visits with him is worse for the children than being separated from their mother. This same choice would arise if he were planning to move to Ohio for a new job, leaving Ms. Navarro in California. Had Mr. LaMusga sought to change custody so that he could move to Ohio with the children, would any court have granted his motion on the ground that protecting his tenuous relationship to the children was essential for their welfare? The answer to this is obviously "no." The court would rightly have seen that preserving the children's long-term placement outweighed any harm from a revised visitation schedule.

The most likely reason the court did not compare the harm the children would suffer from relocating to the harm they would suffer through changed custody is that the court knew that relocation without the children would not occur. Ms. Navarro had previously declined to relocate without her children and in 2001 testified at trail that she would not move without the boys.[112a] Believing she would again remain with her children, the court issued a conditional order allowing Ms. Navarro to retain custody if she did not relocate.[113] In essence, it found detriment based on the assumption that she would stay – evidently concluding that the children were better off remaining in Ms. Navarro's custody in California

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[112] RT 107:26-28.

[112a] RT 89:12-15.

[113] RT 108:15-20.

than in Ms. Navarro's custody in Ohio. This outcome maintains both continuity with the custodial parent and their tenuous relationship with Mr. LaMusga. But defining detriment against the baseline of coercing non-relocation contradicts the holding of *Burgess*.[114] Mr. LaMusga argues that *Burgess* requires revision – that such coercion is simply what one should require of custodial parents and is similar to requirements that parents continue to support their children even if it restricts their life choices. For the reasons we address below, his argument is deficient. Evaluating harm requires a different comparison -- between the harm of relocating with the custodial parent and the harm of being forced to remain behind when the custodial parent moves. Further, the implications for children's welfare are strikingly different.[115]

Even if the record contained some support for the trial court's order, this court should not affirm. The facts of this case raise a variety of controversial issues that were not fully developed below. The evaluator relied on parental alienation – a controversial theory at best.[116] Indeed, he offered a novel account of unconscious alienation. The trial court

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[114] As *Burgess* explained, "The father argues that most custodial parents seeking to relocate are merely 'bluffing'; they will not move if it will result in a loss of custody. Even assuming his assumption is sound, the Family Code provides no ground for permitting the trial court to test parental attachments or to risk detriment to the 'best interests' of the minor children, on that basis." *Burgess*, 13 Cal 4th at 36 n.7.

[115] We address this issue below in conjunction with our discussion of contingent custody transfers. The insufficiency of literature cited in letter briefs to the Court to establish the wisdom of forcing custodial parents to remain near noncustodial parents is demonstrated in our own letter brief of August 2002 and in Dr. Wallerstein's brief discussing mental health issues. We do not repeat those arguments here, but rather cross refer to these materials that are already before the Court..

[116] The Ohio State Board of Psychology, for example, has scheduled a hearing on August 1-2, 2003 to consider "whether to issue a reprimand or suspend or revoke [Dr. David Darnall's] license to practice psychology" because of his use of a non-validated "Parental Alienation Scale" instrument and other non-validated "alienation" taxonomies.

expressly rejected this aspect of his analysis and found that no alienation had taken place. Mr. LaMusga, however, continues to press alienation theory in this Court. Without an opportunity for consideration in the trial courts, it would be premature for this Court to give parental alienation theories its imprimatur. Indeed, given the deficiencies of the doctrines, it would be an extremely unfortunate mistake.[117]

Public Records Request on hearing on David Darnall, available from the Ohio State Board of Psychology at psy.enforce@exchange.state.oh.us. In the instant case, the evaluator employed just such a taxonomy ("unconscious alienation"), and provided other unfortunately subjective or speculative theories, as explained in the *amicus* brief of Dr. Judith Wallerstein *et al.* On the scientific and policy deficiencies of various parental and child alienation theories, *see generally* Carol S. Bruch, "Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases," 35 FAM. L.Q. 527 (2001); "Parental Alienation Syndrome and Alienated Children – Getting it Wrong in Child Custody Cases," 14 CHILD & FAM. L.Q. 381 (2002). These materials are available at http://www.law.ucdavis.edu/ Faculty_info.asp?PROFNAME=CarolSBruch. Appendix C contains pages 390-92 of the Child & Family Law Quarterly article, which describe the relevant English authorities, including materials set forth in the following appendix. Appendix D then provides the expert opinion on mental health principles for a broad range of visitation issues that was written by Drs. Claire Sturge and Danya Glaser at the request of the English Court of Appeal and later "overwhelming[ly]" endorsed by mental health practitioners who were surveyed by the Lord Chancellor's Office. Because it was written in a different context, its focus is necessarily somewhat different than that set forth in the amici brief of Dr. Wallerstein and her colleagues in this case. It is extremely useful nonetheless as a concise yet comprehensive analysis and guide for difficult visitation cases.

[117] The difficulties of this analysis and the related doctrine of Parental Alienation Syndrome are addressed below, together with other social science arguments that have been and may be advanced to the Court. The trial court's decision may rely in part on an allegation that Ms. Navarro failed to correct her children when they make negative remarks about their father. From a strictly legal standpoint, requiring one parent to say kind things about the other parent raises issues of free speech. *See Shutz v. Shutz*, 1991 Fla. 814, 581 So. 2d 1290 (Fla. 1991) (finding that a court ordering one parent to say favorable things about the other parent is an unconstitutional infringement on free speech, but upholding the order to refrain from making negative comments). From a mental health perspective, leading scholars now emphasize the importance to children of accurate, age appropriate information concerning why their parents do not get along. Papering over or contradicting children's observations can undercut their sense of reality. It is unwise policy for courts to silence or punish adults who acknowledge difficulties that

III. AS A MATTER OF JURISPRUDENCE, THE COURT SHOULD REAFFIRM THE CENTRAL TENETS OF *BURGESS* AND SIGNAL ITS DISAPPROVAL OF THE LINES OF LOWER COURT AUTHORITY THAT THREATEN TO UNDERCUT *BURGESS*.

For the most part, the community of family law scholars was delighted by *Burgess*. We have followed with interest the lower court decisions that apply the case. Unfortunately, some of those decisions are at odds with the spirit of *Burgess*. This case gives the Court the opportunity to forcefully reaffirm the basic tenets of *Burgess*, refine the aspects of its holding that have proved problematic and signal its disapproval of the lower court decisions that threaten to undermine *Burgess*.

Relocation may, of course, enhance the lives of many children. The post-*Burgess* case law provides many examples of custodial parents who, through relocation, seek to free themselves and their children from poverty, inadequate employment opportunities, isolation or domestic violence. We will refer to these custodial parents as women, because the factors that defeat many of their relocation decisions in the post-*Burgess* cases have not prevented moves by custodial fathers.[118]

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clearly exist. In this case, the experts and Mr.LaMusga himself acknowledged his continuing struggle to overcome his distant and remote parenting style, and the expert identified several of Mr. LaMusga's traits that appear to be directly relevant to the children's mixed feelings about their interactions with him.

[118] Only 3 cases involved relocation requests by custodial fathers. *See Leitke, supra*; *In re Marriage of Wiest*, 2003 Cal. App. LEXIS 2020 (2nd Dist. 2003); *LaGuardia v. Dayle Tamura*, 2002 Cal. App. LEXIS 317 (4th Dist. 2002). In each of these cases, the father was permitted to relocate (twice at the trial court level and once through a reversal by an appellate court). None lost custody of a child during the process except that the father in *In re Marriage of Leitke*, *supra*, whom the trial court permitted to relocate to Michigan, had the relocation decision reversed on appeal nearly two years later as to one of the three children who had moved there with him; the case was remanded to ascertain whether new facts supported placement of this child with the father and an instruction that, if so, "the [trial] court must articulate such circumstances in a manner that permits meaningful appellate review."

For the vast majority of these women, everything depends on a proper resolution at the trial court level. If relocation of the children is refused, her choices are threefold: to abandon her plans in order to retain custody, to go forward with the move (while hoping to call the bluff of a non-custodial parent who wants to have his children nearby but is unprepared to care for them himself),[119] or to accept that she will move, but without her children.

Each of these fact patterns occurs in the cases, but a decision to relocate without the court's approval is an extremely risky choice, even if the woman is able to afford an appeal and has good grounds for it. Because custody orders are not stayed pending appeal,[120] if the

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[119] This may have been the choice that faced Ms. Navarro. Mr. LaMusga did not request primary custody and his arguments ask the Court to endorse the use of temporary, contingent order that will not require a decision that would place the children in his care.

[120] Code of Civil Procedure § 917.7. Although this section gives the trial court discretion to stay execution pending appellate review, no stay was entered in any of the post-*Burgess* appellate relocation cases. In several of the cases, custody had therefore been transferred, while in many others the custodial parent cancelled the planned move in order to retain custody. In many of the cases in which no move took place, the trial court awarded joint physical custody and increased the non-custodial's time with the children immediately, often to 50% time. This common practice is designed to ensure that the non-custodial parent will qualify for a de novo hearing rather than come within § 7501, should an order prohibiting relocation be reversed on appeal or should the custodial parent later seek to relocate. That technique was not employed by the court in this case, apparently because of Mr. LaMusga's troubled relationship with his children. Although such a time division was suggested by the evaluator as a possible future step if Ms. Navarro "continued" alienating the children, the court concluded that no alienation had taken place and the evaluator's suggestion was therefore irrelevant. It seems doubtful that the court would have increased Mr. LaMusga's time with the children substantially in any event, given the continuing deficiencies in the father-son relationships. Instead, the trial court's order for a "temporary" one-year change in custody to Mr. LaMusga was probably entered only because the court already knew (from Ms. Navarro's testimony) that she would not move if to do so would result in a custody transfer. Indeed, Mr. LaMusga had not requested custody. The trial courts in Marin County initially responded to *Burgess* in a similar fashion: the judges announced to the bar that they would henceforth award joint legal and joint physical custody unless it was affirmatively demonstrated that the

children are transferred to their father's care, they will have lived in his household for one or two years before the appellate court rules. Given this reality, there will be no outright reversal. Instead, the court will remand the case with directions that the trial court apply the correct legal standard to the situation that now exists, not to the facts as they stood at the time of the initial decision -- a result that appellate courts find troubling but necessary. On remand, it is quite possible that the court may choose not to dislocate the child again, given the policies that favor continuity and stability in the custodial relationship.

The appellate case law reveals that post-*Burgess* trial court decisions are of uneven quality.[121] Indeed, the case law has taken on a somewhat baroque character, as counsel and judges who are hostile to relocation have distended *Burgess* and § 7501. Some decisions have given the exceptions to *Burgess* an unduly expansive reading, some interpret "detriment" to the child too loosely, some seek to micro-manage custodial parents' life and career plans, some impose prejudicial delays, some misapply the need for frequent and

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arrangement would be contrary to the children's interests. At the time, it was already clear that California law permits no such automatic preference for one custody form over another. *See* former California Civil Code § 4600(d), added by 1988 Cal. Stats. ch. 1442, (now Family Code § 3040(b)). The formal practice was later abandoned. Three senior family lawyers currently practicing in the county confirmed this history to Professor Bruch in May 2003; none had documentation at hand.

[121] Although California's appellate panels can and have corrected inappropriate trial court decisions, appeals are available only to some. The *Amici Curiae* Brief of Margaret Gannon *et al.* describes the reality of relocation litigation for the estimated 75-80% of family law litigants who proceed without counsel; sound results in their cases depends completely on trial courts' faithful application of § 7501. When *Burgess* is not honored by custody evaluators or trial judges, even custodial parents who are able to employ counsel and pursue appeals must be prepared to incur tens of thousands of dollars in legal costs, even if the proper outcome seems abundantly clear. Further, if a custody transfer took place because the custodial parent went forward with her move, the delay pending appeal may have changed the facts so significantly that she will have little or no chance to resume her custodial role.

continuing contact, and some entertain custody evaluations when they are uncalled for and adopt inappropriate theories. Many of the issues with which the courts have difficulty are present in this case. Here we identify problem areas, whether or not presented by this case, and suggest ways in which the Court's opinion in this case may restore the clarity of *Burgess*, thereby promoting better outcomes and greater consistency.

We begin with the exceptions to the rule that the custodial parent has the right to determine a child's residence that were articulated in *Burgess*.

A. Some Courts Have Taken an Unduly Expansive Approach to the Exceptions to *Burgess*.

Those who wish to prevent their children's relocation begin, of course, by attempting to bring their cases within these exceptions. Their purpose is to avoid four hurdles: the § 7501 presumption that protects the custodial parent's relocation choice, the presumption favoring continuity and stability in the primary custodial relationship, the burden of proof that California custody law imposes on those who seek a change in the primary custodial parent, and, for cases in which a non-temporary custody order has previously been entered, an additional preliminary requirement of establishing changed circumstances.

1. The exception for bad faith

After interpreting the language of § 7501, the *Burgess* Court added an equitable requirement – that a parent with "sound good faith reasons" for relocation is entitled to the statutory presumption and need not establish that the move is necessary. In contrast, one who seeks relocation in order to thwart the noncustodial parent's relationship with the children will not be allowed to relocate, apparently unless she establishes that the move is

necessary.[122] This seemingly sensible application of an equitable principle has proven problematic. Just as fault grounds for divorce led to trumped-up evidence and extensive litigation over matters that had little to do with the business of ending a marriage, bad faith inquiries in the relocation context short circuit the court's attention to what is best for the children.

Allegations of bad faith on the custodial parent's part that were rare in relocation cases before *Burgess* now appear in virtually every case, including this one.[123] Assertions of "parental alienation" are now also common (frequently as support for bad faith assertions),[124] as is speculation that a custodial parent who has never violated a custody order might decide to interfere with visitation if the move is allowed.[125] Finally, for custodial mothers (but not custodial fathers) the moving parent's other motives and behavior are frequently examined

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[122] Precisely what burdens should then apply is unclear.

[123] AA140. In his March 19, 2001 responsive declaration, Mr. LaMusga said that he would "ask the Court to deny [Ms. Navarro's] request to move the children to Ohio. [Ms. Navarro] has engaged in bad faith conduct by denigrating [Mr. LaMusga] in the eyes of the children and by actually taking steps to alienate and split the children from their father." (AA 140.)

[124] *Id.* As occurs in this case, such assertions are often presented to suggest that the custodial parent's reason for moving may constitute a "bad faith" desire to separate the children from their father. *Id*. *See also* notes and accompanying text discussing theories of parental alienation.

[125] Even if such concerns were more than speculative, the Uniform Child Custody Jurisdiction and Enforcement Act provides protection against this eventuality. This Act is well-known to the California judges who decide custody cases because it controls jurisdiction and enforcement of sister-state and foreign custody orders in their courts. For cases that are litigated on the merits in California, the Act provides exclusive continuing jurisdiction for California courts and simplified enforcement of California orders elsewhere. Many of the cases that express concern about the possibility of noncompliance following a move may actually be cases in which courts entertain these arguments as pretexts for defeating *Burgess* and § 7501.

and deprecated.[126] Each of these tactics diverts the court's attention from the appropriate legal standards and clouds its understanding of the children's needs.

Courts that have relied on such claims have entered decisions that are contrary to both § 7501 and *Burgess*, and this has encouraged others to pursue similar tactics. So, for example, some cases have held that a custodial parent's plan to take employment near her own aging or ill parent was merely a bad-faith pretext, despite common experience and research which confirm that this is precisely what adults whose parents and children both need care often do.[127] Only those who share children with a former partner can be and are prevented by California courts from responding as do others to the dual human demands that place these custodial parents in what has come to be called the "sandwich generation."

Similarly, a perceived desire to remove the custodial household from high conflict interactions with the non-custodial parent is often treated as evidence of bad faith, although the research literature indicates that this may be the most constructive step a custodial parent

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[126] *See, e.g.*, *Postma, supra; Signorelli, supra; Rice, supra; Biallas, supra; Hawwa, supra; Condon, supra*; *In re Marriage of Edlund and Hales*, 66 Cal. App.4th 1454, 78 Cal. Rptr.2d 671 (1st Dist. 1998). *Contrast, e.g., Leitke*. In *LaGuardia, supra,* the trial court denied the move of an unemployed musician, who planned to move to Las Vegas to seek work following his arrival, without commenting on his motives – the child's need for stability and the mother's ease of visitation were cited instead; the case was reversed on appeal, and his move was allowed. Contrast the denied moves in *Signorelli* and *Postma* (where the women had employment offers at their destinations); *see also Rice* (where the mother had a masters degree in counseling and was qualified to substitute teach, but planned to defer employment for a period after her arrival because she was caring for an infant). The gender disparities in the cases are discussed below.

[127] *See, e.g., Signorelli, supra*, and *Postma, supra*. *See also* BELDEN RUSSONELLO & STEWART AND RESEARCH/STRATEGY/MANAGEMENT, AARP, IN THE MIDDLE: A REPORT ON THE MULTICULTURAL BOOMERS COPING WITH FAMILY AND AGING ISSUES 58 (2001), http://www.aarp.org/inthemiddle/pdf/inthemiddle.pdf (21% of caregivers for the elderly report that where they live is determined by the caretaking situation).

can take on behalf of the children.[128] In this case, Mr. LaMusga advanced several of these arguments. In a declaration, he characterized Ms. Navarro's desire to take advantage of her husband's opportunity to improve his career and income with a job near her sister's family as a bad faith choice.[129] The evaluator endorsed his parental alienation theory and speculated that Ms. Navarro, who had provided Mr. LaMusga with more time and telephone access than court orders required[130] and was never the object of a contempt motion, might not comply with the court's order or might poison the children against their father if she moved.[131]

In this case, the trial judge was unconvinced by Mr. LaMusga's allegations or the expert's analysis.[132] But in other cases, efforts like these have been successful, with trial courts chiding custodial mothers for seeking to improve their living, professional or housing conditions.[133] So, for example, some even conclude that if a mother who says she seeks a better life elsewhere has not searched for jobs or housing in California, this is evidence that her move is really only an excuse to get away from the non-custodial parent – that is, evidence of her bad faith. Such analysis was perhaps most surprising in a case where the woman decided to move back to the place in which she and her former partner had lived before coming to California (also the state in which her mother lived), a possibility the

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[128] *See* Amici Curiae Brief of Dr. Wallerstein *et al.*

[129] In his March 19, 2001 Responsive Declaration, he stated that Ms. Navarro had "engaged in bad faith conduct by denigrating [Mr. LaMusga] in the eyes of the children and by actually taking steps to alienate and split the children from their father." AA 140.

[130] AA 245:22-246:5, 246:19-247:8, 252:15-253:6, 322-31.

[131] AA 411.

[132] RT 106:6-11,107:1-9.

[133] *See* the discussion of micro-management below.

couple had been considering but had not decided one way or the other just before their separation.[134]

None of the cases evidences similar concerns when custodial fathers seek to move. Indeed, bad faith was not even mentioned in one case where the custodial father had "frustrated and will continue to discourage his former wife's relationship with the children" and the record contained what the appellate court termed "shockingly inappropriate" and "truly horrific" letters and notes the father had written to his teenage sons.[135] This man had also told the custody evaluator that he would tell the trial court anything it wanted to hear, but would do what he wanted once he had relocated to Michigan.[136] "Let them come after me . . . my family will protect me," he added.[137] In light of the cases, it would be appropriate for the Court to remove the equitable requirement and specify the test that should apply to a renewed relocation request by a parent who was previously held to have sought relocation in bad faith.

These developments undercut § 7501 by shifting the court's inquiry away from the children. Instead an inquiry into the motives of the custodial parent becomes paramount, and many cases reveal speculation, expert testimony based on unscientific premises, and micro-management of the type *Burgess* wisely eschewed.[138]

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[134] *See, Rice, supra*. Further details are set forth in the discussion below of micro-management.

[135] *Leitke*, 2001 Cal. App. LEXIS 459, ** 5-6 & nn.3-4. *See also* the discussion below of parental alienation.

[136] *Leitke*, *supra*, at *1.

[137] *Id*.

[138] *See* the discussion below of these matters.

2. The exception for joint custody.

The presumption favoring the move may also be avoided if the non-custodial parent establishes that joint physical custody exists, both de jure and de facto. Family Code § 3087 permits the modification of a joint custody order upon a showing that the "best interest of the child [so] requires," and in *Burgess*, the Court stated that the statute applies to relocation cases.[139] Judicial practice, however, now applies the joint physical custody label to schedules in which as much as 80% of caretaking time is exercised by one parent.[140] This frequently

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[139] *Burgess*, 13 Cal. 4th at 40 n.12. Had the *Burgess* Court considered the context in which the section was adopted, it might have emphasized that the best interest test contains a presumption favoring a primary caretaking parent, even when the section applies. Section 7501 and relocation cases were not considered when § 3087 was adopted. More importantly, its purpose was not to preserve equal custody rights for the parties to a joint custody order, but rather to ensure that these orders could easily be replaced by sole custody orders whenever they created difficulties. (For that reason, the section also expressly declares that the court may act on its own motion.) It was enacted to provide a safety valve for inappropriate joint custody orders, which had begun to be used to settle difficult disputes or for cosmetic purposes (for example, to avoid use of the terms "noncustodial parent" and "visitation"). These orders often caused difficulty when the parents disagreed about matters ranging from medical care to driver education to summer camp because their legal effects were unclear. So that courts could easily revert to a traditional sole custody order whenever a joint custody order did not work, the section did away with the traditional requirement for a showing of changed circumstances. A motion to terminate a joint custody order and designate a sole custodian was therefore facilitated, not discouraged, by this section. In the vast majority of cases, it was assumed, one parent would already have been carrying out most caretaking responsibilities and now needed to be freed to get on with them without disruption. Personal account of Professor Bruch, who participated in developing the legislation. Properly read, the *Burgess* Court suggests a similar analysis; it conditions the best interests test of § 3087 on sharing physical custody both under an existing joint custody order and in fact.

[140] In these cases, of course, the primary caretaker presumption should nevertheless impose the same burden of proof for a de facto change in custody that the changed circumstances doctrine would if the arrangement had been labeled sole physical custody; the only difference should be that evidence from a longer time period is admissible in a case lacking a sole custody order,

seems designed to avoid § 7501 and preclude moves should a relocation issue later arise. Only rarely are such joint physical custody orders actually accompanied by roughly equal time shares, although this may be recommended by mediators or experts once a concrete move is at issue, as occurred in LaMusga.[141] Instead, time shares in most cases continue to look much like a typical sole physical custody and visitation arrangement. Yet, should the primary caretaker seek to move, these courts may improperly apply the de novo best interest test that is authorized by *Burgess* and § 3087 only for truly shared de jure and de facto physical custody cases. At the time, it was already clear that California law permits no such automatic preference for one custody form over another.[142]

This happens sufficiently frequently to invite attempts like the one in *Lasich*, where a stipulated joint physical custody order was in place. The father, who spent no more than 20% of the time with his children, argued that he was entitled to defeat a proposed relocation without having to rebut a presumption in favor of the primary caretaker's decision.[143]

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[141] Dr. Stahl's first suggestion of an eventual 50/50 joint custody arrangement came in 2001, after had become aware that Ms. Navarro, who had waited longer than he had initially advised, once again planned to move to Ohio. In *In re Marriage of Williams*, 88 Cal. App.4th 808 (2nd Dist. 2001), the mother had been a full-time homemaker of four children until she and her husband decided to separate, when she returned to work. When he moved out of the house a few months later, they shared a nanny and alternated custody on a weekly basis for approximately half a year until the custody order was entered. She was awarded custody of two children, who accompanied her to a new marriage in Utah, and custody of the other two children was awarded to their father. In an excellent opinion, the Court of Appeal set the decision aside and returned for consideration of the children's best interests; the trial court had not considered what effect divided custody would have on them.

[142] *See* former California Civil Code § 4600(d), added by 1988 Cal. Stats. ch. 1442, (now Family Code § 3040(b)).

[143] *See Lasich* 99 Cal. App.4th at 710 (the marital settlement agreement, entered as a judgment of dissolution, provided for joint legal custody and joint physical custody, but the evidence established that the mother has had the children 80% or more of the time

Primary caretakers should not be required to litigate such frivolous challenges to their relocation prior to relocating. This case permits the Court to remind the lower courts that the primary caretaker presumption applies whenever the facts show that one parent has been shouldering most of the caretaking responsibilities, regardless of the labels or even the time-shares.[144] It would also be useful if the Court were to emphasize that litigation to adjust visitation schedules can be conducted following relocation and that this rule applies whenever a de facto primary custodial parent is apparent, no matter how the custody order reads.

B. Other Courts Have Interpreted the "Detriment" to the Child That Warrants a Custody Transfer Too Loosely.

A non-custodial parent who is unable to avoid § 7501 through one of these recognized exceptions – bad faith or de jure and de facto joint custody – must, of course, establish detriment to the children that renders a custody transfer essential to their welfare. Mr. LaMusga sometimes argues that this case boils down to only one issue – how detriment is to be defined for the purpose of rebutting the presumed right of the custodial parent to relocate.

As we have noted above, § 7501, fairly read, imposes a stringent proof standard for the showing of "prejudice." *Burgess*' use of the term "detriment" in lieu of "prejudice," has

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since the parents separated).

[144] We note in this regard that although time is usually a good surrogate for caretaking functions, in many supposedly equal time shares it is only one parent who is responsible for innumerable tasks beyond spending time with the children. These may include the major and minor tasks of parenting, such as purchasing clothing, arranging child care and medical care, purchasing gifts and arranging children's parties or after-school activities, caring for the children when they are ill, etc. All of these "tie-breakers" are relevant to the determination of whether there is, in fact, a primary caretaker parent.

proven unexpectedly unfortunate.[145] "Detriment" has had a long history in California law as a rigorous term of art in cases in which a child's custody is awarded to a non-parent over the objection of a parent. It also appears in pre-*Burgess* relocation cases. Its current usage, as in this case, often elides the distinction between the term of art and common linguistic usage – a development that we believe would be less likely if the statutory language of "prejudice" were applied.

The kinds of harms Mr. LaMusga cites, for example, are essentially the kinds of harms any move will occasion and therefore cannot rebut § 7501.[146] Although he argues that his relationship with the children will end, however real his fears may be, no evidence was introduced in this case to support his reasoning. Similar claims now appear in many of the cases, and judges often assert that children's relationships with their non-custodial parents will be damaged profoundly by relocation.[147] Even if prejudice is established, however, the court must go on to weigh the harms to the children of relocating with their custodial parent against those they would suffer by a change in custody in order to determine whether a custody transfer is essential to their welfare. All too frequently we observe that court

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[145] *Burgess* was merely incorporating earlier case law in this choice of terminology.

[146] Although the trial court in this case decided that it was essential that the children continue to work with their father to improve the life-long deficits of their relationship, it also acknowledged that if *Burgess* applied, these harms could be ameliorated. *Compare Biallas, supra* (trial court found detriment; only specific harm was reduced visits with father and grandfather).

[147] In addition to the arguments in this case, *see, e.g., Condon, supra* (this argument was advanced although the young children had already spent 9 months away from their father, apparently with his consent, during the intact marriage); *Edlund, supra*; *Wiest, supra* (Court of Appeal applied *Burgess* but expressed its concern that "a move away may effectively sever the child's relationship with the parent who is left behind").

mediators and custody evaluators completely ignore *Burgess* and § 7501,[148] and rarely does a trial court apply the mandated two-part test.[149]

New statutory language dealing with custody to non-parents suggests that "detriment" itself now requires a more explicit definition.[150] In relocation cases, we conclude that it would be similarly helpful if this Court were to return to the express language of § 7501. This would avoid the ambiguity now apparent in the use of the term "detriment" and emphasize the need for greater rigor than the cases demonstrate.

We turn now to an examination of the mental health theories that commonly appear

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[148] *See, e.g., Edlund*, *supra* (expert used detriment language but applied incorrect standard – that mother gave no urgent or compelling reason to move); *Lasich, supra* (only detriment was change in visits with father and grandmother, but mediator concluded it would be in the minors' best interest for mother to remain in Sacramento as their primary custodial parent under the existing plan, in which she had 80% of the time share); *Wiest, supra* (evaluator used best interest test and recommended that mother's time share be increased to 50% immediately and that custody be switched to her when Air Force father who had always had at least 73% of time share was transferred); *Hawwa*, *supra*; *LaGuardia, supra*.

[149] Cases in which the trial court failed to apply the two-part test (in addition to this case) include, *e.g., In re Marriage of Forrest*, 2002 Cal. App. LEXIS 4620 (4th Dist. 2002). *See also Lasich, supra*, asserting that under note 3 of *Montenegro* the changed circumstances rule does not apply to cases in which there is a de facto primary caretaker. It appears this comment may indicate confusion between the changed circumstance doctrine (which imposes a burden of proof and limits the evidence that may be admitted) with the primary caretaker doctrine (which imposes a burden of proof but does not limit the evidence).

[150] *See* Cal. Fam. Code § 3041(b)-(d), effective January 1, 2003:

> As used in this section "detriment to the child" includes the harm of removal from a stable placement of a child with a person who has assumed, on a day-to-day basis, the role of his or her parent, fulfilling both the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time. . . .

Id. § 3041(c).

when evaluators or court personnel ignore *Burgess*.

C. The Court Should Refuse to Allow the Use of Questionable Psychological Theories to Create Exceptions That Undercut *Burgess*.

As noted above, controversial and questionable theories are being used by mental health professionals and lawyers to challenge relocations in large numbers of the litigated cases – often when there is little objective basis for denying the move and no pre-relocation litigation should be required.[151] In this case, for example, Dr. Stahl's June 29, 2001 evaluation report set forth his theory that Ms. Navarro was unconsciously engaging in "alienating behavior."

There are two problems with Dr. Stahl's "unconscious alienation" theory. The first is that it is not supported by the facts in this case. The second is that the theory itself has no empirical validation. As to the facts, Dr. Stahl, as evaluator in 1996, had noted that Mr. LaMusga had personal difficulties. He suggested that Mr. LaMusga's distorted perceptions might lead him to accuse Ms. Navarro of alienation in order to avoid facing his own guilt about the quality of his parenting.[152] In reaching his "unconscious alienation" conclusion in June 2001, Dr. Stahl cited no evidence that Mr. LaMusga had overcome these earlier difficulties. Despite this, Dr. Stahl largely accepted Mr. LaMusga's version of the facts. Even more inexplicably, he failed to provide Ms. Navarro with an opportunity to rebut Mr.

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[151] As Justice for Children (JFC), an ABA award-winning national advocacy organization, puts it, "Whenever custody of a child is in dispute, the decision maker must wade through emotion and hyperbole to deduce the evidence that will indicate what is in the child's best interest." JFC Amicus Curiae Brief, *Linville v. Linville*, No. 00895, at 16 (Md. Ct. Spec.Apps., Jan. Term 2001).

[152] AA 390.

LaMusga's claims.[153] Fortunately in this case, the trial judge was unpersuaded with Dr. Stahl's "theory" and focused instead on the fact that, given the situation, the children were behaving in ways common for children in their circumstances.[154]

In his brief to the Court Mr. LaMusga again seeks to lay the blame on Ms. Navarro. We believe neither the trial court's findings nor the record supports this point of view. In his 2001 report, for example, the evaluator pointed out that the boys were now fully aware of their father's anger, but less so of their mother's.[155] Given his advice in 1996 to the parents to shield the children from their anger,[156] one might have anticipated a comment in the expert's 2001 report noting Ms. Navarro's success and Mr. LaMusga's failure to accomplish the task he set for them. Or, given his 1996 and February 2001 advice that the parties learn

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[153] The American Psychological Associations's guidelines for child custody evaluations in divorce proceedings expressly state that "Important facts and opinions are [to be] documented from at least two sources whenever their reliability is questionable." See Appendix B, Guideline number 11. This standard was not met in Dr. Stahl's evaluation report of June 29, 2001 when it sets forth three examples from Mr. LaMusga of Ms. Navarro's alleged "alienating behavior." *See* AA 409. Indeed, although Dr. Stahl had expressed doubt about Mr. LaMusga's perceptual acuity and accuracy (AA 390), he did not discuss Mr. LaMusga's current assertions with Ms. Navarro or any other source. RT 61:18-25. One of these examples concerned a genealogy report in which one of the boys listed his step-father rather than Mr. LaMusga as his father. Although Dr. Stahl identified this as "perhaps most important" of the examples, it was not investigated. *See* AA 409, RT 61:18-21. Ms. Navarro's trial testimony made clear that she had been troubled by the child's behavior, tried unsuccessfully to convince him to correct the report, and had raised the incident with the children's therapist, Mr. Tuggle, who advised her that she had handled the situation appropriately. AA 252:3-11.

[154] RT 106:6-21. *See generally*, Janet R. Johnston, *Parental Alignments and Rejection: An Empirical Study of Alienation in Children of Divorce*, J. AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW (forthcoming) (assessing the impact of "alienating behaviors" by mothers and fathers and finding that rejected parents are frequently the "architects" of their difficulties with their children).

[155] AA 403.

[156] AA 391-92

to "parallel parent" (*i.e*. attempt to parent to the best of their abilities as individuals), again one would have anticipated a favorable comment on Ms. Navarro's use of letters and faxes.[156a] Instead, Dr. Stahl's 2001 report implies that she was deficient because she sought to minimize interactions with Mr. LaMusga.[156b] There are additional examples of inconsistency. One of particular concern, given that the controlling best interest rubric for relocation cases asks how the children will respond to relocation or a change in custody, is Dr. Stahl's failure to update his seven-month-old interviews with the children.[157] He only interviewed the parents and made a "collateral" telephone call to Mr. Tuggle, yet opined on the children's possible reactions to relocation or a custody transfer.

Most troubling was his failure to include sections in his report specifically addressing the boys' developmental stages and wishes. Even Dr. Stahl himself argues in a book that he wrote two years before this report was prepared that such discussions are required in custody evaluations and relocation cases. In this case, Dr. Stahl followed his own recommended outline in all other respects. His sole departures were the omissions of the two that were most relevant to his final recommendation – a discussion of the children's developmental stages as it relates to their long-distance relationship with their father and a discussion of the

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[156a] AA 394 (196); 404-405 (February 2001).

[156b] AA 411 (second paragraph).

[157] We note that Ms. Navarro should have been permitted to simply move and conduct her action to modify visitation from Ohio. Given that an evaluation did take place and children's sense of time, the period since their last meeting with Dr. Stahl was, of course, a long period in their lives. Perhaps Dr. Stahl did not expect the children to change their views despite the therapy that they and their father were undertaking on what he reports was an intermittent basis.

children's own wishes, given their ages and abilities of self-expression.[158]

The factual problems, discussed above, with Mr. LaMusga's alienation theory are only the tip of the iceberg, however. The more serious problem is the theory itself. This brief will not attempt to address this issue in detail because the Court has an excellent *amici curiae* brief from Dr. Judith Wallerstein *et al.* that addresses the relevant mental health concepts and theories.

We note that Professor Bruch has written recently about the deficiencies of theories called variously Parental Alienation Syndrome, Parental Alienation, and Alienated Children.[159] We note also that the *amici curiae* brief submitted by Dr. Wallerstein *et al.* contains similar criticisms of these theories and that the English Court of Appeal has indicated that it considers the use of these theories to be inappropriate.[160] In addition to its lack of demonstrated empirical validity, the alienation theory has a second vice. Because of the looseness of the concepts it espouses, it easily leads to the kind of factual carelessness

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[158] *Compare* PHILIP M. STAHL, COMPLEX ISSUES IN CHILD CUSTODY EVALUATIONS 79, 82 (1999) *with* AA 407-16 (sole reference to developmental issues was comment, "Now that the children are older, it's likely that they will be able to 'hold onto' their relationship with their dad, even with a move . . . .")

[159] Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases*, 35 FAM. L.Q. 527 (2001); *Parental Alienation Syndrome and Alienated Children – Getting It Wrong in Child Custody Cases*, 14 CHILD & FAM. L.Q. 381 (2002) (expanded to include English authorities at 390-92).

[160] *See* Re L (Contact: Domestic Violence); Re V (Contact: Domestic Violence); Re M (Contact; Domerstic Violence); Re H (Contact: Domestic Violence) [2000] 2FLR 334; Re C (Prohibition on Further Applications) [2002] 1 FLR 1136. *See also* Appendix C, in which we attach Professor Bruch's brief discussion of the English materials on point. Further, in Appendix D, we provide a copy of the expert opinion by two psychiatrists on the principles and literature that should guide courts in visitation disputes. The English Court of Appeal requested this expert opinion. When it was later vetted by the Lord Chancellor's Office, it was endorsed by other professionals.

that Dr. Stahl's reports exhibited in this case.

Although the alienation theory is perhaps the worst of the current fads posing as science in the relocation field, it is certainly not the only theory of this kind.[161] Nor are psychologists the only profession that is not as careful as it should be with the scientific evidence. In a publication of the Association of California Family Law Specialists,[162]for example, attorney Leslie Ellen Shear writes:

> Too often we seem to [assume] that it is not only possible, but likely, that parents and children can sustain and strengthen their attachments . . . long distance. The research strongly suggests otherwise. Consider, for example, pre-eminent divorce researcher Mavis Hetherington's conclusion that long distance parents have no significant impact on their children's development.
>
> > [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 post-divorce life.[163]

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[161] In one recent relocation case, for example, a psychologist evaluator concluded that the father had explosive rages that were "potentially lethal." She omitted this conclusion, however, from her written evaluation because she wished to employ "collaborative divorce" techniques in hopes that the couple might enter an agreement concerning their child's care. *See Hawwa.*

[162] "Custody Matters: News and Views About Children's Issues in California's Family Courts," Leslie Ellen Shear, ACFLS Newsletter, Winter 2002, No. 3, at 7 (Nov. 2002). Shear submitted an amicus brief in *Montenegro* and a letter brief in this case.

[163] E. Mavis Hetherington & John Kelly, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED 133-34 (2002). The original language describes instead the limited impact of nearby, skilled non-custodial parents when custodial parents are troubled. Dr. Hetherington actually wrote:

> *Where there is a low level of conflict between parents, a non-residential [parent can have] a positive impact [on a child]. But* the developmental effects of most non-residential parents *are limited. Even if they visit regularly and are skilled,*

Shear goes on to assert that "Sociologist Sara McLanahan reaches a similar conclusion: '[M]oderate levels of visitation do not appear to help children much. What does seem to help is a close father-child relationship . . . .'"[164]

These quotations seriously alter the meaning of the original texts, which are provided in the footnotes following each quotation. Long distance is not the culprit in the quoted sources Rather, Hetherington and McLanahan both emphasize that children do best when they have a close relationship with their noncustodial parent and when there is low inter-parental conflict (a group that comprised only 25% of Hetherington's sample).

Neither of Shear's sources equates proximity between the parents with low conflict or good parent-child relationships. Indeed, Hetherington specifically separates the two, stating that quality of the parent-child relationship is most important, not frequency of contact. According to McLanahan's summary of the research, "Three general factors [quite different from the one Shear claims] account for the disadvantages associated with father

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> *such parents* occupy too little emotional shelf space in the life of a child to provide a reliable buffer *against a custodial parent who goes into free fall.* They are not there to protect against the day-to-day-hassles of postdivorce life. . . .
> *It is the quality of the relationship between the non-residential parent and child rather than sheer frequency of visitation that is most important.*

(language Shear omits supplied in italics). Hetherington and Kelly go on to note that "visits from an abusive, depressed or conflict-prone parent do nothing for a troubled child, except possibly make the child more troubled." *Id.*

[164] Sara McLanahan, "Life Without Father: What Happens to the Children?" CONTEXTS, Spring 2002, at 35, 44. McLanahan actually wrote:

> *Real joint custody is hard to sustain, and* moderate levels of visitation do not appear to help much. What does seem to help is a close father-child relationship, *which depends on the parents' ability to minimize conflict after divorce.*

absence: economic deprivation, poor parenting [by an overextended custodial parent] and lack of social support [in the custodial parent's community]. Economic security is probably the most important . . . ."[165]

None of these possible disadvantages would be present on the facts of this case if Ms. Navarro had been permitted to relocate with the children to Ohio. To the contrary: the household's financial situation would have been greatly improved, the children would have continued to benefit from the mother's parenting in a two-adult household, and the mother would have had the additional social support of her extended family.[166]

It would, of course, be unwarranted for the Court to prescribe a rigid formula as to the kind of expert evidence that the trial courts may receive in custody modification actions that follow relocation cases.[167] Increasing the rigor of the analysis used by evaluators, attorneys

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[165] Certified Family Law Specialists who rely on their professional journal for accurate information may, as a result of Shear's article alone, hold false beliefs and advance fallacious arguments in relocation cases. The chance for professionals to "do good" for your client while "doing well" for yourself may, intentionally or not, foster bad results for those who are less affluent. As the brief of the California Women's Law Center *et al.*, which was submitted on behalf of several women's and children's organizations, and the brief of Margaret Gannon *et al.*, which addresses poverty and domestic violence issues, make clear, women and children depend on the simple, clear rule of § 7501. So do the sound policies of California family law.

[166] We note that Ms. Navarro's husband, who gave up his position in Ohio, has more recently received an job offer in Arizona. On our reading of the facts, the location to which the Navarros wish to move and their motives are irrelevant; this intact step-family should be free under § 7501 to make decisions that Ms. Navarro believes are appropriate for the children of her previous marriage.

[167] As we have pointed out, there should be no need to litigate these issues prior to relocation, although they may arise in custody modification actions following a move. For that reason, what the Court says in this decision will have a major impact on the ultimate welfare of the children in these custodial households. Requests to move are often filed because mothers fear that if they move without permission, no matter the law, local judges will become angered and imposes what the late Professor Bodenheimer termed "punitive decrees." See note 176 *infra*.

and trial courts, however, would improve the quality of decisions in all custody contests, including relocation cases. There are, of course, many ways that the Court might further this goal, ranging from simple statements cautioning against the use of unproved theories in fashioning exceptions to *Burgess* to comments on particular theories of the kind that the English Court of Appeal has chosen.[168]

D. *Burgess* Proscribed Micro-management in Relocations Cases, but Many Cases in Which Mothers Wish to Relocate Display This Problem.

The cases display extensive micro-management of mothers' life plans, in stark contrast to the treatment accorded fathers. To appreciate the difference, we begin with the courts' reactions to the relocation plans of custodial fathers. The *Leitke* case, for example, was discussed above in connection with the father's declared intention to ignore the California courts once he relocated to Michigan. The appellate opinion does not reveal whether the father had a job waiting in Michigan, was employed in California or had searched for more favorable employment near his current residence.

Similarly, in *LaGuardia*, a trial court refused the relocation request of an unemployed custodial father but was reversed and the father, who hoped to find work in Las Vegas after his move, was permitted to relocate. There was no indication that either the trial or appellate level considered that his hoped-for employment was relevant to the decision; there was, however a comment that the father, who was presently unemployed because of a disability, believed that he would be able to find work as a musician in Las Vegas that would give him more time with his child. No mention was made as to whether a job search had been

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[168] In doing so, it may be aided by the list of questions that should be addressed in evaluating new theories that is set forth in the conclusion to Professor Bruch's articles on parental alienation.

undertaken in either California or Nevada. Nor did it appear that the father had any relatives in the Las Vegas area; rather the opinion reports that some of his relatives planned to move there after he did. These may be the relatives who lived near his California home.

Finally, in *Wiest*, the father, who was in the Air Force, was scheduled to be transferred. He had physical custody for all but two days a month for more than a year, but the child's mother had increased her visits to roughly 37% of the time-share. The trial and appellate courts noted that his career would necessitate regular moves approximately every four years. This may explain why the evaluator had recommended a 50/50 custody split with a transfer of custody to the mother if he moved (a technique we have noted in cases where custodial mothers wish to relocate). Both the trial and appellate courts correctly upheld the father's right to relocate.[169]

In contrast to these cases, several of the mother-custody cases demonstrate detailed supervision or comment on the custodial parent's life-style or decisions.[170] In *Rice*, a mother who was granted sole custody so long as she remained in California was refused relocation with her young child to Massachusetts, where the child's parents had lived before coming

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[169] A fourth case, *Thacker v. Superior Court of Placer County*, 2002 Cal. App. LEXIS 11105 (3rd Dist. 2002), involved a custodial father who had remarried. He and his wife cared for the child 59% of the time, but they did not seek relocation. Rather, in this case, it was the child's mother who was a member of the armed forces and planned to take up a new assignment. The trial judge changed his mind several times concerning custody, but ultimately expressed his distaste for the father's harsh parenting style and tried to award the mother (who had only 41% of the time share) to take the child along to her next posting in Korea. Due to procedural complexities, this order was invalid. We note, however, the court's inappropriate use of a de novo test with such a lop-sided joint custody order.

[170] Although not discussed in the text, we mention here the cases of *Signorelli*, *Postma* I and II, and *Hawwa* as truly dramatic examples of inappropriate micromanagement.

to California. Prior to the separation, they were contemplating this move but had not yet decided whether they would return to the East. The trial court, upset by the mother's apparent lack of candor as to some financial matters, criticized her for not having searched for a job or a home to purchase in Santa Barbara. The facts reveal the mother had approximately $175,000 as her share in the equity of her current home and planned to be unemployed for some time in order to care for her infant.[171] She wanted to return East where she believed she could afford to live while the baby was small and would find less expensive real estate. The holder of a masters degree in counseling, she believed she would be able to find work there, either in that field or as a substitute teacher, once the child was older. The court's micro-management extended to stating that it was convinced her relocation was made in bad faith because she would be moving away from California, where her father lived, as did her sons from a former marriage (who were in their father's custody). The woman's mother lived in Massachusetts and she had other relatives on the East Coast, but the court noted that they did not live in the town where she planned to settle.[172] The Court of Appeal affirmed.

A woman who married the man by whom she was pregnant and wished to move to Nebraska to be with him was refused relocation. The trial court criticized her for her involvement with the man and her plans to marry him. The trial court made an inappropriate

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[171] Assuming that such micro-management were appropriate, judicial notice might have been available as to the relative costs of real estate in Santa Barbara and her planned home in the East.

[172] We are not told her sons' ages, how long they had lived with their father, or whether she and her current husband had always lived in the same area with them. Given the woman's moves across country, it seems unlikely that they had all been near each other. Indeed, we are not told in what part of California they lived.

use of the joint custody exception to Burgess; the mother had clear primary custody. The only detriment shown was the decrease in visitation with the father and a grandparent that would take place. Almost two years after custody was transferred to his father, the Court of Appeal reversed.[172a] Whether, after such a lengthy period, the son will ever return to his mother's care was therefore uncertain, and one wonders if her undoubtedly costly victory will benefit others more than herself.

Perhaps the most dramatic micro-management of a mother's professional plans occurred in a published case, *Condon*. This woman was an internationally known artist, who had spent a total of nine months in France during the marriage while her children were very young. Her most important professional opportunities, including completing a commissioned work for Prince Charles, would be advanced if she could relocate there. The trial court decided that she should go instead to her home country of Australia, where her family lived. Although the Court of Appeal opinion expresses discontent that she was allowed to move, it decided to affirm because of the care with which the trial court had crafted its opinion. Nonetheless, the Court of Appeal insisted that on remand, the trial court add a number of additional provisions designed to ensure that an Australian court could not later permit her relocation to France. (The court was concerned that it might be tempted to do so because by enhancing the woman's apparently extraordinary reputation further, it would be enhancing the reputation of Australia.) In addition, the appellate opinion states that the cultures and languages of the United States and Australia are similar, apparently concluding that resuming residence in France would be less desirable; it recommends that this test of cultural

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[172a] *See Biallas.*

similarities is appropriate. We are taken aback by the reasoning of the case,[173] yet believe it unlikely that women who are allowed to relocate to any foreign country dare to challenge the kinds of restrictions placed on Ms. Condon.[174] We cannot, however, imagine that custodial fathers would encounter this overt interference with such professional opportunities.

In *Edlund*, a mother's fiance was transferred to employment in Indiana. This would permit the couple to buy a home in a nice area with good schools, allow the mother to work part time or less, and make it financially feasible to have children of the new marriage; none of this was financially available to the couple in the Bay Area. In addition, the mother had family members in the mid-west. The father in this case had not taken full advantage of his visitation time although he lived nearby in Santa Cruz. The trial judge criticized the mother's values at length, calling her immature and materialistic, and said the most important thing for this child was to remain near her father in the Bay Area. Although we believe his comments were inappropriate and inaccurate, we are pleased to note that he expressly permitted the relocation because he was bound not to micro-manage under *Burgess*; his decision was affirmed in an excellent appellate opinion.

E. Trial Courts Employ Unnecessary Custody Evaluations and Other Delaying Tactics to Defeat Burgess.

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[173] We note in passing that it contains many misstatements of domestic and international law. Arguments based on PAS were presented in the case that asserted that a de facto termination of the children's relationship with their father would result. The court suggested that termination of child support would be acceptable potential sanction and also that the children might spend alternating years in the two countries – both of which we find deeply troubling.

[174] *See, e.g., Lasich*, where the mother is permitted to relocate to Barcelona.

There are more subtle ways in which trial courts can defeat relocations than those just discussed. In this case, Ms. Navarro first indicated her intention to move late in 2000 (three and a half years ago) during a custody evaluation for which she and Mr. LaMusga had already waited twenty months. We have noted above the many ways that delay can, in practice, defeat a woman's aspirations for a better life for herself and her children. In this case, the delays Ms. Navarro undertook in 1996 to enhance the boys' life-long relationships with Mr. LaMusga cost her an opportunity to attend law school and to have the support of her family during what may have been her most difficult years as a single parent. However painful, these delays were voluntary. Many years later, however, delays imposed by court order separated her second husband, Mr. Navarro, from his family (including his very young child) for almost a year, while he tried to maintain the possibility of the relocation they wanted by accepting the job he had found in Ohio. When that separation strained the family and threatened to continue indefinitely because of the appellate proceedings, the delay brought him home to a position far less desirable than the one he gave up to move East. Ms. Navarro, during this period, was the sole parent of three children, two whose father lived not far away in the Bay Area, and one – the little one – whose father (Ms. Navarro's husband) lived far away. There is no way to predict, should this Court affirm Ms. Navarro's clear statutory right to decide where her children will live, whether her husband will find an equally inviting job opportunity again – in Ohio, Arizona or wherever the family's interests lead them. The trial court's order has elevated a defunct marriage with longstanding troubled parent-child relationships over an existing marriage with healthy parent-child relationships.

Burgess properly recognized that justice delayed is justice denied; it emphasized that § 7501 should be honored without delay or artifice. Although *Burgess* recognized that

relocation can appropriately precede the development of new visitation schedules, and California's jurisdictional statutes support that approach,[175] custodial mothers fear that they will be held in contempt if, in the interim, they are unable to fulfill the literal requirements of the old visitation order. Worse, they fear punitive decrees that transfer custody to the noncustodial parent, not because that serves the children's interests, but simply to punish the parent who exercised her right to relocate.[176]

Yet, these custodial parents can be impoverished and emotionally defeated if they simply seek to clarify the visitation schedule before they depart. Their respectful, responsible behavior is no guarantee of equally respectful treatment by judicial officers who control the calendar and can impose orders that frustrate the clear dictates of *Burgess* and § 7501. *In re Marriage of Wright*,[177] a case currently in the early stages of litigation, demonstrates the gratuitous, costly and potentially prejudicial delays mothers face if a father opposes the move, even on friv olous grounds, and the judicial officer *sua sponte* raises legal arguments that directly contravene *Burgess*.[178]

Ms. Wright (who has held a *pendente lite* sole custody order since December 1999 and has always had the children for more than 70% of the time) filed a motion on March 5,

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[175] See the discussion of continuing jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act.

[176] *See* Brigitte M. Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CALIF. L. REV. 978, 1003-09 (1977).

[177] No. D99-04722, Contra Costa County. Details of the case are based on the record, which Professor Bruch has examined, or information obtained from Joanne Schulman, Esq., co-counsel for the mother.

[178] The commissioner's experience and expertise render it unlikely that these are the product of confusion or inattention.

2003, to modify the visitation schedule in light of her intended relocation to a job and her family in Texas. Despite an order shortening time, her motion could not be heard by the commissioner until April 30. At that time, the commissioner restrained the relocation of the 10- and 12-year-old children and ordered a third evaluation (over the mother's objection).[179] She set a recommendation conference for July 25 (3 months later), at which time "[t]he matter will either be settled . . . or set for trial."[180] Trial, therefore, even under expedited proceedings in that county, can be expected no sooner than late November 2003, almost 10 months after the motion to modify was filed.

The commissioner cited *In re Marriage of McGuinnis*, a pre-*Burgess* joint physical custody case, and *Montenegro v. Diaz* for the proposition that an evaluation is required in connection with the move and the mother is not entitled to rely on *Burgess*. Her reasoning is in direct violation of *Burgess* on each point.

Burgess permitted a move by the holder of a temporary sole custody order and made clear that the only delay that would be permitted in such a case might be one under Family Code § 3024. Noting that the provision is not mandatory, the *Burgess* Court held, "We do

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[179] The commissioner refused to rely on the two prior evaluations (the most recent of which was completed 14 months earlier), each of which recommended that the mother be awarded sole physical custody. The most recent evaluation also recommended a reduction in the father's visitation time (which, during the past two years, has never exceeded 27%). Her stated reason was that the most recent evaluation was too old and did not deal with the father's allegations of bad faith – allegations that family members who live in Texas do not like him and that the custodial mother's job offer is from a cousin. It is, of course, unclear how these assertions, even if true, could sustain a finding that the move is prompted by bad faith or that a custody transfer is appropriate, but Mr. LaMusga mounted nearly identical allegations about his wife's family when interviewed by Dr. Stahl for the third evaluation in the instant case.

[180] Reporter's Transcript of Proceedings of April 30, 2003 at 8:2-13, 9:22-24.

not construe [§ 3024] to limit, expressly or by implication, the right of a custodial parent to relocate under Family Code section 7501."[181] Indeed, the section applies only if a court has previously ordered the custodial parent to provide 45 days' notice of any intended move in order to permit an opportunity to attempt mediation of a new custody arrangement. It does not authorize extending the 45-day period for mediation or any other reason.

The trial officer in *Wright* also indicated her view that *Montenegro* and *In re Marriage of McGinnis,* 7 Cal. App. 4th 473 (2d Dist. 1992), as amended by 8 Cal. App. 4th 144A (2d Dist. 1992), bar a custodial parent with a temporary order from the § 7501 presumption favoring her relocation decision. This theory, which is being pressed in other cases as well, is incorrect in every regard. First, *Montenegro*, as discussed above, is irrelevant – both this case and *Burgess* (where § 7501 was applied to permit relocation) involved expressly temporary orders. In other words, the temporary sole custody order in this case provides no basi for distinguishing it from *Burgess*. Second,, *McGinnis*, which was a pre-*Burgess* ***joint*** custody case, dealt with a father's right to a hearing before relocation. As such, it was clearly irrelevant to *Burgess*, which involved a temporary ***sole*** custody order. It is equally irrelevant to the temporary sole custody order in this case and to other temporary sole custody relocation cases.

F. Courts Continue to Order Contingent Custody Transfers in Direct Contravention of *Burgess*.

When no exception to § 7501 is established, and detriment is not shown, the custodial parent should be able to move. This is not necessarily the case. Instead courts that have no

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[181] *Burgess*, 13 Cal. 4th at 37 n.9.

legal ground to bar relocation often, as in this case, impose a contingent custody transfer.

Judges who cite bad faith or detriment do not order outright transfers of custody in the cases. They simply deny the relocation, leaving the children in the care of the woman who sought relocation – often after imposing a contingent custody order that would transfer custody only if the custodial parent goes forward with the move. Obviously, if the custodial parent aimed to thwart contact, this behavior should already have been evidenced through violations of custody orders and, perhaps, contempt sanctions. Yet the cases that bar relocation on "bad faith" reasoning or a supposed concern about possible future thwarting of contact demonstrate no such histories, and genuine custody transfers are not ordered in them.

Instead, as in this case, contingent orders are used to call the custodial parent's "bluff." Although expressly disapproved by *Burgess*, they remain common.[182] Further, even if a custodial parent did seek to decrease the frequency of the children's transitions and to remove her household from the center of a maelstrom, it is unclear whether there is any burden she can meet to permit relocation. We are convinced that a relocation in these circumstances is actually likely to help the children, not harm them.[183]

Burgess recognized this practice for what it is – a effort to coerce the custodial parent

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[182] *See also, e.g., Forrest, supra; Rice, supra; Hawwa, supra; Mildred, supra.*

[183] But even if not, are there any circumstances that would permit her relocation – necessity, for example? Surely this has not sufficed in the period since *Burgess*. Courts, having once labeled parties as "whimsical" or as acting in bad faith, are apparently unwilling to accept any reasons, no matter how dramatic, as justifying the move that was earlier refused.. *See Signorelli II* (woman's mother dying of pancreatic cancer); *Postma II* (chiropractor whose California practice had failed, but holds job offers in Pennsylvania, where her elderly mother lives). This should surely not be the law.

into abandoning her plans in order to retain custody. Noting that nothing in the Family Code permits such tests of parental dedication, *Burgess* specifically prohibited this practice. Yet this case and many other post-*Burgess* cases continue to employ this strategy.

Indeed, Mr. LaMusga argues that there is nothing wrong with such coercion if it serves the children's interests. His apparent motivation is two-fold. No doubt he realizes that no grant of custody to him could survive appellate review. Further, it may well be that he really does not want custody – he has never actually sought it.[183a] Perhaps he prefers to let Ms. Navarro carry the major share of parenting duties, perhaps, as Dr. Stahl's analysis implies, having the children around too much simply makes him too frustrated and impatient, perhaps he is unwilling to accommodate his lifestyle to the children's needs, or perhaps his current wife does not want the boys to live with them. The reasons are really immaterial. Mr. LaMusga surely prefers that Ms. Navarro have custody of the children and goes to some length to argue the virtues of the contingent order that has kept her here. His belief that the children's welfare depends on remaining here is clearly shared by judicial officers in several of the cases we have discussed. Mr. LaMusga argues that *Burgess* was wrong in condemning such contingent custody transfer orders. Just as with support obligations, he reasons, parents have child custody obligations that may confine their life choices. He is mistaken; the analogy does not hold.

Prohibiting a move may force the parent to choose between the custody of the child

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[183a] Although his attorney filed a memorandum of points and authorities on March 12, 2001 stating that custody "should" be transferred to Mr. LaMusga if Ms. Navarro relocates, neither it nor the responsive declaration to which it is attached requests sole or primary legal or physical custody. Instead, the declaration merely requests visitation according to Dr. Stahl's March 2001 evaluation or a "focused" evaluation on the relocation request itself. AA 137-139, 140, 143.

and opportunities that may benefit the family unit, including the child as well as the parent. Dr. Wallerstein points out

> Certainly it will not encourage the mother to feel good about the father. Since she is human, it will increase her sense of hurt and her resentment. This will without doubt exacerbate the existing ill feeling and will raise the conflict between the parents. . . ***[T]here is no research in the country which does not see this as hazardous to the welfare of children."***[184]

Dr. Wallerstein goes on to note that the custodial parent is likely to become depressed "as she sees her opportunity to rebuild her life vanish." A second marriage, as in this case and many others among the post-*Burgess* case law,[185] may be placed in jeopardy – and with it, both the children of the previous marriage and those from the new marriage (who are now placed at risk for parental divorce).[186] The fact that it is the former spouse who continues to cause the woman pain only adds to her anguish.[187] As Dr. Wallerstein concludes:

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[184] E-mail from Dr. Judith Wallerstein to Professor Bruch, May 16, 2003, on file with Professor Bruch (emphasis supplied).

[185] *See Biallas, supra; Edlund, supra; Williams, supra; Forest, supra; In re Marriage of Abrams*, 105 Cal. App.4th 979, 130 Cal. Rptr.2d 16 (2nd Dist. 2003).

[186] For information on stepfamilies, *see generally*, M.A. Mason and J.. Mauldon, *The New Stepfamily Requires a New Public Policy*, 52(3) J. SOC. ISS.11 (1996); A.J.CHERLIN, MARRIARGE, DIVORCE, REMARRIAGE (9th rev. ed.1992); C. Bachrach, *Children in Families: Characteristics of Biological, Step-and Adopted children,* 45 J. MARR. & FAM. 171 (1983); Lyn White, "Stepfamilies Over the Lifecourse: Social Support," *in* STEPFAMILIES: WHO BENEFITS? WHO DOES NOT? 109 (Alan Booth & Judy Dunn, eds. 1994); E.M. Hetherington and K. Jodl, "Stepfamilies as Settings for Child Development," *id*. at 55; E. Mavis Hetherington, *An Overview of the Virginia Longitudinal Study of Divorce and Remarriage: A Focus on Early Adolescence*, 7 J. FAM.PSYCHOL. 39 (1993).

[187] *See* the poignant description in the publication based on Dr. Wallerstein's *amica* brief in *Burgess.* Judith S. Wallerstein and Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L.Q. 305, 315 (1996).

> None of these consequences follow when the father is ordered to pay child support. It is not cruel to ask a father to pay child support, nor does it affect his children detrimentally if he feels pressured to do so. These consequences are specific to the cruel choice being imposed on the hapless mother who feels doomed to give up her future in order to keep her child.[188]

The *Burgess* Court was wise when it concluded that the Family Code does not condone these orders. This case provides an opportunity for the Court to emphasize that their imposition is clear reversible error.

G. The Cases Reveal Examples of Judicial Indifference to Domestic Violence, Including Custody Awards to Acknowledged Abusers.

Domestic violence appears in several cases. Given its incidence at marital breakdown, this is tragic but not surprising. It is, however, of concern that, despite judicial training in the area, violent behavior is seemingly ignored by courts that decide child custody cases. The most egregious example is in *Hawwa, supra*, where the trial judge held that no domestic violence had occurred. To do so, he cited an absence of contemporaneous complaints and dismissed the relevance of the wife's testimony, that of a neighbor who had called the police on one occasion and intervened personally on another, and that of the evaluator, who reported that the husband's explosive rages were potentially lethal and cited standardized tests supporting her observations.

There are others. In one, the court reports that the husband "spanked" his wife, pulled a telephone out of the wall and had a restraining order entered against him to protect his wife's parents.[189] More troubling, however, is *LaGuardia, supra.* This is the relocation case

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[188] Wallerstein email, *supra* note 184.

[189] In *Condon, supra*, the court found that at least two incidents of violence against the wife had occurred, but the husband testified that he had not struck or slapped his wife

in which the trial court denied the father's relocation to Las Vegas, a decision that was appropriately reversed by the Court of Appeal.[190] Although custody itself was not at issue, the opinion reports several troubling matters. The custodial father had been arrested for beating his mother, who provided care for the child, and conceded violence against the child's mother, who had twice snatched the child (once to Mexico and once to Hawaii). There was no indication that the child's mother had been criminally prosecuted for the first abduction; she pled guilty to a misdemeanor as to the second. The woman lived more than 100 miles from the father, yet the custody evaluator was concerned that the father would disrupt her ability to visit if he moved from San Diego to Las Vegas. She was a professional – a veterinarian – so one would assume she could afford to travel the short distance from the Los Angeles area to Las Vegas to visit her child.[191] It is, of course, difficult to read between the lines of an appellate report that was not directly considering the custody issue. One is

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after he was arrested for the "spanking" incident, and the court discounted the wife's allegations as exaggerated.

[190] We note that this case arose in San Diego where relocation was also denied to a custodial mother in another case. *See Forrest, supra*. In that case, the trial court misapplied footnote 12 of *Burgess*, which permits a de novo review of custody for cases in which there is both de jure and de facto joint physical custody. In *Forrest*, there was neither (the mother held a sole custody order and was the child's primary caretaker). Without describing the actual time-share, the trial court ruled that the father "saw" the child frequently (the parents lived only 5 doors apart); no explanation was provided as to whether "seeing" the child consisted of nothing more than a smile and a wave, but the absence of any time-share breakdown suggests this form of contact was a make-weight. The trial court ordered a contingent custody transfer if the woman moved to Washington, D.C., with her fiancé, who had been offered a position there with the Navy; if she remained in San Diego, she was to retain sole custody. The panel that approved this legally incorrect decision on appeal contained two of the same judges who reversed another San Diego case that restricted the relocation of the custodial father in LaGuardia. Both decisions were unreported.

[191] Indeed, she had greater funds available than she would have had if she had been paying her child support obligations.

nonetheless left wondering if the relative tolerance of the woman's abductions, the distance of her home from her child and the evaluator's concern that the father would prevent her from exercising visitation in Las Vegas may all stem from the father's concededly violent behavior. We find it troubling that two of the three father custody cases (*LaGuardia* and *Leitke*) involve out-of-control fathers who have been awarded custody of young children by the trial courts.

CONCLUSION

The language and common sense of § 7501 are as appropriate today as when the section was enacted so many decades ago. And the basic tenets of *Burgess* remain as sound as when the opinion was announced. Yet, despite these strong foundations, California's relocation law has become burdened by doctrines and trial court inconsistencies that have undercut its effectiveness. Many of these, upon reflection, seem grounded in views about women and their family roles: courts' responses to the desires of women to improve their employment opportunities, to remarry or to move with a new husband to an area that holds promise for him[192] are dramatically different from their responses to the relocation decisions of custodial fathers.

This case presents the Court with an opportunity to restore the clarity and simplicity of § 7501. But to do so, it must address the practical impediments that our review of the cases reveals. Just as jurors are instructed both before and after a trial that they must apply

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[192] This is, of course, a common choice in our culture, and one that often will have dictated the locale in which the former marriage ended. If the husband is content in his professional life, he may happily remain there. For a wife, who is statistically more likely to be living at a place that was chosen for her husband's needs, marital breakdown often leaves her without the anchors that tie him to the community. *See generally Lasich, supra;, Bryant, supra; Abrams, supra; Rice, supra; Hawwa, supra*.

the law, whether or not they agree with it,[193] a similar fidelity is required of judicial officers.[194] This case presents the Court with an opportunity to vigorously restate the reasoning and principles that control relocation cases and to fine tune the areas – such as the good faith requirement and the effects of *Montenegro* – that time has proven untoward.

At the same time, there is an equally important need to reinforce the fine analysis of many panels of the Court of Appeal (including the one that decided this case below)[195] and of the many judges who faithfully apply the law, including those who do so despite their personal displeasure. The task, in the end, is to place children at the center of the analysis. And to understand that California's protection of stability and continuity in the primary custodial relationship – expressed by carefully constructed best interest rubrics – remains fundamental to children's welfare. When courts lose sight of that focus and replace it with an overriding concern for one or the other parent, they are in danger of making the error

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[193] 1 California Jury Instructions – Civil (BAJI) Instrs. 0.50, 1.00 (2002).

[194] Cal. Rules of Court, Appendix II, California Code of Judicial Ethics, Canon 3B(2). Yet we note that some of the most dramatic departures from § 7501 and *Burgess* appear (sometimes with the name of the trial judge missing) among the unpublished cases. When restrictions are affirmed but the opinions are not published, Mr. LaMusga and others may inaccurately conclude that *Burgess* imposes a "bright line" straightjacket on the Courts. More fundamentally, we are concerned with the pattern of nonpublication in these relocation cases. As we read these opinions, many of the, seem legally novel and important, albeit contrary to *Burgess*. Even where ample good faith reasons are present, for example, such as an aging grandparent, a new marriage, or better employment opportunities, and there has been no interference with visitation in the past, relocation may be refused on the trial court's conclusion that the move has an addition purpose, that of interfering with visitation. This case permits the Court to plug this sub silentio loophole.

[195] *See also, e.g.*, the Court of Appeal opinions is several reported decisions: *Whealon, supra; Ruisi v. Theriot*, 53 Cal. App.4th 1197, 62 Cal. Rptr.2d 766 (1st Dist. 1997)*; Biallas, supra; Edlund, supra; Williams, supra; Lasich, supra; Abrams, supra; In re Marriage of Abargil*, 106 Cal. App.4th 1294, 131 Cal. Rptr.2d 429 (2003).

Judge Yegan noted in the *Williams* case: "In its zeal to reward good parents, the family law court may have punished good children."[196]

Surely in many of the relocation cases that we find unwarranted, trial courts believed that by protecting the non-custodial parent's convenient visitation they were being fair to the father and also benefiting the children. For the reasons we have discussed and those advanced by other *amici*, the costs of these misperceptions, however well intentioned, are too high. They are too high for the children. They are too high for those with whom they live. And they are too high for a society that seeks to improve the quality of life for the poorest among us. We urge the Court to take this opportunity to restore the promise of *Burgess* and § 7501.

Dated: May 21, 2003

Respectfully submitted,

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Attorney for *Amici Curiae*,
Herma Hill Kay *et al.*

[196] *Williams, supra*, at 814.

CERTIFICATE OF COMPLIANCE

I, Carol S. Bruch, counsel of record for *Amici Curiae* Law Professors Herman Hill Kay, *et al.*, hereby certify, pursuant to Rule 14(c)(1) of the California Rules of Court, that the [original] Brief of the *Amici Curiae* Supporting Affirmance was produced using 13-point Times New Roman font including footnotes, and contains approximately 28,849 words, which exceeds the 14,000 words permitted by the Rule and for which leave of Court to file a Brief in excess has been requested. Counsel relies on the word count of the computer program, Word Perfect 10, used to prepare this Brief.

_____

CAROL S. BRUCH

PROOF OF SERVICE
STATE OF CALIFORNIA - COUNTY OF YOLO

I declare that I am a citizen of the United States of America, am over the age of 18 and am not a party to the within action and my business address is University of California, Davis, School of Law, 400 Mrak Hall Drive, Davis, California 95616.

On May 21, 2003, I served the document described as:

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I served these documents by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail.

I declare under penalty of perjury under the laws of the State of California that [the foregoing] is true and correct.

_____
Margaret Durkin