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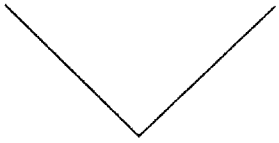

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The Use of Unpublished Opinions on Relocation Law by the California Courts of Appeal: Hiding the Evidence?

Carol S. Bruch[*]

Ambassador Šarčević and I met in Budapest, at the 1978 Congress of the International Association of Comparative Law. Professor Erik Jayme, who had been on the faculty panel when the young Petar Šarčević took his doctoral examination in Mainz,[1] told me this was someone I *must* meet – a man with the poise, the intellect, the education, and the linguistic skills to take him far. How prophetic those words were. And what a wonderful journey of collegiality and friendship began for me. Soon I urged Professor Šarčević to speak on the nonmarital cohabitation laws of the Yugoslav Republics at the 1979 Congress of the International Society of Family Law in Uppsala.[2] He came, he spoke, and his many years of distinguished service to the Society began. It is a privilege to write here in honor of the man I came to call Petar and to express my high regard for his life's companion, Susan.

This essay, which concerns California's use of unpublished appellate opinions, involves two of Petar's many fields of expertise – civil procedure and family law. It is a report of what I learned when I compared seven years of published and unpublished opinions on the topic of relocation law – the law that controls when a custodial parent wishes to relocate with the couple's children, but the noncustodial parent objects. The study period begins

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I express my thanks to Robert Berlet, King Hall Class of 2007, and to the law school's reference librarians – Margaret Durkin, Head of Public Services, Susan Llano, Elisabeth McKechnie, and Erin Murphy – for their excellent and unstinting research assistance. Errors or omissions are my own.

[1] Professor Jayme reports that he was then a new faculty member, and this was the first doctoral examination committee on which he sat. What an auspicious beginning it was for each of them.

[2] See ŠARČEVIC P., "Cohabitation without Marriage in Yugoslav Law", in: *Marriage and Cohabitation in Contemporary Societies*, Toronto 1980, p. 293.

one day after the California Supreme Court decided an important precedent on the topic[3] and ends almost seven years later, as the matter was again before the court.[4]

I. The Study

1. California Relocation Law

Section 7501 of the California Family Code grants the parent with custody of children the right to choose their place of residence unless the move would "prejudice" their rights or welfare.[5] Because the Code language had not changed since it was adopted in 1872, in 1996 the state's highest court interpreted the command in terms of current practice. Its decision in *In re Marriage of Burgess*[6] held that the person who was providing the children's primary care, whether *de facto* or under court order, was presumptively entitled to decide where the children would live, even if the move would necessarily affect the noncustodial parent's visitation schedule. Further, a joint custody order would not entail a different analysis if one parent was actually exercising primary custody. The court also expressly disapproved contingent custody orders – orders in which custody is ordered transferred to the noncustodial parent if and only if the custodial parent goes through with the move. It directed the lower courts to refrain from micromanaging the custodial parent's decisions: a judge's views on her[7] reasons for moving are irrelevant, the court said, unless they reveal a bad faith effort to interfere with the noncustodial parent's access to the children. Even if the statutory presumption does not apply – for example, in disputes between parents who share joint custody under court order and also in fact – it reminded the lower courts that the best-interests-of-the-child standard protects children's stability and continuity in an existing primary custodial relationship.[8]

2. The Use of Unpublished Opinions by Courts in the United States

Despite this strong protection of the custodial parent's decisions, in recent years challenges by noncustodial parents have been increasingly successful. Published appellate cases for the period I studied continued to uphold relocation requests two-thirds of the time, but the far more numerous unpublished appellate cases revealed a different picture. Not only

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[3] See *In re Marriage of Burgess*, 13 Cal. 4th 25 (1996).

[4] The court's opinion was released a year after the study period ended. See *In re Marriage of LaMusga*, 32 Cal. 4th 1072 (2004).

[5] Cal. Fam. Code § 7501: 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.

[6] 13 Cal. 4th 25 (1996).

[7] Because a mother was the custodial parent who sought to move in all but 3 of the relocation cases, I use the feminine except when discussing the 3 fathers' relocation requests. There was also one joint physical custody case during the study period in which a father cared for his child 59% of the time, but the child's mother sought sole custody and relocation.

[8] 13 Cal. 4th at p. 37, *citing Burchard v. Garay*, 42 Cal. 3d 531, 536 (1986).

was there an inordinate percentage of denials, given the substantive law; the law was applied in a palpably different manner.

This, of course, is incompatible with the common law doctrine of *stare decisis*, which requires courts to respect earlier decisions on legally comparable facts.[9] That doctrine has suffered, however, in the face of mounting judicial workloads. Many U.S. jurisdictions have responded to this pressure with a practice that excludes the vast majority of appellate jurisprudence from the official – and hence, also the commercial – reports.[10] When a state or federal jurisdiction provides that unpublished opinions may not be cited to the courts,[11] the scope of necessary research into case law is reduced for judges and attorneys alike. In theory, because only decisions involving no novel facts or legal questions are left unpublished, this does not affect the rule of law.

Any case (or portion of a case) that may be of future precedential importance is – again, in theory – published. In California, for example, an opinion may be published if it:

(1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;
(2) resolves or creates an apparent conflict in the law;
(3) involves a legal issue of continuing public interest; or
(4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.[12]

Under the rule, approximately 93% of the opinions from the California Courts of Appeal remain unpublished.[13] Further, also by court rule, they cannot be cited or relied on in an-

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[9] See generally JAMES F. JR./HAZARD G.C. JR./LEUBSDORF J., *Civil Procedure*, 5th ed., New York 2001, p. 679, § 11.6 (Stare Decisis): "The doctrine ... is a mandate that courts should give due weight to precedent."

[10] Depublication, where, for example, the California Supreme Court, without comment, orders that a published opinion be "depublished", is a related issue that is beyond the scope of this essay. See BARNETT S.R., "Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court", in: *Loy. L.A. L. Rev.* 1993/26, pp. 1033 et seq., for an analysis and critique of this practice.

[11] In California, the state constitution gives the state supreme court the authority to determine which opinions of the Supreme Court and the Courts of Appeals are published. Calif. Const. Art. 6, § 14. It does not, however, expressly confer authority to decide whether unpublished opinions may be denied precedential value. *Ibid.* No test of the court-imposed no-citation rule, however, appears to have been mounted.

[12] California Rules of Court, Rule 976(c). Publication is decided by majority vote of the judges who heard the case. *Ibid.*, Rule 976(b).

[13] Supreme Court of California, Report of the California Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions, Draft Preliminary Report and Recommendations (October 2005), p. 10 (reporting an annual average of 12,040 Court of Appeal opinions from 2002-2004, with an annual average of 1,013 published and 11,027 unpublished opinions, giving an average publication rate of 8.4 percent).

other case, except in matters of *res judicata* or when relevant in a criminal or disciplinary action.[14]

California is not alone in this practice; some states and several federal circuits have similar rules regarding unpublished opinions, but rules of this sort are far from universal.[15] Indeed, if a recommendation from the Appellate Rules Advisory Committee of the U.S. Judicial Conference is adopted, it may soon be possible to cite unpublished opinions in federal courts.[16] Reforms are also being considered in California, albeit far more modest in nature.[17]

3. *Methodology and Statistical Findings*

Unfortunately, as I discovered in 2003, the theory is flawed, and many important judicial decisions are being relegated to unpublished status. Eighteen months earlier, California's courts had begun to post unpublished opinions electronically for 60 days.[18] Although only published cases have precedential value under California's rule, as the drafter of a friend-of-the court brief in a pending relocation case,[19] I was free to address the overall pattern of judicial responses – not as an appeal to precedent, but rather to document the degree to

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[14] California Rules of Court, Rule 977 (a)-(b).

[15] See BARNETT S.R., "No-Citation Rules Under Siege: A Battlefield Report and Analysis", in: *J. App. Prac. & Process* 2003/5, pp. 473, 473-476, 499, for a summary of federal circuit and state stances on unpublished opinions.

[16] They proposed a Federal Rule of Appellate Procedure 32.1 to this effect. RAPATTONI L., "Panel OKs Rule on Citing Unpublished Opinions: Committee Advances Rule on Citing Unpublished Opinions", in: *Daily Journal*, April 25, 2005, available at http://www.nonpublication.com/panelok.htm. The rule has been endorsed by the Judicial Conference (the policy-making body of the federal judiciary). Under 28 U.S.C. 2074, the U.S. Supreme Court has until May 1, 2006 to act on the proposal. If the Court approves the rule, it will go into effect automatically unless Congress legislates otherwise by December 1, 2006, *Ibid.*

[17] Reconsideration of the rules for citation of unpublished opinions was outside the charge of an advisory committee to the California Supreme Court that has just released its draft report. The group nevertheless suggests (1) that broader citation opportunities may be appropriate and (2) that future attention should be given to the more fundamental question of changing the presumption against publication to one in favor of publication. *Draft Preliminary Report and Recommendations* (note 13), p. 35, points 3 and 5(a).

[18] This practice took effect on October 1, 2001. Posting is on the official website of the California courts. Judicial Council of California, Administrative Office of the Courts, News Release: California Supreme Court Posts Unpublished Opinions on Web Site (October 1, 2001). The cases nevertheless remain available thereafter through commercial on-line legal research services (Westlaw and LEXIS).

[19] See *Brief Amici Curiae of Herma Hill Kay et al. to the California Supreme Court in In re Marriage of LaMusga*, No. S107355 (May 21, 2003) (on behalf of 14 named California family law professors), available at http://www.law.ucdavis.edu/faculty/bruch.html (near top of publications list; appendices are also available), http://www.thelizlibrary.org/lamusga/bruch-law-prof-brief.pdf (without appendices). The decision that resulted was a serious disappointment to those who joined this brief. See *In re Marriage of LaMusga*, 32 Cal. 4th 1072 (2004) (abandoning, either expressly or by example, many doctrines that it purported to follow).

which the lower courts had been faithful to *Burgess*, the controlling decision the Court had rendered seven years earlier.

My research convinced me that courts were using their power over publication to hide many important decisions and, more broadly, to pretend faithfulness to precedent, while actually undercutting it to a serious degree. Two tables summarize these post-*Burgess* decisions.[20] Table 1 reports what can be gleaned from appellate opinions about trial court relocation orders.

a) Relocation Cases in the Trial Courts

TABLE 1
TRIAL COURT OUTCOMES
IN RELOCATION CASES SUBSEQUENTLY DECIDED BY
CALIFORNIA APPELLATE COURTS
(Appellate Cases Decided Between April 15, 1996-April 1, 2003)

	Relocation Authorized	Relocation Refused
Published[21]	9	3
Unpublished[22]	15	35

As the first row of this table reveals, attention exclusively to *published* appellate cases suggests that 75% of trial court decisions on point (9 of 12) authorized relocation. But the

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[20] The numbers set forth in the tables are based on a more detailed analysis that is contained in Appendix 1 to the *Brief Amici Curiae of Herma Hill Kay et al.* (note 19), available at http://www.law.ucdavis.edu/faculty/bruch.html (near top of publications list).

[21] The first line of this table states the dispositions concerning relocation that had been entered at the trial level in 12 of the published Court of Appeal decisions that were entered during the full 83½ -month study period. Four additional appeals are not included on this chart. One was a decision that did not treat all of the household's children the same as to relocation. See *In re Marriage of Williams*, 88 *Cal. App.* 4th 808 (2001). Three others involved non-relocation aspects of the trial court decisions. *See In re Marriage of Vennewitz*, No. C037671, 2002 *Cal. App. Unpub. LEXIS* 4437, (Jan. 29, 2002) (visitation schedule and travel costs); *In re Marriage of Lasich*, No. C040037, 2002 *Cal. App. Unpub. LEXIS* 10479 (Nov. 14, 2002) (bond and travel fund); *Peters v. Masdeo*, No. D039683, 2003 *Cal App. Unpub. LEXIS* 782, (Jan. 24, 2003) (modification to joint legal custody).

[22] The unpublished cases reported here were identified by a LEXIS Shepard's citation service search for cases citing *In re Marriage of Burgess*, 13 *Cal.* 4th 25 (1996). Because of the effective date for electronic access, unpublished cases were available for only the last 18 months of this study (i.e., 21.5 % of the total 83½ – month period). The figures set forth in these tables assume that publication rates remained constant over the entire study period. By multiplying the number of unpublished decisions that appeared in the final 18 months by 5, the tables provide a rough approximation of the total number of unpublished opinions that were rendered during the entire period. One additional unpublished case from the final 18 months (equivalent to 5 cases over the study period) is not reflected on this table, because not all of the children in the household were treated the same in terms of their relocation. See *In re Marriage of Lemke*, No. G027471, 2001 *Cal. App. Unpub. LEXIS* 459 (Dec. 24, 2001).

second row, which reflects the *unpublished* appellate cases, reveals a very different picture: only 30% of the trial court decisions that resulted in unpublished appellate decisions authorized relocation (15 of 50) – far less than the 75% figure the published cases suggest. Even when the published and unpublished trial court decisions in this table are aggregated, they reveal that, overall, only 38% of the trial court dispositions allowed relocations – again, far less than the 75% figure seen in the published decisions.

Because relatively few custodial parents are in a financial position to mount an appeal (no matter how persuasive their case),[23] it is likely that the percentage of custodial parents who actually win relocation at trial is much lower than even the figures reported in Table 1 imply.[24] Indeed, practitioners report that because trial judges in family law cases realize that (as a practical matter) they are immune from appellate review, many decisions ignore the controlling law. The overall impression of relocation disputes that the published cases give is, then, misleading. Similarly distorted perceptions are surely likely in many areas of the law,[25] given the heavy predominance of unpublished cases in California.[26]

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[23] See, e.g., *In re Marriage of Hawwa*, No. A093979, 2001 *Cal. App. Unpub. LEXIS* 2186, (Oct. 30, 2001) (discussed below at notes 30-38 and accompanying text, where the mother's outstanding attorney's fees for representation in the trial court alone totaled $60,000). A friend-of-the-court brief on behalf of poverty lawyers in *LaMusga* describes the reality of relocation litigation for the estimated 75-80% of family law litigants in California who proceed without counsel. Sound results for them depend completely on a trial court's faithful application of the law. Even if the proper outcome seems abundantly clear, if *Burgess* and § 7501 are 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. The trial court's order will not be stayed. Cal. Civ. Proc. Code § 917.7. So, if a custody transfer took place because the custodial parent went forward with her move, the typical one- or two-year delays pending appeal may have changed the facts so significantly that she will have little or no chance to resume her custodial role. Only a parent who puts her move on hold in order to retain the children's custody has any realistic chance of actually benefiting if she achieves a reversal on appeal. See generally *Brief Amici Curiae* of GANNON M. A. *et al.* to the California Supreme Court, in *In re Marriage of LaMusga*, available at http://www.thelizlibrary.org/lamusga/poverty-brief.pdf; *Brief Amici Curiae of Henna Hill Kay et al.* (note 19), pp. 20-23.

[24] Some trial court relocation decisions that were not appealed are recounted in appeals from later disputes in the same cases. See, e.g., *In re Marriage of Mildred B.*, No. A094724, 2002 *Cal. App. Unpub. LEXIS* 8226 (Aug. 29, 2002); *In re Marriage of Leitke*, No. G027471, 2001 *Cal. App. Unpub. LEXIS* 15459 (Dec. 24, 2001).

[25] A colleague notes that an unsound legal rule which is not discussed in published cases may appear to be forgotten and, therefore, unimportant. Yet – because California does not authorize publication for straightforward applications of an existing rule – it is possible that the problematic statute or case is actually being applied time and time again in unpublished opinions. These cases may entail direct applications of the rule that individually lack novelty. Yet collectively, they present the important news that the seemingly archaic rule has significant continuing impact. Because this information is hidden in the unpublished cases, however, neither appellate judges nor other professionals may recognize what is actually a pressing need for law reform. Conversation with Professor Margaret Z. Johns of the University of California, Davis School of Law on December 8, 2005.

[26] The incidence of published versus unpublished cases in this study of relocation law is much higher than the state-wide average for all decisions. Note 13 and accompanying text. Unfortunately, no sources reveal the usual appeal rate for family law cases. It seems likely, however, that there was an

b) *Relocation Cases in the Courts of Appeal*

Table 2, below, shows that, although the Courts of Appeal moderated the unfavorable trial court orders somewhat, they were nonetheless far less supportive of relocation than the ratios of their published cases suggest:

TABLE 2
APPELLATE COURT OUTCOMES
ON REVIEW OF CALIFORNIA TRIAL COURT RELOCATION DECISIONS
(Appellate Cases Decided Between April 15, 1996-April 1, 2003)

	Relocation Authorized	Relocation Refused
Published	9	3
Unpublished	25	25

The 9 *published* appellate opinions authorizing relocation that appear on row one of Table 2 affirmed 7 trial court orders permitting relocation and reversed 2 others that had restrained relocation. The 3 published opinions on row one that refused relocation include 1 affirmed trial court order denying relocation and 2 cases in which the Courts of Appeal reversed trial court decisions that had permitted relocation. In other words, 8 of the 12 published decisions affirmed the lower court, with the remaining cases displaying 2 reversals of orders permitting relocation and 2 reversals of orders denying relocation.[27]

In contrast, the *unpublished* Court of Appeal decisions show 25 relocation authorizations and 25 relocation denials.[28] These opinions affirmed relocations 10 times and reversed denials 15 times, for a total of 25 decisions permitting relocation. They also affirmed 20 denials and reversed 5 authorizations, for a total of 25 cases denying relocation. These numbers reveal the role of the Courts of Appeal in moderating unfavorable trial court responses to relocation: the appellate courts reversed denied relocations 3 times as frequently as they authorized relocations (15 to 5). Yet, when all of the published and unpublished appellate decisions on Table 2 are aggregated, they reveal only slightly more authorized moves than denials (34 to 28).[29]

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), one would have expected relatively few restrictions. Tables 1 and 2 suggest that the opposite is true – that trial and appellate courts in the post-*Burgess* period may have been too quick to restrain moves.

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elevated number of published relocation appeals during the study period because the courts were interpreting and applying a new leading case – *Burgess*.

[27] In a published decision that is not included in the table, the Court of Appeal reversed and remanded a trial court decision that had authorized the relocation of two children but denied relocation as to their two siblings; it directed the trial court to consider the likely impact on the children of separating them. See *In re Marriage of Williams*, 88 Cal. App. 4th 808 (2001).

[28] The unpublished cases are tallied and imputed as described in note 22.

[29] One additional unpublished case from the final 18 months (equivalent to 5 cases over the study period) is not reflected on this table, because not all of the children in the household were treated the same in terms of their relocation. See *In re Marriage of Leake*, No. G027471, 2001 Cal. App. Unpub. LEXIS 459 (Dec. 24, 2001).

II. The Negative Effects of Unpublished Opinions and No-citation Rules

It was therefore no surprise when my qualitative review of the cases revealed that many unpublished appellate decisions were at odds with the controlling law, particularly at the trial court level. Further, as I explain below, California's use of unpublished opinions and its rule barring citations to them impede litigants' access to impartial justice.

1. Omitting the Name of the Trial Judge

These pernicious effects are exacerbated at the trial court level when an unpublished opinion omits the name of the trial judge. Published appellate opinions must include the name of the judge whose decision was reviewed, but this practice is not required for unpublished opinions.[30] So, for example, when an appellate court reversed the presiding judge for family law in a San Francisco Bay Area county, it omitted his name. Apparently this was intended to spare him from embarrassment, as his decision in *In re Marriage of Hawwa* was seriously flawed.[31] The case involved a woman who, with her young son, went from southern California to Syria for a family visit. She expected her husband to move their household a couple of thousand miles to Minnesota for a new job while she was away. Their plans changed. The woman decided to end the marriage and returned with their child to the east coast to live with her parents. The husband decided to take a job in northern California rather than in Minnesota, and moved to an area his wife had never seen.[32]

At trial, a neighbor from southern California testified that he had heard "screaming and crying from their apartment, along with the sound of furniture and other objects being broken." He said he had personally interfered to stop the husband's violence once, and he had called the police another time. The woman also testified about her husband's abuse. Finally, a court-appointed psychologist testified that interviews and psychological testing revealed that the husband was susceptible to "explosive rages, which were potentially homicidal." The trial court's response was an order transferring custody of the 4-year-old child (for whom the woman had provided full-time care since his birth) to the father if the woman did not relocate to the area in which he now lived. The judge blamed the woman for the couple's separation and said that abuse had not been established, because she had made no contemporaneous reports, and there was no direct corroboration other than the neighbor's testimony. Not surprisingly, the appellate court reversed and remanded, noting that "both parents relocated upon separation." It also remarked that the trial court "became so intent on assessing blame that [it, like the parties,] failed to focus on the child's best interest." But it made no comment on the domestic violence issue and buried its opinion in the unpublished cases – a choice that enabled it to omit the trial judge's name.

The opinion clearly qualified for publication. The double relocation presented a novel set of facts,[33] as did the trial court's improper use of a contingent custody transfer to force

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[30] See JESSEN E., *California Style Manual*, 4th ed., San Francisco 2000, pp. iv, 191-92 at § 5:28.

[31] *See In re Marriage of Hawwa*, No. A093979, 2001 Cal. App. Unpub. LEXIS 2186, (Oct. 30, 2001) (reviewing decision of Judge Jacob Blea III).

[32] The decision does not state the chronology of these two events, nor does it reveal whether the wife played any role in her husband's revised plans.

[33] As the appellate court noted, "Existing community ties have already been disrupted. The question is not whether the child should be removed from an area where he had once lived with both par-

the woman to follow her ex-husband.[34] The appellate court's decision to ignore the trial court's treatment of the abuse issues was also a matter "that involves a legal issue of continuing public interest" and, therefore, rendered the opinion publishable.[35]

Finally, and perhaps most importantly, whether or not the opinion was published, other family law litigants needed to know the identity of the trial judge. California law authorizes peremptory challenges (for which no reasons must be stated or proved)[36] and challenges for cause (for which specific grounds must be alleged and proved)[37] to disqualify a judge from hearing a case in which a litigant believes the judge will not be impartial. Surely no domestic violence victim would want to appear before the judge who decided *Hawwa*,[38] and custodial parents seeking relocation might feel the same. Finally, before committing to the expense of an appeal, other litigants who had received similar treatment in the trial court would want to gauge whether their district Court of Appeal could be expected to treat their views seriously.

In other words, on these facts, the fair administration of the law required both public identification of the trial judge and publication of the appellate opinion.

Additional unpublished opinions that failed to name the trial judge dealt with appeals from trial courts that had ignored § 7501 and *Burgess*. These courts, too, granted contingent custody transfers that were expressly disapproved by *Burgess*, including orders that would have transferred custody to fathers who had been providing far less than half of their child's care.[39] One of these cases reports a hearing that appears to have been delayed by at least a year, a technique that trial officers in the county openly employ to defeat re-

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ents." See Rule 976(c)(1) (publication permissible when the case "applies an existing rule to a set of facts significantly different from those stated in published opinions").

[34] See *In re Marriage of Fingert*, 221 *Cal. App. 3d* 1575 (1990) (holding on right to travel grounds that a custodial parent could not be ordered to move to an area not of her choosing).

[35] See Rule 976(c)(3). Unfortunately, the panel had little motivation to share its indifference to this matter.

[36] See Cal. Code Civ. Proc. § 170.6. Only one such challenge is permitted per case.

[37] See Cal. Code Civ. Proc. § 170.1 & 3.

[38] In addition, California judges (who are usually appointed by the state's governor) must periodically stand for election. Although a sitting judge almost always runs unopposed, sufficient public concern about a judge's lack of judicial temperament or impartiality may prompt a challenge or even a recall campaign.

[39] See *In re Marriage of Mildred B.*, No. A094724, 2002 *Cal. App. Unpub. LEXIS* 8226 (Aug. 29, 2002), p.*4 (father had visits after school until 5:30 p.m. and on alternate weekends); *In re Marriage of Postma and Hasson* (I), No. A096713, 2002 *Cal. App. Unpub. LEXIS* 9317 (Oct. 4, 2002), p.*6 (father had an overnight visit each week on Wednesday, alternate weekends from Saturday noon to Sunday at 6 p.m. and 3 weeks in summer); *In re Marriage of Postma and Hasson* (II), No. A098060, 2003 *Cal. App. Unpub. LEXIS* 43 (Jan. 6, 2003), p.*7 (visitation schedule not reported). For a similar order in an unpublished opinion that named the trial judge, see *In re Marriage of Forrest*, 2002 *Cal. App. Unpub. LEXIS* 4620 (Jan. 24, 2002) (mother with *sole* physical custody and approximately 72% time share requested move with fiancé to his new Navy job, but trial and appellate courts applied test Burgess reserved for *de jure and de facto joint* custody cases to impose contingent custody order) (* = designation for on-line versions of California Court of Appeals unpublished opinions).

location requests.[40] These judges' disregard of the controlling statute and precedent were, however, placed out of view in unpublished opinions that omitted the trial judge's name.

The committee considering California's rules on publication has made a tentative proposal that would specifically prohibit publication decisions that seek to avoid embarrassment to trial judges, litigants or lawyers.[41] As this discussion reveals, that proposal is too narrow; the rule should also require that the name of the trial judge be included in every unpublished opinion.

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[40] On December 4, 2004, Contra Costa County court personnel presented a course on relocation law for practicing attorneys and mental health professionals. When one of the court's commissioners stated that he never permits relocation, a colleague remarked that he could not say such a thing, but then offered that her solution is to "slow the case down." Remarks of Commissioner Josanna Berkow to Commissioner James Libby. That technique was employed in one of the unpublished cases from that county in this sample. During earlier litigation, the evaluator recommended denying an out-of-state relocation with a 7-year-old child for "approximately three years." The trial court imposed an impermissible contingent custody order that restricted the child to a two-county area. The mother did not appeal, but renewed her motion when her child was 10. The case was not heard, however, until the child was 11, when relocation was finally authorized; the case was later affirmed on appeal. See *In re Marriage of Mildred B.*, No. A094724, 2002 *Cal. App. Unpub. LEXIS* 8226 (Aug. 29, 2002). Judicial personnel in the same county also delayed hearings in other cases until job offers were lost, then held that the proposed relocations were made in bad faith or were "whimsical" because no significant job offers remained open at the time of trial. See, e.g., *Cassady v. Signorelli*, 49 *Cal. App.* 4th 55 (Aug. 29, 1996) (trial and appellate courts criticized woman for failing to seek jobs in California and denied mother the protective § 7501 presumption); *In re Marriage of Postma and Hasson* (I), No. A096713, 2002 *Cal. App. Unpub. LEXIS* 9317 (Oct. 4, 2002) (motion cited Pennsylvania job offer to expire one month later; hearing held 2 months after expiration of offer, when court criticized mother for not searching for positions in California). Later motions by Signorelli and Hasson to relocate were also denied, although each had new job offers that remained open despite calendaring delays. Neither woman was ever accused of violating a court order. See *Cassady v. Signorelli*, S079739, 1999 *Cal. LEXIS* 6119 (Sept. 1, 1999) (before unpublished decisions made available online; mother's extensive, unsuccessful search for California employment in her field ignored); *In re Marriage of Postma and Hasson* (II), No. A098060, 2003 *Cal. App. Unpub. LEXIS* 43 (Jan. 6, 2003). The judicial behavior in their cases is at odds with that seen in the father-custody relocation cases, where no attention is paid to job offers. See the discussions below in the text accompanying notes 42-52.

[41] *Draft Preliminary Report and Recommendations* (note 13), pp. 31-32. The draft proposals were put out for public comment in October 2005. One provides, "Factors such as ... potential embarrassment of litigants, lawyers, or trial judges should not affect the determination of whether to publish an opinion." During its work the committee surveyed the justices on the Court of Appeal. Eighty-six responded. When they were asked about the relative importance of certain factors in making a decision *not* to publish a case that appears to meet the requirements of Rule 976 (c), the most frequent factors listed were potential embarrassment to litigants or lawyers (39%) and to trial judges (37%). *Ibid.*, pp. 26-27.

2. *The Effect of No-citation Rules on the Substantive Law*

Trial court decisions during the study period were of extremely uneven quality. Counsel and judges who were hostile to relocation distended § 7501 and its interpretation in *Burgess*. Some decisions gave the exceptions to *Burgess* an unduly expansive reading, some interpreted "detriment" to the child too loosely, some sought to micro-manage custodial parents' life and career plans, some imposed prejudicial delays, some misapplied the statutory requirement for the child's frequent and continuing contact with the noncustodial parent, and many entertained unscientific custody evaluations.

a) The Father-Custody Relocation Cases

Given this disarray, California's rule barring litigants from citing unpublished cases is particularly unfortunate. A review of the three unpublished father-custody relocation cases is instructive. Each case displays legal issues that merited attention but were lost to California's jurisprudence because of the no-citation rule.

In *In re Marriage of Leitke*, the appellate court found that the father had "frustrated and will continue to discourage, his former wife's relationship with the children,"[42] and remarked, "[W]e have no trouble concluding that Leitke was moving ... to distance himself and the children from [the children's mother]."[43] The record contained what the appellate court termed "shockingly inappropriate" and "truly horrific" letters and notes the father had written to his 10- and 14-year-old sons.[44] Mr. Leitke 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 relocated to Michigan, adding, "Let them come after me ... my family will protect me."[45]

The trial court nevertheless awarded Mr. Leitke sole custody of all three children – the two older boys and a 7-year-old daughter – and authorized the relocation. The Court of Appeal affirmed as to the boys,[46] but reversed and remanded the question of what custody order would best serve the interests of the little girl.[47] It also imposed a contingent custody order of the sort *Burgess* prohibited.[48] The opinion does not mention whether the father

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[42] 2001 *Cal. App. Unpub.* LEXIS 459 (Dec. 24, 2001), p. *2.

[43] *Ibid.*, p. *11.

[44] *Ibid.*, ** 5-6 & nn.3-4.

[45] *Ibid.*, *1.

[46] Apparently this choice was influenced by 3 years of failed reunification efforts and concern that placing the boys with her might even be dangerous. The mother's own behavior, including an extramarital affair, was also important in fueling their animosity. *Ibid.*, p.*6, n.4.

[47] The child had testified that she liked receiving inoculations, because she could cry and her father would not know it was because she missed her mother. *Ibid.*, p.*8. The appellate court accepted the estrangement between the older boys and their mother, but expressed its conviction that the little girl should not be subjected to such a poisonous home atmosphere. *Ibid.*, pp.**7-8. On remand, it insisted that the trial court reconsider the girl's custody and supply sufficient facts to permit a meaningful appeal from whatever order it entered. *Ibid.*, p.*15 & n.5.

[48] Although the court cited *Burgess*, its opinion confounds contingent custody orders with outright custody transfers. It ordered that custody would transfer to the child's mother if the father, who the court assumed had moved to Michigan two years before (after the trial court's decision), if he

was employed in California or had searched for employment in either California or Michigan, nor whether he had a job waiting in Michigan.

Similarly, in *LaGuardia v. Tamura*, the appellate court authorized relocation, this time to an unemployed custodial father whose relocation had been denied by the trial court.[49] The father believed that he would be able to find work as a musician in Las Vegas. The appellate opinion does not mention whether any evidence supported the man's belief, nor whether he had undertaken a job search in either California or Nevada. Neither court expressed concern because LaGuardia had not yet obtained a job offer in Las Vegas. Apparently the father had no relatives in the Las Vegas area to assist him, but some of his relatives planned to move there when he did or afterwards. One of these was his mother, who cared for the child. LaGuardia had been arrested for beating her, and he also conceded abusing the mother of his child. The trial court found that he would interfere with visits by the child's mother if he moved to Las Vegas.[50]

Finally, in *In re Marriage of Wiest*, the father, who was in the Air Force, was scheduled to be transferred. He cared for his child 63% of the time under a joint physical custody order.[51] The trial and appellate courts noted that his career would necessitate moves approximately every four years. Although the trial court remarked that this lifestyle was not a "preference," it also said no evidence suggested that it was detrimental. The court nevertheless ordered a custody transfer to the child's mother during any periods the father might be required to leave the country. Both courts upheld the father's right to relocate.[52]

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did not move back to California. This aspect of the case is reminiscent of the order that was held unconstitutional in *In re Marriage of Fingert*, 221 *Cal. App. 3d* 1575 (1990), and the similar order that was set aside on appeal in *In re Marriage of Hawwa*, No. A093979, 2001 *Cal. App. Unpub. LEXIS* 2186 (Oct. 30, 2001).

[49] *LaGuardia v. Tamura*, No. D037615, 2002 *Cal. App. Unpub. LEXIS* (Apr. 24, 2002).

[50] To what extent the father's abuse may have played a part in some of her own instability is unknown. The woman had, for example, once removed her son from California in violation of court orders, and there were concerns about her past parenting.

[51] *In re Marriage of Wiest*, No. B162058, 2003 *Cal. App. Unpub. LEXIS* (Feb. 28, 2003). The evaluator had recommended a 50/50 custody split with a transfer of custody to the noncustodial mother if he moved. This technique is often employed on behalf of noncustodial fathers in cases where custodial mothers wish to relocate, as it facilitates a later custody award to the parent who is not moving.

[52] A fourth unpublished case, *Thacker v. Superior Court*, CO41644 & C041816, 2002 *Cal. App. Unpub. LEXIS* 11105 (Nov. 26, 2002), involved a joint physical custody order in which the mother, an Army officer, provided 41% of her 8-year-old daughter's care. While she was awaiting a hearing on her request for sole physical custody, she learned that she was being posted to Korea for a year and, thereafter, to Washington state. The trial judge changed his mind several times concerning custody, but ultimately tried to award the mother sole custody and authorize the child's relocation with her. The appellate court, which had granted a stay of one of the trial court's orders (a stay the trial court ignored), took two extraordinary and inappropriate steps: (1) it reweighed evidence that was heard and decided by the trial court, and (2) it made an outright custody order to the father rather than remanding the case for further proceedings consistent with the legal standards it announced in its opinion. These steps benefited a father who, the trial judge had held, lacked nurturing qualities and was overly domineering and inflexible. Whether he was also a member of the armed forces was not reported. *Thacker*'s facts were distinctive in another way. As a parent in military service whose current and future reassignments were foreseen, the mother was successful in

b) The Mother-Custody Relocation Cases

Two aspects of the father-custody cases are particularly revealing and bear on the need for revised publication rules and practices. The first concerns the exception *Burgess* announced which removed bad faith cases from the § 7501 presumption that protects the custodial parent's decision. The second concerns the *Burgess* rule that barred judicial micromanagement of parents' relocation decisions. As the following mother-custody examples demonstrate, in their cases the courts dealt with these matters very differently.

aa) Findings of Bad Faith

On the first point – bad faith – the unpublished father-custody cases were distinctive. Although the *Leitke* and *LaGuardia* courts fully expected these custodial parents to interfere with their children's relationships with their mothers after relocation, they chose not to apply *Burgess'* bad faith exception to defeat the relocation requests.[53] This was remarkable, given these men's documented histories of extreme behavior. Publication was warranted for both cases.[54]

In contrast, mothers have often been denied relocation on bad faith grounds although none of the opinions reported any comparable evidence of interference.[55] Indeed, some bad faith assertions are based on pure speculation – an assertion that a woman with an unblemished history of obeying the court's orders will suddenly choose to violate visitation orders if the move is allowed.[56] Frequently the relocating mother's motives and behavior

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the trial court, only to lose before an unusually activist appellate court. In contrast, the military father who was about to be reposted in *Weist*, with further reassignments every 4 years, won his relocation request. See the discussion of *Weist* in the text accompanying notes 51 and 52. A comparison between *Thacker* and *Wiest* is complicated, however, by the differing custody orders these officers held when their litigation began. It is also difficult to compare *Thacker* with cases in which men exercised lesser custodial roles, as these men sought – not primary custody and the right to relocate with their children – but only to keep their children nearby in the care of their mothers. *Thacker* should have been published for the novelty of its facts and to sharpen the focus on how *Burgess'* remarks on *de facto* and *de jure* custody should be interpreted.

[53] The appellate court in *LaGuardia* wrote, "Although the [trial] court found LaGuardia would have interfered with [the mother's] visitation with [the child] if the proposed relocation were allowed, such finding was ... not [made] as an answer to the ... question whether LaGuardia had good faith reasons for the move ... [W]e decline to interpret that finding ... as the effective equivalent of an implicit finding that LaGuardia had a bad faith intent in seeking to relocate." *LaGuardia v. Tamura*, No. D037615, 2002 *Cal. App. Unpub. LEXIS* 317 (Apr. 24, 2002), p.*42.

[54] There are at least 3 possible grounds for publication under the current rule: they applied an existing rule (the *Burgess* interpretation of § 7501) to a set of facts significantly different from those stated in published opinions, they created an apparent conflict in the law, and their decisions involved a legal issue of continuing public interest.

[55] But see the facts recounted in a child support case, *Wilson v. Shea*, 87 Cal. App. 4th 887 (2001) (unmarried mother asked father to leave her and their child alone when child turned 5; visits resumed 3 years later when mother brought paternity action).

[56] The *LaMusga*, *Postma*, and *Cassady* trial court cases are examples. See *In re Marriage of LaMusga*, 32 *Cal.* 4th 1072 (2004); *In re Marriage of Postma and Hasson* (I), No. A096713, 2002 *Cal. App.*

are examined and deprecated as trial courts chide them for seeking to improve their living, professional or housing conditions.

So, for example, some conclude that if a mother who says she seeks a better life elsewhere has not first searched for jobs or housing in California, this is evidence that her move is really only an excuse to get away from the noncustodial parent – i.e., it is motivated by bad faith. This reasoning was applied in *Rice v. Reiland*,[57] an unpublished opinion concerning a woman who wanted to move from Santa Barbara back to Massachusetts, where she and the child's father had met and had lived for some years before coming to California. The couple had been considering this move together quite recently, but had not yet decided what to do when they separated.

Although it seems the woman merely sought to reinstate the situation that had existed before her move west, the court called her decision "inexplicable."[58] Despite her familiarity with Massachusetts, the judge also deprecated her (seemingly, quite plausible) belief that housing would be less expensive in Massachusetts, that her savings would go farther there (while she remained at home to care for the couple's infant), and that, given her masters degree in counseling, she could find work either in that field or as a substitute teacher when she returned to the workforce. Further, the appellate court in *Rice* made a factual finding to defeat her move that it said was implicit in other findings – a step the Court of Appeal refused to take in *LaGuardia* on an equally controlling matter.[59]

The bad faith doctrine was also applied to women who sought to move closer to their elderly mothers in order to care for them and to enjoy better professional opportunities for themselves. In *Cassady v. Sirgnorelli (II)*, a welfare mother sought relocation to Florida, where her own mother was dying of pancreatic cancer. The grandmother's doctor wanted the mother to come so the grandmother could remain at home for the unknown period until her death.[60] The woman had previously been denied relocation to that city in a pub-

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Unpub. LEXIS 9317 (Oct. 4, 2002); *Ibid.*, (II), No. A098060, 2003 *Cal. App. Unpub. LEXIS* 43 (Jan. 6, 2003); *Cassady v. Signorelli*, 49 *Cal. App.* 4th 55 (1996); *Cassady v. Signorelli*, S079739, 1999 *Cal. LEXIS* 6119 (Sept. 1, 1999). In none of these cases had visitation orders been violated, and in none had even a motion for contempt ever been filed. Conversation with Kim M. Robinson, Esq., Oakland, California, attorney for these mothers (December 13, 2005); this was also the case as to Ms. Signorelli when I later represented her. Even if concerns for violated visitation orders after relocation were more than speculative, in the United States the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) provides protection against this eventuality. This statute controls jurisdiction and enforcement of sister-state and foreign custody orders in U.S. state courts. See Cal. Fam. Code §§ 3400 *et seq.* 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 the rule of § 7501 and *Burgess*.

[57] No. B143955, 2001 *Cal. App. Unpub. LEXIS* 1535 (Nov. 19, 2001).

[58] The move would place her far from her two older children and her father, who all lived in California. The opinion does not reveal whether these children had lived in California during the woman's earlier residence in Massachusetts, how old they were, in which part of the state they lived, nor how often she saw them. One doubts that the judge would have been so incredulous if a *male* noncustodial parent had wanted to move some distance away from his children.

[59] See note 53. The opinions in *Rice* and *LaGuardia* created an apparent conflict in the law on this point that merited their publication.

[60] That proved to be approximately eight months. The trial court ordered the mother to leave her 8-year-old daughter with the child's father if she went to care for her mother. The father, however,

lished case after the trial court delayed its hearing until most of her job offers had expired, then called her "flaky," and the appellate court, in a published opinion, termed her plans "somewhat whimsical."[61] This time the woman had multiple professional opportunities in Florida and an offer of free housing. She introduced into evidence government figures on average wages and the cost of living to demonstrate the economic sense of her plan. None of these matters was of concern to any of the courts in the father-custody cases, and most were not even mentioned in their opinions. The trial and appellate courts nevertheless denied her request,[62] saying there were no changed circumstances.

Similarly, in *In re Marriage of Postma and Hasson (II)*, a chiropractor whose declining practice in California had forced her into bankruptcy, sought to move near to her family in Pennsylvania.[63] Her elderly mother had sustained neurological damage in a car accident, and the woman – who planned to assist her – also held multiple professional job offers there. Her proposed relocation was also denied on bad faith grounds.

If these custodial parents aimed to thwart contact, one would have expected this behavior to have been evidenced already through violations of custody orders. Yet the cases just described demonstrated no such histories, and genuine custody transfers were not ordered in them. In these and other cases, judges imposed contingent custody orders that were expressly disapproved by *Burgess*.[64] Rarely were they overturned on appeal.[65]

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had a history of domestic violence and had been suspected of sexual abuse some years before. Made to choose between the welfare of her mother and of her child, the woman decided to protect the little girl. The grandmother was therefore placed in a nursing home. The trial judge entered an order that authorized the mother and child to fly across the country to be with the grandmother at the time of her death (something the doctor feared she would be unable to predict). The mother sought relief from the appellate courts, but it was denied. See note 62. When the grandmother neared death on a Friday evening, the child's father refused to return the child from a weekend visit, and law enforcement assistance could not be secured until Sunday afternoon. The grandmother died Monday, shortly before the mother and child boarded the next available plane to Florida. I am aware of these facts because I was counsel for Ms. Signorelli at the time.

[61] See *Cassady v. Signorelli*, 49 *Cal. App.* 4th 55 (1996). The grandmother had offered the woman and child the free use of rental property she owned, and the cost of living in that area was far less than in California (where the woman and her child shared a rented room in a friend's home). The mother's field, parapsychology, is a recognized academic discipline. Her job offer from a public junior college also contemplated work with older women returning to school.

[62] See *Cassady v. Signorelli*, S079739, 1999 *Cal. LEXIS* 6119 (Sept. 1, 1999) (rendered before unpublished decisions available on line; mother's extensive, unsuccessful search for California employment in her field also ignored).

[63] See *In re Marriage of Postma and Hasson* (I), No. A096713, 2002 *Cal. App. Unpub. LEXIS* 9317 (Oct. 4, 2002), p.*6; *In re Marriage of Postma and Hasson* (II), No. A098060, 2003 *Cal. App. Unpub. LEXIS* 43 (Jan. 6, 2003), p.*7.

[64] See also, e.g., *In re Marriage of Forrest*, 2002 *Cal. App. Unpub. LEXIS* 4620 (Jan. 24, 2002); *Rice v. Reiland*, No. B143955, 2001 *Cal. App. Unpub. LEXIS* 1535 (Nov. 19, 2001); *In re Marriage of Hawwa*, No. A093979, 2001 *Cal. App. Unpub. LEXIS* 2186, (Oct. 30, 2001); *In re Marriage of Mildred B.*, No. A094724, 2002 *Cal. App. Unpub. LEXIS* 8226 (Aug. 29, 2002).

[65] An exception was the decision of the Court of Appeal in *LaMusga*. See *In re Marriage of LaMusga*, No. A096012, 2002 *Cal. App. Unpub. LEXIS* 1027 (May 10, 2002). That decision, however, was later overturned by the California Supreme Court in an opinion that purported to follow *Burgess*, but reinstated the trial court's contingent order and took many additional steps that were also

Cassady and *Postma* also involved conflicting responsibilities for the women – to their mothers and to their children – an important contemporary problem for middle-aged women in the United States, who have become known as "the sandwich generation."[66] Given the public importance of the issue and the novel fact pattern, these opinions merited publication. Instead, the courts that kept these women from performing their dual caretaking roles hid their cruel decisions among the unpublished opinions.

More generally, the conflicting analysis of the bad-faith cases and the father-custody cases indicates that publication should have been provided.

bb) Micromanagement

None of the three father-custody relocation cases displayed the judicial micromanagement that *Burgess* proscribed. But as the above examples reveal, this judicial behavior was far too common in the mother-custody cases. There is a great divide between the public face of relocation law, as seen in the published opinions, and the private reality for the majority of custodial mothers, which is hidden from view in unpublished opinions.

Mothers also endured inappropriate treatment from trial judges in published cases, although sometimes, relocation was nevertheless authorized. In *In re Marriage of Edlund and Hales*, for example, a disgruntled judge castigated a woman who was making intelligent plans for her family's future and called her immature and selfish, but nevertheless permitted the relocation.[67] Publication of the excellent appellate opinion in the case, which may have hoped to encourage other to replicate the trial judge's acceptance of the rule of law, also inevitably and incorrectly implied that even unhappy trial court judges were honoring the law in relocation cases. In a second case, a woman planned to marry the man by whom she was pregnant and asked to move to Nebraska to be with him. The trial judge, who chided her for her involvement with the man and for her marriage plans, made an erroneous use of the joint custody exception to *Burgess* and awarded the child's care outright to

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clearly inconsistent with its own precedent. See *In re Marriage of LaMusga*, 32 Cal. 4th 1072 (2004).

[66] See BELDEN, RUSSONELLO & STEWART (WASHINGTON, D.C.) AND RESEARCH/STRATEGY/MANAGEMENT (GREAT FALLS, VA), AARP, *In the Middle: A Report on the Multicultural Boomers Coping with Family and Aging Issues* 2001, p. 58, available at http://assets.aarp.org/rgcenter/il/in_the_middle.pdf (21% of caregivers for the elderly report that where they live is determined by the caretaking situation).

[67] See *In re Marriage of Edlund and Hales*, 66 Cal. App. 4th 1454 (1998). The judge was angered that the woman wished to move to Indiana with her finance when he was transferred there by his employer. This would, however, 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 for them to have children of the new marriage; none of this was financially feasible for the couple in their current community. In addition, the mother had family members in the Midwest. The child's father had not taken full advantage of his visitation time, although he had lived nearby. Yet 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. She expressly permitted the relocation, however, because she conceded she was bound not to micromanage under *Burgess*.

his father, although the mother had clear primary custody.[68] Almost two years later, the Court of Appeal reversed in a published opinion.

Perhaps the most dramatic micromanagement of a mother's *professional* plans occurred in a third published case, *In re Marriage of Condon*. The wife, Ms. Cooper, was an internationally known artist, who had spent seven months in France during the marriage with her very young children and had purchased a home there, perhaps (the court said) with her husband's assistance. 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, however, that she should go instead to her home country of Australia, where her family lived and she could be self-supporting. It also imposed a contingent custody transfer if she moved to France. Although the Court of Appeal opinion expressed discontent that Ms. Cooper was allowed to move at all, it affirmed – directing 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.[69] It is inconceivable that custodial fathers would encounter interference of this sort with such professional opportunities.

III. Conclusion

Both published and unpublished relocation opinions from the study period displayed sloppily reasoned bad faith assertions and extensive micromanagement of mothers' life plans, in stark contrast to the deferential treatment the appellate courts accorded to fathers but hid in unpublished opinions. Although the small number of father-custody cases precludes any definitive conclusions, these cases are so unlike any of the far more numerous mother-custody cases that it is difficult to imagine any explanation other than gender bias. Whether or not bias is at work, the California rule that precludes a woman from bringing the conflicts between these cases and hers to the attention of the courts is profoundly prejudicial. And all litigants are potentially harmed by the appellate courts' practice that permits omitting a trial judge's name in an unpublished opinion.

Many of the unpublished opinions detailed in this essay merited publication – most notably, the father-custody cases and the cases in which women sought to aid their mothers and pursue better employment opportunities. They concerned matters of considerable public interest, they involved novel facts, and – most importantly – they created conflicts in the substantive law and in its application.

Whether any significant changes for the better in California's treatment of unpublished opinions can be anticipated in the near future is, however, doubtful. The California advisory committee on rules concerning publication was not instructed to re-evaluate the

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[68] The trial court had criticized her for her involvement with the man and her plans to marry him. The only asserted detriment to the child was an inevitable decrease in visitation with his father and a grandparent, something *Burgess* had said could not defeat a move.

[69] See *In re Marriage of Condon*, 62 Cal. App. 4th 53 (1998). The appellate opinion sets forth many misstatements of domestic and international law and accepts unsound theories concerning children. It also establishes a chauvinistic test of cultural similarities for international relocations. Women who are allowed to relocate to any foreign country probably will not dare to challenge the kinds of restrictions the court placed on Ms. Cooper. See, e.g., *In re Marriage of Lasich*, 99 Cal. App. 4th 702 (2002).

basic principles of unpublished opinions.[70] Nor was the committee asked to address whether citations to unpublished opinions should be allowed. Although the committee nevertheless chose to go beyond its charge,[71] it has instructed those who comment on its draft proposals not to do so. This decision to wear blinders is deeply disappointing.

More fundamentally, the Supreme Court's failure to demand an investigation of the impact of unpublished opinions and the no-citation command on the rule of law in California renders the advisory committee's draft a missed opportunity of the first order.[72] Future progress may well depend instead on the willingness of others to examine and then ameliorate the harmful consequences of these practices for California's litigants and the substantive law.[73]

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[70] Its charge from the Supreme Court was to review "the existing standards for the publication of opinions of the Courts of Appeal and [to recommend] whether the criteria or procedures set forth in the rules for publication of these opinions should be changed ...", *Draft Preliminary Report and Recommendations* (note 13), p. 6.

[71] *Ibid.* at p. 34: While the issue of citation to unpublished opinions was not contained in the committee's charge, the committee did ask justices and attorneys about their views on limited citation to unpublished opinions in petitions and answers filed with the Supreme Court.

[72] Its relevant (but extremely tentative) suggestions were (1) that the Supreme Court "consider" appointing a committee to evaluate the possibility of expanding the circumstances under which parties may bring unpublished cases to the attention of the Supreme Court, and (2) reevaluate "at a future time" whether the presumption against publication should be replaced with one favoring publication. *Ibid.* at p. 35.

[73] If the courts are disinclined to grasp the cudgel, legislation may be required. Additional studies of publication and citation practices in various areas of the substantive law would undoubtedly be instructive in any event. I have located only one other study of this sort: SIEGELMAN P./DONOHUE J., "Studying the Iceberg From its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases", in: *Law & Soc'y Rev.* 1990/24, pp. 1133 *et seq.*