IN THE SUPREME COURT OF CALIFORNIA

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

APPELLANT'S ANSWER BRIEF ON THE MERITS

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

Attorney for Appellant,
Susan Poston Navarro

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PRELIMINARY STATEMENT

This post-judgment move-away case is controlled by Family Code § 7501 – a statute which has been in place since 1872 – that grants custodial parents the "***right to change the residence of the child[ren]***, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child[ren]" (emphasis added). This Court dealt with a custodial parent's right to relocate with children under this statute in *In Re Marriage of Burgess* (1996) 13 Cal.4th 25, and every appellate court decision since then has faithfully applied Family Code § 7501 with the guidance of the *Burgess* decision.[1]

In this case, reversing the position he took below, the father of the children (the noncustodial parent) now concedes that the mother as custodial parent has the presumptive right under Family Code § 7501 to move with the children out of California:

> ***[The Mother's] presumptive right to move with the children (Fam. Code §7501)*** . . . ***is not disputed here.***[2]

This concession is in accordance with *Burgess*, which correctly construed § 7501 as granting custodial parents the "presumptive right" to relocate, recognizing as a fact of 21st Century life and as a

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

[2] Respondent's Opening Brief on the Merits ("RB") at 37 (citation to record below omitted) (emphasis supplied).

matter of sound public policy that it is both unrealistic to assume that divorced parents will remain in the same location after their marriage ends and unlawful to exert pressure on them to do so:

> In [move away cases] . . . the trial court must take into account the ***presumptive right*** of a ***custodial parent*** to change the residence of the minor children, so long as the removal would not be prejudicial to ***their*** rights or welfare.

Burgess, supra, at 32; Family Code § 7501 (emphasis supplied). The focus in this line of cases is on the presumptive right of the custodial parent to move away and relocate with the minor children. The sole countervailing consideration permitted by the statute is whether the removal would be prejudicial to the ***children's*** rights or welfare, not the non-custodial parent's rights or welfare.

The only questions open for decision with respect to a custodial parent's request for a move-away order are:

(1) Does the custodial parent have sound, good faith reasons for the proposed relocation, or is she making the request in bad faith; and

(2) If the request is made in good faith, has the non-custodial parent proven that, as a result of the move, the children will suffer such detriment as would render it essential or expedient for the welfare of the children to order a change of custody.

In Re Marriage of Edlund and Hales (1998) (1st App. Dist.) 66 Cal.App.4th 1454, 1469. It is important to note that the non-custodial parent's showing of "changed circumstances" constituting

such detriment or prejudice to the children's rights as would be necessary to justify a change of custody must consist of something more than merely the proposed move itself. *Id.* The showing of prejudice required of the noncustodial parent must be sufficient to render a change of custody "essential or expedient" for the children's welfare. Given the paramount importance of maintaining the children's established mode of care with their primary caretaker, the burden on the noncustodial is indeed a heavy one, and rightfully so.

In the present case, the Court of Appeal held that the trial court's placement of "primary importance" on reinforcing the noncustodial parent's relationship with the children was contrary to Family Code § 7501 and *Burgess* because it ignored the presumption in favor of maintaining the children's bond with their primary caretaker. The appellate court also concluded that the trial court did not apply the proper legal standard and relied on factors (such as the inevitable fact that the children would see their father less often if they lived at a greater distance from him) that are irrelevant to a finding of prejudice under § 7501.

The central facts governing this child custody proceeding are undisputed:

Respondent, Gary LaMusga ("Gary"), and Appellant, Susan P. Navarro ("Susan"), separated in 1996, when their two boys were two and four years old. Although Susan planned to move to Ohio where she had been accepted for law school, she voluntarily abandoned her goal when custody evaluator Philip Stahl suggested deferring the

move because of his concern that the boys would not be able to maintain attachment with their father at their young ages. When the boys began experiencing difficulties following visitation with Gary (regression from toilet training, complaints about being forced to sleep on the floor at Gary's house, and Gary's insistence that he "will do whatever the hell he wants" about such difficulties), Susan placed them in therapy.

For the next four years, Gary declined to participate in therapy with the boys or even to meet with their therapist, psychiatrist Dr. Gary Gelber. He successfully opposed Susan's motion to require his participation. Although the trial court encouraged Gary both to cooperate in therapy and to meet with Dr. Gelber, he steadfastly refused to do either, maintaining that to support therapy would not be good litigation strategy on his part because "Dr. Gelber will be in the position of becoming an adverse witness in the child custody proceedings." By the time Gary decided it was time to participate in counseling sessions with the boys – four years after the parties separated – his relationship with his sons had further deteriorated.

In February 2001, after deferring her move for five years and foregoing law school, Susan sought the court's permission to move to Ohio, this time because her new husband, Todd Navarro, an automobile sales associate, accepted a more lucrative and career enhancing position as a sales manager in Cleveland.[3] Gary opposed

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[3] AA 135:13-18.

the move without seeking a change in custody.[4]

Dr. Philip Stahl, who had been re-appointed to evaluate custody in light of Susan's intended move in 2001, found that the only "potential" detriment from the move would be in the boys' relationship with their father, but that aside from this potential risk, "there is no evidence of any other potential detriment to the boys if they move."[5] Dr. Stahl made no recommendation approving or disapproving the move. Based on his evaluation and after a half-day trial, the trial court found that Susan's move was based on legitimate good faith reasons and was not designed to thwart Gary's contact with the boys. It also found that Gary's relationship with the boys was "tenuous and somewhat detached," but it nonetheless denied Susan's request to move with the children and ordered that the boys' custody be changed to their father for at least one year if she chose to move.

The Court of Appeal reversed the trial court's order only "to the extent it grants physical custody of the children to Father if Mother moves away" and remanded for the court's re-determination, after consideration of any relevant intervening circumstances, whether the standards governing change of custody have been met. This Court granted Gary's petition for review.

Because Gary disregards and misrepresents the facts and history of this case in key respects as well as the well-established

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[4] AA 137.

[5] AA 413.

law of this State, Gary's petition for review and brief do not correctly state the issues before this Court. Gary's petition in fact reveals the following issues for this Court's decision.

ISSUES PRESENTED

I. WOULD MOTHER'S PROPOSED MOVE PREJUDICE THE "RIGHTS OR WELFARE" OF THE CHILDREN UNDER FAMILY CODE § 7501 TO SUCH A MAGNITUDE THAT IT JUSTIFIES A CHANGE IN THEIR PRIMARY PHYSICAL CUSTODY FROM MOTHER TO FATHER?

A. Has a noncustodial parent who has a "tenuous and somewhat detached relationship" with his children carried his burden of proving prejudice when he can show only that the children's time with him, while preserved in aggregate amount, would need to be rescheduled into less frequent blocks of time?

B. When a custodial parent who has always provided more than 75% of her children's care, and who voluntarily defers a good-faith move for five years to permit the noncustodial parent the opportunity to improve his relationship with the children (an opportunity he declined to take advantage of for four years), finally decides to relocate, has the noncustodial parent carried his burden of showing prejudice?

C. Will the rights and welfare of 7- and 9-year-old brothers who wish to accompany their life-long primary caregiver be so prejudiced if she relocates that it will become essential or expedient to transfer their custody to the noncustodial parent whose relationship with them, after a five-year opportunity for development, remains "tenuous" and "detached"?

As this Court's decision in *Burgess* emphasized, the clear and explicit language of Family Code § 7501 confers on the parent who is the primary physical custodian of a child – the person who takes care of and attends to that child's day-to-day needs – a presumptive right to change the child's residence. That right can be dislodged only if the noncustodial parent carries the burden of showing changed circumstances concerning the child's rights or welfare that

are so profound they would support a change of custody.

Based on the rule of *Burgess* and the unchallenged findings of the children's close relationship with Susan and their distant and highly problematic relationship with Gary, the Court of Appeal reasoned that the trial court, which expressly declined to apply § 7501 and *Burgess*, had failed correctly to impose the burden of proof on Gary and remanded for further proceedings. As the Court of Appeal has directed, those proceedings were to include the intervening circumstances, including a proposed move by Susan to a different and closer location – Arizona – that will facilitate contact between the boys and their father. The Court of Appeal did not mandate any particular final outcome on remand.

The Court of Appeal's decision is firmly grounded in statutory prescription and California case law. It should be affirmed in order to permit the further proceedings below.

II. DO THE INEVITABLE CONSEQUENCES OF A CUSTODIAL PARENT'S RELOCATION – INCLUDING LESS FREQUENT IN-PERSON CONTACT BETWEEN THE CHILD AND THE NONCUSTODIAL PARENT – JUSTIFY RESTRAINING A MOVE AND CHANGING CUSTODY TO THE NONCUSTODIAL PARENT?

In restraining Susan's move to Ohio and ordering a change of custody to Gary in the event of Susan's relocation, the trial court observed that a move of 2,000 miles would not promote "frequent and continuing contact" with Gary. As *Burgess* correctly finds, however, this is an inevitable consequence of practically any relocation. Rejecting similar arguments, every post-*Burgess* appellate decision has endorsed and reaffirmed this conclusion. Indeed, the trial court in this case noted that, if it were to apply the

§ 7501 presumption, it too would have authorized relocation despite the decreased frequency of face-to-face contact.

If a trial court may ignore the statutory presumption and then seize upon the obvious and indisputable fact that greater distance means less frequent in-person contact between the children and the noncustodial parent, without regard for other alternative forms of contact and the total visitation time allotted, no move is likely ever to be permitted. The Legislature's mandate in § 7501 and this Court's decision in *Burgess* would be completely undermined and nullified.

III. MAY THE NONCUSTODIAL PARENT RELY ON ALLEGATIONS OF "PARENTAL ALIENATION" WHICH ARE NEITHER SUPPORTED BY THE EVIDENTIARY RECORD NOR THE TRIAL COURT'S FINDINGS?

A. Does California law or public policy require a custodial parent to ignore, actively discourage or attempt to refute her children's expressions of unhappiness with the noncustodial parent in order to avoid losing custody?

B. Are a noncustodial parent's claims of "alienation" a lawful basis to deny relocation and transfer custody, especially when the trial court expressly found that no alienation had occurred?

Since the parties' separation and throughout these proceedings, Gary has enjoyed regular visitation on a schedule to which he voluntarily agreed, plus many additional days that Susan has voluntarily provided. Susan has never thwarted Gary's visitation nor disobeyed any court order. Custody evaluator Stahl found no reason to believe she would do so if a move were permitted.

Despite these uncontroverted facts, the children's relocation

was restrained because the trial court perceived that Susan was unable to promote the relationship between Gary and the two boys in a way the court felt was appropriate. The trial court's perception was rooted solely in its finding that Susan had failed to stop supposedly negative comments the children made about Gary. The trial court did not find that Susan had made any such negative comments herself, nor that she had actively undermined or interfered with Gary's parenting or time visiting with the children. It expressly fond that no alienation occurred.

While parents certainly have legal and moral obligations to obey visitation orders and to refrain from affirmative conduct designed to injure the children's relationship with the other parent, no statute has required and no case has held that a parent must, contrary to his or her reasonable beliefs about what is best for the children, punish them because they perceive and express negative aspects regarding the other parent. Yet this is precisely what the trial court's finding requires of Susan and parents like her.

This kind of judicial micro-management of parent-child relations has never been endorsed and, indeed, was condemned by this Court in *Burgess*. It is neither sound law nor good social policy, and should be similarly eschewed in this case. In addition, the doctrine of "parental alienation" espoused by Dr. Stahl in this case is contrary to the scientific literature and should be rejected on legal and policy grounds.

IV. SHOULD *BURGESS* BE OVERRULED AND FAMILY CODE § 7501 "REINTERPRETED" SO AS TO EFFECT A JUDICIAL REPEAL OF THE STATUTE, THEREBY ALLOWING COURTS TO DISREGARD ITS

EXPRESS PRESUMPTION IN FAVOR OF RELOCATION, AND AUTHORIZING RESTRAINTS ON CUSTODIAL PARENTS WHO WISH TO RELOCATE WHENEVER THERE MAY BE SOME NEGATIVE IMPACT FROM AN OTHERWISE GOOD-FAITH MOVE?

A. Does the passage of six years since *Burgess* without legislative amendments to Family Code § 7501 indicate the Legislature's agreement with the Court's construction and thereby control the question of statutory interpretation?

B. Do the appellate decisions following *Burgess* demonstrate that the *Burgess* decision provides a sensible guide for application of Family Code § 7501?

Family Code § 7501 and *Burgess* have been consistently interpreted and applied in every subsequent appellate decision (seven in all) to impose on the noncustodial parent a burden of showing prejudice to the child so severe that it constitutes a "substantial change of circumstances" requiring a change of custody. None of these cases has suggested that detriment arising merely from less frequent physical contact due to increased distance between parent and child is sufficient to meet that burden; indeed, all have held to the contrary, and the trial court explicitly acknowledged in its decision that this would have been a consequence of applying *Burgess* and § 7501 to this case.

This uniformity is not the product of ambiguity or inflexibility, but rather a faithful application of California's comprehensive statutory scheme. Custodial parents are protected so that they can make relocation decisions without fear that employment, education or other opportunities will be lost by a noncustodial parent's tactical decision to stall the move through litigation. At the same time, the interests of noncustodial parents are protected because California

retains exclusive jurisdiction to modify custody and visitation after the move takes place.

As evidenced by the *amicus* letters to the Court supporting Gary's position, this case is, in truth, a frontal assault by the so-called Fathers Rights Movement on section 7501 and *Burgess*, both of which are gender-neutral. The attack asserts that *Burgess* deprives fathers (who are often more occupationally and financially stable and have less need to move following divorce) of their purported "right" to keep their children nearby even when they have, in many cases (as here) voluntarily deferred to their former spouses the day-to-day responsibilities of caring for those children. These fathers incorrectly assert that the weight of mental health research agrees with their position, believing that children are inevitably harmed by increased distance from the noncustodial parent. Despite these claims that children can thrive only if both parents live nearby, none of the "experts" they cite recommend either that courts restrain noncustodial parents from moving away from their children or even that noncustodial parents be encouraged to follow their children to a new location after divorce.[6] Their efforts are focused exclusively on sacrifices by custodial parents and their households, with no suggestions for comparable adjustments in their own plans or lives.

Gary has gone to extraordinary lengths to achieve his goal of

[6] In *Tropea v. Tropea*, 665 N.E.2d 145 (1996), the New York Court of Appeals noted that is an appropriate option for noncustodial parents to consider.

effectively eviscerating section 7501 and *Burgess*. Throughout his Opening Brief on the Merits, Gary has made false assertions of fact and misstated the record to this Court in an effort to blame Susan for his problematic relationship with the children. As just one example, Gary falsely asserts that custody evaluator Dr. Stahl recommended against Susan's move in 2001 because the move would be harmful to the children. In fact, in his report dated June 29, 2001, and at trial, Dr. Stahl expressed ***no opinion*** regarding whether Susan's move should be granted or denied.

What the custody evaluator did find in this case was that Susan's only contribution to Gary's poor relationship with the children was her inadvertent tendency to "overindulge" their emotions and negative feelings about their father. Dr. Stahl called this "unconscious alienation," and testified at trial that no amount of effort on Susan's part could correct it because it was a matter of her "being different" and "feeling different." The trial court disagreed with Dr. Stahl, and expressly found that no "unconscious alienation" occurred. Gary nevertheless makes assertions of fact here that are not supported by the record and asks that this Court reweigh the evidence. If a custodial parent's unconscious and inadvertent tendencies to empathize with and be solicitous of her children's emotions can defeat a move and result in a change of custody, it would effectively render section 7501 and the *Burgess* line of cases meaningless.

Section 7501 has been part of the law of this State since 1872. The Court's clear and straightforward interpretation of its command

in *Burgess* has been echoed in a consistent and unbroken line of appellate decisions and left intact by the Legislature for the six years since *Burgess*. If the public policy issues loom as large as Gary and his supporters claim, the Legislature is the proper forum for the sweeping changes in statutory law and modifications to *Burgess* they propose.

PROCEDURAL POSTURE

This is a post-judgment move-away case from the Contra Costa County Superior Court, in which Susan, the custodial parent, sought to move with the parties' two minor children (ages 9 and 7) from California to Cleveland, Ohio, where her husband had accepted a lucrative job offer. After trial of the matter on August 23, 2001, the Superior Court made specific findings that:

(i) Susan was and always had been the primary caretaker of the children,

(ii) Susan's proposed move was based on legitimate, good faith reasons and was not designed to interfere with Gary's relationship with the children,

(iii) Susan did not have the presumptive right to move with the children under Family Code § 7501 because the court had before it a motion to modify visitation and because the parties were not always cooperative in the co-parenting of their children,

(iv) a move of approximately 2,000 miles would not promote frequent and continuing contacts between the children and the noncustodial parent, and

(v) it was of "primary importance" to improve Gary's longstanding "tenuous and somewhat detached" relationship with the children before Susan would be permitted to move.

With these findings the trial court denied Susan's request to move with the children and ordered an immediate change of custody to Gary for at least one year if Susan chose to move. Susan appealed.

The Court of Appeal unanimously reversed, holding that there was no legal basis permitting the trial court to ignore Susan's presumptive right to move under § 7501 simply because of the pending visitation motion or because the parties had not always cooperated in co-parenting their children.

The Court of Appeal also held that the trial court's placement of "primary importance" on the children's relationship with the noncustodial parent was inconsistent with Family Code § 7501 and the legal principles set forth in *Burgess*, both of which place paramount importance on maintaining the children's stability and continuity of established modes of care with their primary caretaker. Finally, the Court of Appeal reversed the trial court's finding that frequent and continuing contacts could not be maintained even after moving to Ohio.

The appellate court did not, however, enter an order permitting the move. It instead remanded the case to the trial court for proper application of the correct legal standards governing the move.

Gary's Petition for Rehearing was denied by the Court of

Appeal. Gary's Petition for Review in this Court was granted. Gary's Opening Brief now concedes that the Court of Appeal was correct in applying § 7501 and *Burgess* to this case.

Pending trial on Susan's relocation request, her husband, Todd Navarro ("Todd"), accepted the job offer in Cleveland and moved there in March 2001. When the trial court denied Susan's move, Todd left his job in Cleveland where he was earning over $8,000 per month and returned to California to a job where he earns $4,200 per month.[7] In September 2002, Todd was offered a management position with an auto dealership in Mesa, Arizona at a salary of $9,000 to $12,000 per month.[8] In light of Todd's new job offer, Susan has abandoned her plans to move to Ohio, and on September 16, 2002, filed a motion in the trial court to move to Arizona. The trial court has stayed hearing on Susan's new motion to relocate pending the Court's review of this case.[9]

STANDARD OF REVIEW

Custody and visitation orders are reviewed under the deferential abuse of discretion test:

> The precise measure is whether the trial court could have reasonably concluded that the order in question advanced the "best interest" of the child.

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[7] *See* Susan's Notice of Motion to Abandon Appeal and for Other Relief filed in the Contra Costa Superior Court on September 16, 2002 ("JND") of which this Court granted judicial notice by order entered on October 2, 2002. (JND ¶ 3.)

[8] JND, ¶ 4.

[9] *See* Appellant's Second Request for Judicial Notice, served and filed herewith.

Burgess, supra, at 32. As the Court of Appeal recently defined the test:

> [T]he scope of discretion always resides in the particular law being applied, *i.e.*, in the legal principles governing the subject of [the] action. . . . Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an "abuse" of discretion.

Thayer v. Wells Fargo Bank (2001) 92 Cal.App.4th 819, 833, *quoting City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297.

Appellate courts are "less reluctant to find an abuse of discretion" when a trial court orders a change in an existing custodial arrangement. *Marriage of Carney* (1979) 24 Cal.3d 725, 731.

In light of (i) the undisputed facts in this case, (ii) the strong presumption in favor of maintaining the children's relationship with their primary caretaker, and (iii) the applicable legal standard – a substantial showing that a significant change of circumstances independent of the move make a change in custody essential or expedient (*Burgess*, *supra*, 13 Cal.4th at 38) – the trial court's order transferring custody of the children from Susan to Gary if Susan moved was not in the children's "best interest." Instead, it constituted an abuse of discretion which the Court of Appeal properly reversed. For the reasons more fully set forth below, and especially in light of Gary's concession that § 7501 and *Burgess* apply, this Court should either dismiss review of this case as improvidently granted or affirm the decision of the Court of Appeal.

STATEMENT OF FACTS

A. Background and the First Custody Evaluation

Susan and Gary married in October 1988 and separated in May 1996 after a seven-and-a-half-year marriage.[10] Restraining orders issued against Gary in July 1996 precluded him from coming within 100 yards of the family residence.[11] The parties' marital status was terminated in December 1997 in a bifurcated proceeding.[12]

Susan and Gary are the parents of two children, Garrett LaMusga, born May 5, 1992, and Devlen LaMusga, born May 5, 1994.[13] On July 8, 1996, when the restraining orders issued, the parties agreed to the appointment of Philip Stahl, Ph.D, to evaluate the custody and visitation issues, including Susan's proposed move to Ohio where she had been accepted to law school and where her sister and her family (with whom the children were especially close) lived.[14] Dr. Stahl's report issued on October 10, 1996, and made important findings regarding Gary:

- ". . . interviews and psychological testing reveal significant concern about [Gary's] dependency, perceptual accuracy and decision making. It is this examiner's observation that [Gary] perceives things in a rather idiosyncratic manner, and has a somewhat narcissistic approach in the way he deals with problems

[10] AA 4, 32.

[11] AA 35.

[12] AA 89.

[13] AA 4.

[14] AA 37, 224:20-25.

that he experiences."[15]

- ". . . it is equally possible that his distorted perception causes him to see alienation where none exists. In fact, it is this examiner's observation that his projection of blame onto [Susan] for alienating Tori [Gary's daughter from a previous marriage] against him is just that; *i.e.*, blaming her for alienating Tori when he, in fact, is feeling guilt at detaching from Tori. While a different process may be operating with the boys, it is this examiner's opinion that the issues in this case increase the likelihood of his fear of alienation, even where there is no alienation taking place."[16]

With respect to Susan's move to Ohio, Dr. Stahl advised against it at the time, citing the boys' young ages (4 and 2) and their need to "establish a greater attachment" with their father and to "stabilize that relationship prior to a move taking place."[17] He recommended reviewing the relocation question "in approximately two years."[18]

In light of Dr. Stahl's concern regarding the boys' need for a stronger attachment with Gary, Susan voluntarily remained in California and relinquished her admission to law school. After trial in November 1996, a final custody order was entered on December 23, 1996, awarding the parties joint legal custody with physical custody of the children to Susan.[19] Gary was granted gradually-increasing visitation on alternating weekends from Friday at 5:00

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[15] AA 389.

[16] AA 390.

[17] AA 394.

[18] AA 395.

[19] AA 82.

p.m. to Sunday at 6:00 p.m., every Tuesday and Wednesday from 4:00 p.m. to 7:30 p.m., and additional time on holidays.[20]

B. Susan's Efforts to Facilitate the Boys' Relationship With Gary

1. Therapy for the Children

Following the parties' separation in May 1996, the boys began to experience difficulties with visiting their father. Garrett became overly aggressive (contrary to his nature), disorganized and unfocused, regressed in his toilet training, complained of being forced to sleep on the floor at his father's house, complained that his father "yells" a lot, and that he could not "be me" when his father began a series of unannounced drop-ins at Garrett's preschool.[21] Devlen developed a nervous facial tick, a stutter in his speech, and developed escape plans in response to his father's demands that he demonstrate affection.[22] When Susan brought these problems to Gary's attention, he responded that he "will do whatever the hell he wants" regarding the children.[23] Susan enrolled the children in therapy with child psychiatrist Gary S. Gelber, M.D., and in October 1996 sought an order directing Gary to cooperate with Dr. Gelber and meet with him as requested by Dr. Gelber.[24]

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[20] AA 82-83.

[21] AA 48:8-23.

[22] AA 48:24-49:2.

[23] AA 49:8-10.

[24] AA 49:16-18. Gary's Opening Brief asserts that Dr. Stahl never observed the boys' anxiety, thereby implying that Susan's reports of such difficulties were false. (RB 11.) In fact, Dr. Stahl's testimony in August 2001, which was hampered because he

Although Gary acknowledged in a declaration filed on October 26, 1996, that "Dr. Gelber cannot effectively be a treating psychologist [*sic*] without my participation in the child's therapy," he refused to participate out of a "concern that Dr. Gelber will be in the position of becoming an adverse witness in the child custody proceedings."[25]

The court's custody order entered on December 23, 1996, directed that the children remain in therapy with Dr. Gelber, and stated that "[Gary] shall not be required to cooperate with the children's psychotherapist, Gary S. Gelber, M.D. or to meet with him as requested by Dr. Gelber, but [Gary] is encouraged by the Court to do both."[26] Gary never attended any therapy sessions with the children and Dr. Gelber,[27] and made no attempt to participate in any therapy with the children until four years later, sometime after March 2000, when the children (then ages 8 and 6) began seeing a different counselor, Barry Tuggle, MFT, at the

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had not reviewed his 1996 evaluation report "in a while," was only that he did not recall having witnessed anxiety himself during the evaluation. (RT 27:23-26.) In the 1996 report itself, however, Dr. Stahl stated that the boys' therapist (then Dr. Gelber) "reports . . . anxiety in them and recommends that they continue in therapy." AA 394.

[25] AA 65:3-6.

[26] AA 83:28-84:3.

[27] Without any citation to the record, Gary asserts as fact that he "was always willing to work through existing problems with a therapist." (RB at 13.) His own sworn testimony in the record in fact demonstrates the exact opposite to be true. AA 65:3-6.

recommendation of Garrett's schoolteacher.[28]

Around the time that the boys began therapy with Dr. Gelber, Susan, she began meeting with child and adult psychiatrist Dr. Lenore Terr. Dr. Stahl was aware of this fact when he wrote his 1996 custody evaluation.[29] Gary’s assertions that Susan refused to participate in therapy are therefore inaccurate.[30]

2. Susan Grants Additional Visitation to Gary and Keeps Him Informed of and Involved With the Children's Activities.

In the years following the December 23, 1996 custody order, Susan regularly and on numerous occasions tried to reinforce Gary’s relationship with the boys by granting him additional time with the children beyond his regular time periods.[31] She also encouraged additional telephone contact between Gary and the boys, including

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[28] AA 360:14-24, 369:1-370:4.

[29] He reported that he “attempted” to speak with Dr. Terr (AA 379), a fact that he did not recall five years later at trial. RT 72:28-73:3.

[30] Gary’s Opening Brief inaccurately contends that Gary was always willing to work through existing problems with a professional therapist but that Susan’s willingness was “marginal.” (RB 13-14.) No citations to the record are or could be provided for either of these false assertions. The Opening Brief also erroneously claims that Susan had not been in personal therapy during the five years between 1996 and 2001, citing only Dr. Stahl’s trial testimony that he could not recall that she had done so. (RB 21, citing RT 72:28-73:3.) Susan’s testimony in response to an artful question at trial in August 2001 is also misrepresented as providing further “proof” that she had not sought therapy. (RB 21.) In fact, the question to which Susan responded was whether she had been in therapy “since 1997” (not “since you and Gary separated in 1996,” which would have produced a different response). To the question as posed Susan truthfully replied “no.” RT 89:6-8.

[31] AA 246:19-247:8.

having the boys keep a calendar of their phone calls – which were far more numerous than the biweekly calls to which Gary was entitled under the court order – to help them maintain a connection with their father between visits.[32]

Susan also kept Gary informed of the boys' illnesses (at times in writing),[33] and of their activities and academics – *e.g.*, passing along report cards to Gary and advising him of Garrett's difficulties on spelling tests[34] and Garrett's need for a tutor (which Gary acknowledged in writing),[35] sending Gary more than 175 photos of himself and other family members at numerous events (including pictures of the boys at Garrett's First Communion and Devlen's promotion to yellow belt in karate),[36] inviting Gary, his wife Karin, and Karin's daughter Kelsey to the boys' birthday parties in 1996, 1997 and 1998.[37] Gary also assisted in coaching Garrett's soccer

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[32] AA 245:22-246:5, 252:15-253:6, 322-31.

[33] AA 247:8-15, 285.

[34] AA 247:15-20.

[35] AA 247:20-26.

[36] AA 248:1-10 (and referenced exhibits).

[37] AA 225:1-3.

team,[38] and in signing up the boys for karate[39] and football.[40]

Susan also consistently listed Gary as "father" on the boys' annual school applications, all of which were also signed by Gary.[41]

In August 1997 Susan agreed to alter her existing vacation plans to travel to Florida with the boys in order to accommodate a trip to Oregon that Gary had planned with the boys. The parties exchanged confirming letters on this point.[42]

In stipulations filed on December 9, 1997 and July 13, 1998, Susan agreed to adjust and expand Gary's holiday and summer visitation.[43] Gary did not readily reciprocate.[44]

C. The Second Evaluation Report

In April 1999 the parties agreed to reappoint Dr. Stahl to

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[38] AA 251:4-6.

[39] Gary falsely asserts that he was not informed of Devlen's enrollment in karate. (See RB at 11.) Susan in fact obtained Gary's approval before signing Devlen up, after informing Gary in writing on March 14, 2001, of Devlen's desire to enroll in karate. (AA 251:14-24, 313.)

[40] AA 251:14-24, 313-14.

[41] AA 246:6-11, 262-276.

[42] AA 246:12-18, 278-79.

[43] AA 87, 93.

[44] Dr. Stahl's evaluation dated February 26, 2001, reports that Gary "ultimately" let the boys spend an extra day with Susan during Christmas vacation in 1999 when her sister's family visited from Ohio, but not until his initial refusal had caused "a significant regression for the boys . . . the toll of the conflict was immense." AA 404.

perform an updated review of the visitation arrangement.[45] For reasons that are unexplained in the record, Dr. Stahl did not begin the evaluation until November 2000 (a year and a half later), and did not issue his report until February 26, 2001.[46]

During the evaluation process Susan advised Dr. Stahl that her husband, Todd Navarro, had recently been offered a management position with a Toyota dealership in Cleveland, Ohio, and that she wanted to move to Cleveland where she also had close family.[47] By this time Susan and Todd had a 15-month-old daughter, Aisling, to whom Garrett and Devlen (then ages 9 and 7, respectively) were very attached.[48] Dr. Stahl expressly declined to address the relocation issue in his evaluation report dated February 26, 2001.[49]

In his report, Dr. Stahl noted the boys' feelings that Gary is mean and yells at them, which they expressed consistently in all interview settings and to their therapist, but concluded that the boys "are acting like children who are alienated and split in their feelings toward their parents," and who were having difficulty dealing with the conflict and tension they felt between the parents.[50]

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[45] AA 137.

[46] AA 396.

[47] AA 400.

[48] AA 411.

[49] AA 405.

[50] AA 400-03.

He reported that the children were aware that Gary is very angry at their mother, but "less aware . . . how angry their mother is at their father."[51] Further, he stated that the children expressed their desire to move to Ohio with their mother, even in Gary's presence at his home.[52] Dr. Stahl noted that Gary was "self-centered" and "doesn't deal with the boys' feelings that well," that Gary was "detached from them" and that he "has a hard time interacting with them even though he tries."[53]

Dr. Stahl believed that Susan "tends to overindulge [the boys] when they express negative emotions about their dad" by giving them more attention when they express those feelings.[54] According to Dr. Stahl, this "reinforces any loyalty conflicts" the boys feel, although he believed Susan's actions were "unconscious."[55]

Expressing his belief that the boys would do better having less frequent visits and longer blocks of time with each parent, Dr. Stahl recommended adjusting Gary's timeshare with the boys by replacing weekly Tuesday and Wednesday evening visits with a weekly Thursday overnight, and expanding the alternating weekend visits so that Gary would have the children from Friday after school until

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[51] AA 403. This evidence is inconsistent with Gary's claim that the children had observed their mother's anger toward him over a five-year period. RB 13.

[52] AA 402.

[53] AA 403.

[54] *Id.*

[55] AA 403-04.

Monday morning.[56] For the 2001 summer vacation, Dr. Stahl recommended that Gary have the boys for alternating two-week periods.[57] These recommendations were adopted by the court in orders entered on April 23, 2001 and July 31, 2001.[58]

D. Susan's Request to Move in 2001

On February 13, 2001, Susan filed an Order to Show Cause to relocate to Cleveland with the children.[59] The court scheduled a hearing on the motion for March 19, 2001.[60]

On March 12, 2001, Gary filed a responsive declaration opposing Susan's move-away motion.[61] Gary's responsive declaration sought only to stop the move, or in the alternative, to expand his visitation to a 50% time share; Gary did not ask to become the children's primary caretaker.[62]

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[56] AA 405. Thus, Gary's contention (RB 28) that Dr. Stahl advocated substantially more frequent contacts and his claim that Dr. Stahl's recommended change significantly increased his visitation time (RB 16, 19), are both patently wrong. To the contrary, the midweek contacts were ***decreased*** so that there would be fewer transitions, which resulted in a minor change in the overall timeshare with Gary – *i.e.*, two evening visits were replaced by one overnight visit.

[57] AA 405.

[58] AA 151:17-25, 157:1-4.

[59] AA 132.

[60] *Id.*

[61] AA 137.

[62] On his responsive declaration, prepared on the form adopted by the Judicial Council of California, Gary did not mark the box for child custody. He instead, under item 8 for "other relief," requested that "[Susan's] request that she be permitted to locate [*sic*] the parties' two minor children to the State of Ohio be

At hearing on March 19, 2001, the court appointed Dr. Stahl "to provide a focused evaluation on the issue [of] whether the relocation of the parties' two minor children is in the best interest of said children."[63] Susan's counsel objected to this order to the extent that it did not correctly state the proper legal standard for assessing Susan's move-away request.[64]

E. Dr. Stahl's Third Evaluation Report

Dr. Stahl issued a third report on June 29, 2001, but again offered no opinion as to whether the move should occur.[65] Dr. Stahl concluded, however, that other than the ***potential*** for detriment to their relationship with their father, ***the boys would suffer no detriment from the move.***[66] As Dr. Stahl reported:

> ***Now that the children are older, it's*** ***<u>likely</u>*** ***that they will be able to "hold onto" their relationship with their dad, even with a move***, unlike what I felt when I did my original evaluation for this

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denied, or alternatively that the Court order that both parties submit to a focused evaluation on [Susan's] issue regarding her move away request." (AA 137-38.)

[63] AA 151:12-14.

[64] AA 152:25-27.

[65] AA 414. Gary again misrepresents the record when he falsely contends that Dr. Stahl's report recommended Susan's request to move be denied as harmful to the children. (RB 10.) There was never any such recommendation by Dr. Stahl, who instead provided three possible recommendations for use depending on whether the court authorized the move and whether, if the move was restrained, Susan stayed in California. AA 414-16.

[66] AA 413.

family.[67]

He also reported that the boys wanted to move and that Gary was "clear" about this fact.[68] Dr. Stahl then summarized the risks:

> The major risk of keeping the boys here is that the boys will increase their rejection of their father, blaming him for the disruption of their family with their mother. If that occurs, . . . they could regress in their functioning. . . . Unfortunately, there's no way to predict which way the boys might adjust. . . . ***[T]he risks are clear. . . . [E]ither dad's relationship with the boys could be hurt . . . mother's family could be fractured . . . or the boys would be moved from the primary home that they've known . . .***[69]

Dr. Stahl described Gary's relationship with the boys as "tenuous at best."[70] He also noted that the boys clearly have a well-established relationship with their mother, stepfather and sister.[71] Susan is close to the boys and focuses on their emotions.[72] Dr. Stahl's only expressed concern regarding Susan was about "ways she might ***inadvertently or unconsciously*** promote loyalty conflicts . . . and alienation"[73] (emphasis supplied).

F. The Trial on Susan's Move-Away Motion on August 23, 2001

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[67] AA 412 (emphasis supplied).

[68] AA 409-10.

[69] AA 414 (emphasis supplied).

[70] AA 410.

[71] AA 411.

[72] *Id.*

[73] *Id.*

The parties each submitted declarations in lieu of live testimony. Gary's opening declaration accused Susan of "alienating" the boys from him and cited purported examples of this alleged conduct – a significant portion of which focused on blaming Susan for his detached relationship with Tori, his daughter from a prior marriage.[74]

Susan's opening and rebuttal declarations outlined her many efforts to facilitate a better relationship between the boys and Gary, much of which was substantiated by letters and notes between the parties that were attached as exhibits to her declarations. Susan also outlined the boys' current complaints about visiting Gary (*e.g.*, incidents of inappropriate nudity by Gary and Karin).[75] Susan attempted to resolve these issues with Gary in writing, which proved to be unsuccessful. Gary neither refuted nor denied the matters set forth in Susan's declarations.

There was also unrefuted evidence that Susan had on many occasions allowed Gary additional visitation with the boys beyond the periods specified in court orders.[76] There was also unrefuted

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[74] AA 158:18-159:28. Susan rebutted these allegations regarding Tori and outlined the history of this troubled youth and Susan's efforts to try to help her. Tori was told to stay away from Garrett and Devlen when Susan discovered Tori was using drugs. (AA 248:14-249:20.)

[75] AA 253:21-254:12, 335-36. Children as young as Devlen are naturally vague about matters of sexual conduct, but Gary's and Karin's nude exhibition as seen through an open bedroom door left Devlen clearly uncomfortable by what he had been permitted to see. AA 253:21-254:12.

[76] AA 246:19-247:14. Gary's Opening Brief again distorts the record when it suggests that Susan was not accommodating and

evidence that Susan had gone to great lengths to keep Gary informed of the children's school schedule, illnesses and doctor's appointments, and to provide him with photographs of the children, Gary and other family members at various events.[77] Unfortunately, the same cannot be said for Gary.

There was unrefuted evidence that Gary (i) failed to notify and inform Susan of an emergency room visit with Devlen on July 4, 2000,[78] (ii) made an appointment with a chiropractor for Garrett in March 2001 without notifying Susan,[79] and (iii) enrolled the Roman Catholic children in a Presbyterian summer camp in 2001 without consulting Susan.[80] Gary also failed to include Susan's name and contact information on the registration form for this camp.[81]

Finally, there was unrefuted evidence that Susan had acted appropriately in two very delicate situations – (i) Garrett placed Todd's name in the space for "father" on a genealogy report for school, and (ii) Garrett telephoned Gary and told him he did not

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flexible concerning Gary's time with the boys, citing Susan's refusals to include weekends in his visitation during Spring Break 2001. (RB 11.) In fact, Gary had insisted on precisely the same interpretation during the previous year to deny Susan weekends for her time with the children during Spring Break in 2000. Susan merely provided a comparable vacation period for Gary a year later by adopting the same definition he had used. AA 335, 340.

[77] AA 245:22-248:10.

[78] AA 254:20-26, 342.

[79] AA 255:1-3.

[80] AA 163:25-26, 255:4-15, 345.

[81] *Id.*

want him at the alter during his First Communion ceremony. On both occasions, Susan vehemently expressed her disapproval of Garrett's actions to him. With respect to the genealogy report, Susan told Garrett that "Todd isn't your father. Your Dad is your father and you really should put in his name in that space." Garrett steadfastly refused to do so, and Susan took the matter up with Mr. Tuggle, the boys' therapist. Mr. Tuggle informed her that she had acted correctly in not changing the document herself or forcing Garrett to do so.[82] Susan also expressly disapproved of Garrett calling Gary to tell him he did not want Gary at the alter during his First Communion. Susan told Gary that she did not approve of Garrett's actions and Gary thanked her for her support.[83]

Dr. Stahl and Garrett's former kindergarten teacher, Maureen Henry, testified at the trial.

1. Dr. Stahl's Trial Testimony

Much of Dr. Stahl's testimony, elicited by Gary's counsel, focused on the matters in his first two evaluations reports, although he qualified his remarks by repeatedly noting that he had not reviewed the 1996 report "in a while" and was unsure of his memory because it was more than five years later and he did not have his notes to refresh his recollection.[84]

As to Susan's move, Dr. Stahl testified that he had no reason

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[82] AA 252:3-11.

[83] AA 253:11-14.

[84] RT 24:5-9, 20-22; 26:20-24; 27:23-24; 29:22-26; 32:23-25.

to believe that Susan would not continue to comply with court orders for visitation if she moved to Cleveland with the boys.[85] Although he believed Susan contributed to Gary's problematic relationship with the boys in nonspecific ways,[86] Dr. Stahl testified that no amount of effort on Susan's part would improve the boys' relationship with Gary. The problem is her "emotional style" that tends to reinforce the children's negative feelings about Gary, and it was a matter of Susan "being and feeling different" that was the issue.[87] He also testified that Gary was responsible for his "tenuous and [sometimes] difficult" relationship with the boys because "[h]e gets frustrated and impatient sometimes [and] that makes it harder for the boys . . ." In addition, Dr. Stahl said that Gary contributes to what he termed the boys' "alienation" by "pushing to improve" his relationship with them and by "whatever he does that contributes to the conflict with [Susan]."[88]

2. <u>The Disputed Testimony of Maureen Henry</u>

Maureen Henry was Garrett's kindergarten teacher for the 1998-99 school year.[89] In her declaration filed two years later on August 9, 2001, Ms. Henry opined that Susan was alienating the

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[85] RT 63:22-26.

[86] RT 57:14-58:15.

[87] RT 70:24-71:8.

[88] RT 57:17-58:13.

[89] AA 199:26-27.

affections of both Garrett and Devlen from Gary,[90] and gave three bases for her opinion:

(i) she did not know Gary "even existed" until September 9, 1998 (about a week after school had started),[91]

(ii) Susan at one time told her that Gary lies about things,[92] and

(iii) her ***perception*** that Susan did not want Gary to participate in the classroom.[93]

On cross-examination in open court, Ms. Henry admitted that she had never used the word "alienate" while meeting with Gary's attorney in order for him to prepare her declaration,[94] further admitted that she may have met Gary before September 9 at orientation and also on Garrett's first day of school,[95] and testified that, before signing the declaration prepared by Gary's attorney, she had not reviewed Garrett's school file.[96] Ms. Henry also testified that her statements regarding alienation were merely her "opinion" and not "fact."[97]

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[90] AA 200:3-5.

[91] AA 200:23-201:2.

[92] AA 201:11.

[93] AA 201:18-23.

[94] RT 4:20-5:21.

[95] RT 6:15-26, 8:1-5.

[96] RT 8:26-10:1.

[97] RT 5:12-19.

In a rebuttal declaration, Susan testified that Ms. Henry met Gary, Susan and Garrett at the orientation on August 30, 1998, and again on Garrett's first day of school,[98] and that she (Susan) had taken photographs of Gary and Garrett on his first day.[99] Susan also introduced the school's Application for Admittance form for the 1998-99 school year on which she had listed Gary as Garrett's father, provided Gary's address and telephone number, and indicated marital status as "divorced."[100] Gary's signature also appeared on the application for admission dated January 10, 1997.[101]

G. The Trial Court's Ruling

At the conclusion of the hearing, the trial court made the following findings on the record:

- Susan was the primary custodial parent at the time she filed her motion to relocate, but that this was not "literally a *Burgess* move away circumstance" because the parents were not cooperating in the co-parenting of the children.[102] The trial court concluded "Clearly, if the parties had been co-parenting with the children and cooperative in this matter, under those circumstances there might be a presumptive right for Miss Navarro to relocate with the children. . . ."[103]

- Susan was not engaging in alienation, "i.e., a conscious active effort on the part of one parent to interfere with the relationship between the children and to attempt to cut off the relationship of the other parent." "I don't think that is

[98] AA 354:21-355:2.

[99] AA 354:21-355:26.

[100] AA 262.

[101] AA 263.

[102] RT 105:26-106:1, 22-28.

[103] RT 106:22-25.

what is happening here."

- "Again, at the same time I don't think this is a bad faith move away. I don't think this is an instance where [Susan] is attempting to relocate with the children for the specific purpose of limiting their contact with their father."[104] "I think [Susan] has legitimate reasons for wishing to relocate."[105]

- "The primary importance, it seems to me at this point, is to be able to reinforce what is now a tenuous and somewhat detached relationship with the boys and their father. That there is a process with Dr. Tuggle which is in fact promoting that relationship. That disrupting that would be extremely detrimental. I think the concerns about the relationship being lost if the children are relocated at this time are realistic. Certainly I would find that the preponderance of the evidence would indicate that would be the likely result at this time of a relocation. Therefore, I think that a relocation of the children out of the state of California, the distance of 2000 miles is – would inevitably under these circumstance would be detrimental to their welfare. It would not promote frequent and continuing contact with the father, and I would deny the request to relocate the children."[106]

The trial court went on to rule that if Susan decided to move, custody of the boys would immediately transfer to Gary, but if Susan did not move, she would retain physical custody of the boys under the existing order.[107]

A Minute Order from the hearing issued on August 23, 2001.[108] Susan appealed.[109] The Court of Appeal unanimously reversed. Gary's Petition for Review in this Court was granted.

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[104] RT 107:1-5.

[105] RT 107:8-9.

[106] RT 107:26-108:14.

[107] RT 109:10-13, 19-21.

[108] AA 375.

[109] AA 376.

DISCUSSION

I. GARY'S RECENT CONCESSION THAT SUSAN WAS ENTITLED TO THE PRESUMPTIVE RIGHT TO MOVE UNDER FAMILY CODE § 7501 RENDERS THIS REVIEW PROCEEDING UNNECESSARY.

The trial court in this instance expressly concluded that Susan did not have the presumptive right under Family Code § 7501 to relocate because (i) a motion to modify visitation was pending before the move was requested, and (ii) the parties failed to cooperate in the co-parenting of their children. As stated by the court:

> I'm not convinced this is literally a *Burgess* move-way circumstance. While [Susan] has been the primary custodial parent, prior to the present request for move-away the Court already was being required to consider [a motion to modify visitation] ...
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> * * *
>
> Clearly, if the parties had been co-parenting with the children and cooperative in this matter, under those circumstances there might be a presumptive right for [Susan] to relocate with the children, regardless of the fact that the contact with the other parent, [Gary], would inevitably suffer to some degree. But there are ways to ameliorate those sorts of problems.[110]

Although Gary argued before the Court of Appeal that the § 7501 presumption did ***not*** apply,[111] he now concedes the issue in his Brief on the Merits: "[Susan's] presumptive right to move with the children (Fam. Code § 7501) . . . ***is not disputed here***." (RB at 37 (emphasis supplied).)

Given Gary's significant post-petition concession and his

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[110] RT 105:26-106:25.

[111] *See* Slip Opinion at 7.

decision ***not*** to request a change of custody – leaving the Court with no basis to assess the issue of prejudice – the Court should dismiss review of this case as having been improvidently granted.

II. THE DECISION OF THE COURT OF APPEAL REVERSING THE TRIAL COURT WAS CORRECT AND SHOULD BE AFFIRMED BECAUSE THE TRIAL COURT ERRED IN NOT APPLYING THE CUSTODIAL PARENT'S PRESUMPTIVE RIGHT TO RELOCATE UNDER § 7501 TO THE FACTS AND CIRCUMSTANCES OF THIS CASE.

For over 130 years Family Code § 7501 has secured to custodial parents the right to change their children's residence. The statute provides, in its entirety:

> 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.

Family Code § 7501, enacted in 1872. In considering application of this statute in a divorce action in 1996, this Court noted that because of the ordinary needs for both parents after a marital dissolution to secure or retain employment, pursue educational or career opportunities or advancement, or reside in the same location as a new spouse or other family or friends, it is unrealistic to assume that divorced parents will permanently remain in the same location after their marriage ends or to exert pressure on them to do so. *Burgess*, 13 Cal.4th at 35. As the Court further elaborated:

> In [move away cases] . . . the trial court must take into account the presumptive right of a custodial parent to change the residence of the minor children, so long as the removal would not be prejudicial to their rights or welfare.

Burgess, 13 Cal.4th at 32; Family Code § 7501. The questions for

decision with respect to a custodial parent's request for a move-away order are:

(1) whether the custodial parent has sound, good faith reasons for the move; and

(2) if so, whether the noncustodial parent can show that, as a result of the move, the child will suffer detriment rendering it essential or expedient for the welfare of the child that there be a change of custody.

In re Marriage of Edlund and Hales (1998) 66 Cal.App.4th 1454, 1469. The showing of "changed circumstances" required of the noncustodial parent must consist of more than the fact of the proposed move. *Id.*

The only circumstances under which a custodial parent will summarily lose his or her statutory presumptive right to move under § 7501 is if the court finds that the move is in "bad faith" – *i.e.*, designed to interfere with the noncustodial parent's contact rights with the children. *See Cassady v. Signorelli* (1996) 49 Cal.App.4th 55. The trial court's express findings that Susan's proposed move was based on her legitimate, good faith reasons and was not an attempt to interfere with Gary's contact rights have not been challenged on appeal and negate application of the holding of *Cassady v. Signorelli* to the present case.

Since it is undisputed that Susan is the primary caretaker and custodial parent of the children, and that her proposed move was for legitimate, good faith reasons and was not sought or undertaken in bad faith, the trial court was duly bound to recognize and enforce

Susan's presumptive right under section 7501 to move to Ohio with the children. The burden then properly shifts to Gary to demonstrate that the children would suffer harm as a result of the move so substantial and detrimental in nature that it would be "essential" for their welfare for the court to order a change of custody to Gary. Absent such a requisite showing of prejudice (a showing Gary demonstrably could not make considering his well-documented poor relationship with the children), there is no statutory or other legal authority under which a trial court may refuse to uphold Susan's presumptive right to move.

The trial court's attempt to nullify and abrogate Susan's presumptive right based on its perception that the parents did not always cooperate in the co-parenting of their children, falls outside the bounds of statutory and case law, and is therefore an abuse of discretion requiring reversal. The Court of Appeal appropriately acknowledged these considerations and correctly reversed the judgment of the trial court. As the Court of Appeal correctly noted, a history of disharmony and lack of cooperation between the parties does not permit a trial court to set aside the custodial parent's presumptive right to move as punishment for such behavior – punishment which falls entirely on only one of the "uncooperative" parties but not at all on the other. In determining custody, the court's role is "not to reward or punish the prior behavior of any party, but to judge each party's current ability to provide care for the children." *In re Marriage of Condon* (1998) 62 Cal.App.4th 533, 553; *see also In re Marriage of Hopson* (1980) 10 Cal.App.3d 884,

907.

III. THE TRIAL COURT'S FINDING THAT "FREQUENT AND CONTINUING CONTACT" BETWEEN THE CHILDREN AND THE NONCUSTODIAL PARENT COULD NOT OCCUR IF SUSAN MOVED TO OHIO IS CONTRARY TO CALIFORNIA LAW.

The trial court's finding that moving the children's residence approximately 2,000 miles away from their present residence would not promote "frequent and continuing contact" with Gary was also contrary to well-established case law.

As demonstrated in *Burgess* and its progeny, the policy of Family Code § 3020 favoring "frequent and continuing contacts" between the children and both parents following a divorce can be satisfied by granting "liberal visitation" to the noncustodial parent when the children are relocated. Frequent and continuing contacts were maintained in the case of *In re Marriage of Condon* (1998) 62 Cal.App.4th 533, where the custodial parent moved with her two minor children (ages 8 and 6) from California to Australia. The court in *Condon* crafted a liberal visitation order which essentially maintained father's 25% time share with the children even after the move took place.

Other appellate decisions since *Burgess* have found that frequent and continuing contact with both parents following divorce can be maintained over long distances from California even with children younger than Garrett and Devlen. (*See, e.g., Edlund and Hales*, *supra* (move to Indiana with 4 year old); *Marriage of Whealon*, *supra* (move to Syracuse, New York with 3 year old); *Marriage of Lasich*, *supra* (move to Spain with 7 and 4 year old).)

Likewise, the LaMusga children will be able to maintain frequent and continuing contact with Gary after they move. Dr. Stahl noted the availability of telephone calls, faxes and e-mails as some of the means of maintaining frequent contact between Gary and the children following a move.[112]

IV. GARY, A NONCUSTODIAL PARENT WHO HAS A "TENUOUS" AND "DETACHED" RELATIONSHIP WITH HIS CHILDREN, FAILED TO SUSTAIN HIS BURDEN OF PROVING "PREJUDICE" UNDER § 7501 STANDARDS SUFFICIENT TO REQUIRE TRANSFERRING CUSTODY TO HIM.

A. *The Noncustodial Parent's Burden*

After a judicial custody determination, the noncustodial parent seeking to alter custody can do so only by showing there has been a substantial change of circumstances so affecting the minor child that modification is essential to the child's welfare. *Burgess*, 13 Cal.4th at 37, *citing Burchard v. Garay* (1986) 42 Cal.3d 531, 534. As the Court noted:

> The [changed circumstances] rule requires that one identify a prior custody decision based upon circumstances then existing which rendered that decision in the best interest of the child. The court can then inquire whether alleged new circumstances represent a significant change from preexisting circumstances, requiring reevaluation of the child's custody.

Id.

As the Court held in *Burgess*, the same allocation of burden of persuasion applies in the case of a custodial parent's relocation as in any other proceeding to alter existing custody arrangements:

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[112] AA 415.

> [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 noncustodial parent to assume the burden of persuading the trier of fact that a change [of custody] is in the child's best interests.

Burgess, supra; Burchard v. Garay, supra, 42 Cal.3d at 536. Similarly, the same standard of proof applies in connection with the custodial parent's decision to relocate with the minor children as in any other matter involving changed circumstances:

> [O]nce it has been established [by a judicial custody decision] that a particular custodial arrangement is in the best interests of the child, the court need not reexamine that question. Instead, it should preserve the established mode of custody unless some significant change in circumstances indicates that a different arrangement would be in the child's best interest.

Burgess, supra, at 37-38; *Burchard v. Garay, supra*, at 535. 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 render it essential or expedient for the welfare of the child that there be a change'." *Burgess, supra*, at 38; *In re Marriage of Carney, supra*, 24 Cal.3d at 730.

In a "move-away" case such as this, a change of custody is not justified simply because the custodial parent has chosen, for any good faith reason, to reside in a different location, but only if, as a result of relocating with that parent, the child will suffer detriment rendering it "essential or expedient for the welfare of the child that

there be a change" in custody. *Id.* This standard is consistent with the presumptive right of a parent entitled to custody under Family Code § 7501 to change the residence of his or her minor children, unless such removal would result in "prejudice" to their "rights or welfare." *Id.*

B. *Noncustodial Parent's Four-Year Refusal to Participate in Counseling with Children to Improve Their Relationship Does Not Constitute "Prejudice" Necessary to Justify Change of Custody.*

In order to overcome Susan's presumptive right to relocate with the minor children, it was incumbent upon Gary to present evidence sufficient to support a finding that, as a result of the move, the children would suffer "detriment" rendering it essential or expedient for the welfare of the children that custody be transferred to him. *Burgess*, 13 Cal.4th at 38. There is absolutely no evidence in the record to this effect and therefore Gary utterly failed to carry his burden of proof on this issue.

In his spurious effort to defeat Susan's move, Gary charged that the move would further damage his "tenuous" relationship with the boys. Although it had improved somewhat in their 18 months of counseling with Mr. Tuggle, Gary contended that the relationship still needed work and that it would be detrimental to the boys if they did not remain in California to continue with counseling.

The trial court agreed and explicitly found that it would be detrimental to the children if they did not continue in counseling to rectify their "tenuous" and "detached" relationship with their father. The court placed "primary importance" on the goal of strengthening

the children's relationships with their father, and ordered an immediate transfer of custody to Gary if Susan moved.

Similar claims of a child's need for psychotherapy have been consistently rejected by courts in move away cases, deeming such claims *insufficient* to overcome the presumption in favor of maintaining the established pattern of care with the custodial parent seeking to relocate. *See Edlund and Hales* (1998) 66 Cal.App.4th 1454, 1470. As the court in *Edlund* noted:

> [If such] evidence of "detriment" . . . were sufficient to deny a move-away order, no primary custodial parent would ever be able to secure such an order. Such a minimal showing of "detriment" would also run afoul of the California Supreme Court's holding in *Burgess* that ". . . the interests of a minor child in the continuity and permanency of custodial placement with the primary caretaker will most often prevail," and the showing required to overcome this presumption is "substantial."

Edlund and Hales, 66 Cal.App.4th at 1471, *citing Burgess*, 13 Cal.4th at 39.

Adoption of this minimal showing of detriment would also fly in the face of the emerging trend of decisions by which California courts have approved long-distance relocations, and those decisions have been upheld on appeal on records similar to the instant one. *In re Marriage of Condon* (1998) 62 Cal.App.4th 533, 539-40, 541 n.9, 550-54 (allowing mother to move with sons to Australia where mother had extensive family ties and could become self-supporting, despite fact father had "strong and bonded relationship with his sons" and introduced expert testimony from a psychologist about

"Parental Alienation Syndrome;" trial court carefully crafted visitation order "to minimize adverse effects of the move on the father-child relationship"); *In re Marriage of Whealon* (1997) 53 Cal.App.4th 132, 137-41 (allowing mother to relocate to New York with infant son despite fact father had extensive weekly visitation with the child). *See also In re Marriage of Biallas* (1998) 65 Cal.App.4th 755, 762-64 (reversing denial of mother's request for move-away order where mother had physical custody; trial court did not give sufficient weight to presumption favoring continuation of existing custodial arrangement, and the only showing of detriment involved alleged "negative effects" of move on visitation with father and paternal grandmother).

It was an abuse of discretion for the trial court to hold otherwise, and the Court of Appeal correctly held in reversing the trial court's judgment.

C. *The "Doctrine of Implied Findings" Does Not Apply to Legal Errors that Appear on the Face of the Decision.*

The so-called doctrine of implied findings operates where a trial court renders a statement of decision containing ambiguities or omissions. The doctrine does not, however, apply to errors of law appearing on the face of a court's decision. *United Services Auto Ass'n v. Dalrymple* (1991) 232 Cal.App.3d 182, 186.

Gary's attempt to invoke the doctrine of implied findings and apply it to the trial court's decision is inappropriate for two reasons. First, there are no ambiguities or omissions in the trial court's statement of decision rendered at close of trial on August 23, 2001.

The trial court was abundantly clear and precise in explaining its analysis and reasons for denying Susan's move, clearly and unequivocally stating that Susan was not entitled to the presumptive right to move because it would not promote frequent and continuing contacts and because the parties had not always cooperated in co-parenting their children. These clear and unequivocal grounds leave no room for application of the implied findings doctrine.

Secondly, the trial court's ***express*** refusal to consider Susan's presumptive right to move under § 7501 when assessing "prejudice" is clear legal error to which the doctrine of implied findings has no application. Gary attempts erroneously to invoke the doctrine here in the hope that this Court, too, will analyze the issue of "prejudice" outside § 7501 and the framework of *Burgess*, thus enabling even minimal showings – including ordinary effects of relocation – to prevent good faith moves from being approved. This Court's adoption of Gary's proposed analysis would in one fell swoop abrogate the presumptive right of custodial parents to move and, through judicial fiat, render § 7501 meaningless.

V. THE TRIAL COURT ERRED IN GRANTING A CONDITIONAL CHANGE OF CUSTODY IN ORDER TO RESTRAIN SUSAN'S MOVE.

The trial court also erred when it ordered a ***conditional*** change of custody to Gary if Susan moved. Such conditional custody orders can be construed as calling the relocating a parent's bluff – she will not move if doing so will result in a loss of custody. There is no statutory basis for permitting trial courts to test parental

attachment or risk detriment to a child's welfare on those grounds. *Burgess*, *supra*, at 36 n.7.

It is difficult to imagine how such a custodial arrangement could be in the children's best interest, particularly where it results in stripping them away from Susan, their primary caretaker with whom they have a close and well-established relationship, and placing them with their father with whom they have at best a "tenuous and somewhat detached relationship." One appellate court has recently held that such conditional orders are the equivalent of coercing the mother to stay in California and that such orders "are contrary to *Burgess*." *In re Marriage of Bryant* (2001) 91 Cal.App.4th 789, 791.

The trial court's order of August 23, 2001, conditionally changing custody to Gary if Susan moves, certainly achieved its desired effect. Like any loving mother forced into this untenable position, Susan has stayed in California to preserve her role as the children's primary caretaker while her husband Todd was living and working in Cleveland. Because of the trial court's decision disallowing the move without a change of custody, Todd was ultimately compelled to leave his job in Cleveland and return to his family in California, suffering a 50% pay cut in the process.

CONCLUSION

Accordingly, and for the foregoing reasons, the Court should dismiss review as improvidently granted or affirm the decision of the Court of Appeal in its entirety.

Dated: January 17, 2003

Respectfully submitted,

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Kim M. Robinson
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I, Kim M. Robinson, counsel of record for Appellant, hereby certify, pursuant to Rule 14(c)(1) of the California Rules of Court, that Appellant's Answer Brief on the Merits was produced using 13-point Century Schoolbook font including footnotes, and contains approximately 12,121 words, which is less than the 14,000 words permitted by this Rule. Counsel relies on the word count of the computer program, Word Perfect 10, used to prepare this brief.

____
Kim M. Robinson

PROOF OF SERVICE

THE UNDERSIGNED STATES:

I, Kim M. Robinson, am a citizen of the United States of America. I am over the age of 18 years and am not a party to the above-entitled action. On January 17, 2003,I served copies of the following documents:

APPELLANT'S ANSWER BRIEF ON THE MERITS

on the parties in this action as follows:

Garret C. Dailey (SBN 76180)
2915 McClure St.
Oakland, CA 94609

Steven A. Greenfield (SBN 68534)
1806 Bonanza St.
Walnut Creek, CA 94596

Attorneys for Respondent, Gary LaMusga

Susan Poston Navarro (LaMusga)
2160 Armstrong Dr.
Pleasanton, CA 94588

Judge Terence L. Bruiniers
Contra Costa County Superior Court
725 Court St.
P.O. Box 911
Martinez, CA 94553

Court of Appeal (BY HAND DELIVERY)
First Appellate District
350 McAllister St.
San Francisco, CA 94102

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

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 17, 2003, at Oakland, California.

____

Kim M. Robinson