August 19, 2002

Chief Justice Ronald M. George
and the Associate Justices of the
California Supreme Court
San Francisco Office
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Letter Brief Amici Curiae Recommending Denial of Review in *Marriage of LaMusga*, Case No. S107355 in the Supreme Court of the State of California (Court of Appeal No. A096012, Contra Costa Superior Court No. D95-01136)

Honorable Justices:

We write to urge the Court to deny review in *Marriage of LaMusga* (S107355), which deals with the proper test to apply when a custodial parent seeks to relocate with the children, a matter that was resolved by the Court in 1996 when it decided *Marriage of Burgess* (1996) 13 Cal.4th 25. *Burgess* continues to provide sound guidance and requires no revision of the sort urged by respondent and those who support him.

We are mental health and law professors and researchers and a member of the California Legislature who have no direct interest in this case or in any other case pending in the California courts. Our scholarly and professional concerns, however, encompass the well-being of children and other family members, social science research, and family law. Our most relevant affiliations are reflected on the signature page.

Our recommendation that the Court decline review is based on the following five points:

1. <u>Revision of the *Burgess* rule would violate California=s long-standing rules of statutory construction</u>.

Respondent and those who support him disregard the central holding and fundamental tenet of *Burgess* that governed the Court of Appeal=s review in this

case: Based on Family Code section 7501, a statute that has been part of California law since 1872, a non-custodial parent seeking to prevent the relocation of a child with a custodial parent must be prepared to prove that Athe child will suffer detriment rendering it >essential or expedient for the welfare of the child that there be a change.=@ (13 Cal.4th at p.38.) AThe dispositive issue is . . . whether a *change in custody* is >essential or expedient for the welfare of the child.=@ (*Id.*; emphasis in original.) Under *Burgess* and in accordance with the well-established law of this state, Athe interests of a minor child in the continuity and permanency of custodial placement with the primary caretaker will most often prevail,@ subject to the child=s needs and, if sufficiently mature, expressed preferences. (*Id*. at p. 39; *Marriage of Carney* (1979) 24 Cal.3d 725, 730; Fam. Code section 3042(a).)

***Burgess* was not grounded in this Court=s perception of policy or its assessment of social science literature. Rather, it interpreted California Family Code section 7501, which grants a custodial parent the right to determine where a child shall live, in light of contemporary terminology and practice. In the six years since *Burgess*, the legislature has kept section 7501 exactly as it was first enacted and as it stood when *Burgess* was decided. Under the Court=s long-standing rules of statutory construction, this demonstrates the legislature=s agreement with the Court=s interpretation. (*People v. Hallner* (1954) 43 Cal.2d 715, 720; *Estate of Griswold* (2001) 25 Cal.4th 904, 910 (2001).)**

***Burgess* also comports with California Civil Code section 3541, a maxim of jurisprudence that directs California courts to prefer an interpretation that gives effect to a provision over one that would render it void. Family Code section 7501 clearly intends that custodial parents be entitled to decide where their children will live in all but the most unusual and extreme circumstances; *Burgess* simply honors that rule. The revision urged by respondent and his advocates would, contrary to this maxim, eviscerate section 7501 by divesting most custodial parents of an opportunity to determine where their children will reside.**

2. <u>Social science research does not support the propositions advanced by those who seek review in order to revise *Burgess*</u>.

Social scientists agree that children are likely to do best if they have two loving, emotionally healthy parents who are readily available to them. Unfortunately, that proposition does not assist the resolution of the relocation cases governed by Family Code section 7501 and *Burgess*, and none of the social science literature cited by those who seek review in this case supports their arguments to the contrary. The issue is not whether moving creates difficulties for children in intact or divided families. Of course it does. But as is quite clear, moving is what millions of American families do, and the question is what courts are to do when faced with this phenomenon. Similarly, the issue is not whether mothers and fathers are important to children. Of course they are. The question is whether a custodial parent B mother or father B who wishes to move with the children should be allowed to do so, and the studies cited fail to shed any light on this question.

In the *Braver* study, for example, the findings of differences between the two groups of youngsters (those who remained in the same locale and those whose fathers or mothers had relocated) are remarkably similar. (Sanford L. Braver, Ira M. Ellman & William V. Fabricius, *Some New Data Suggesting That Current Legal Rules May Not Serve the Interests of Children Whose Parents Relocate After Divorce, forthcoming.*) The subjects (first-year college students enrolled in a psychology course) report no significant differences in their personal or emotional adjustment except for those youngsters who remained with their fathers when their mothers relocated and those who moved with their fathers. They also report no difference in what is a key agenda item for youngsters at their age, their relationships with the opposite sex. Equally, there is no difference in their report of substance abuse. The only important differences identified are those that report distress from the divorce when either father or mother moved, but we have no information about the ages at which the distress occurred, how long it lasted, nor how serious it was. The only other significant difference is that the young people whose parents had moved (especially the girls) report a poorer sense of their overall physical health, but we are not told the nature of their complaints, how serious they are, or how these difficulties compare with those of other women in their freshman year of college.

Aside from the fact that the differences reported between the youngsters who had relocated with their custodial parents and those who had remained in the same locale with both parents were modest and hardly significant at best (except where the father had left or had relocated with the child) two other considerations sharply diminish the probative value of the Braver study: First, as he and his co-authors state, even their modest findings are only correlational and cannot be established as causative. Thus, it is just as likely that relocation is a consequence of a stressful and unhappy or dysfunctional living arrangement as a cause of it, and the Braver study offers no evidence to favor one hypothesis over the other. Second, the proper comparison group to the relocation of the custodial parent with the child is not simply cases where both parents continue to live in the same area. Rather, the salient group is cases where the custodial parent was prevented from moving. Such a study was not conducted, yet only these comparisons could give a fair measure of the potential negative effects of blocking or permitting relocation. In sum, what is important about this limited study of a small group of young adults is the striking similarities between children who moved with their mothers and those whose parents did not move.

3. <u>If Burgess were to be revised to make relocation by custodial households more difficult, this Court=s jurisprudence on gender equality in child custody cases would require that non-custodial parents be similarly restricted as to their relocation decisions</u>.

Even if the Court were to hold that relocation by custodial parents (mostly mothers) is automatically detrimental because children do better when both parents are nearby, this rule would constitute gender discrimination of the sort eschewed by the Court in *Burchard v. Garay* (1986) 42 Cal.3d 531. Discrimination could be avoided, however, if the Court were to apply the same revised principles to the relocation of noncustodial parents (mostly fathers). This would require that non-custodial parents, too, seek court approval to relocate and, to obtain that approval, overcome a presumption that their relocation would harm the children.

Gender equality would reasonably require that a non-custodial parent lose most of his or her visitation time if he or she relocated without court-authorization (just as a custodial parent would lose primary custody absent court authorization). This rule, of course, would penalize the children while it penalized their parents, just

as the pre-*Burgess* rule did. Even if some children might benefit from relocation plans that were abandoned in the face of such coercion, many others would suffer. These would include, for example, children whose parents, by abandoning moves, suffered economically, educationally or emotionally. In addition, whenever courts imposed sanctions of decreased time with the children on non-complying custodial or non-custodial parents, the children would suffer.

Examined more closely, then, proposed restrictions on relocation that provide no penalty for relocation by non-custodial parents are gender-based. They are also coercive and harm children while purporting to protect their interests. None of the literature cited for the proposition that moving harms children compares the difficulties of children who move following divorce with those of children who move during an intact marriage. And none of it compares children whose parents voluntarily remain in their former residential areas with those whose parents have been ordered to remain there. Indeed, the most salient new finding is that the young adults who did significantly more poorly than their peers in some regards were those whose custody was shifted to the visiting parent when the custodial parent relocated. It is tragic that this red flag, which supports the California legislative scheme, is ignored by advocates who claim that a return to Acalling a parent=s bluff@ would benefit California=s children.

4. <u>This Court=s decision in *Montenegro* does not support review here</u>.

Some of respondent=s supporters suggest that *Montenegro v. Diaz* (2001) 26 Cal.4th 249 merits a re-examination of *Burgess*. To the contrary, *Montenegro* did not involve a relocation sought by a custodial parent and opposed by a non-custodial parent. Rather, it was a change of custody case following an interim, non-final custody order that required a first-time review of the child=s best interest in a custodial placement. It did not involve section 7501, which was the legal lynchpin of *Burgess*, nor the resulting presumption in favor of a custodial parent=s proposed move. Therefore, it has no impact on the Court of Appeal=s decision in this case.

5. <u>There is no reason to believe that the kind of wholesale revision of *Burgess* sought by respondent is necessary or appropriate</u>.

***Burgess* has not been abused. Most parents, both mothers and fathers, who move away do so because of circumstances directly related to the short-term or long-term welfare of their families, e.g., to obtain a better job, to form or maintain a new marital relationship, and/or to live closer to family members who can provide child care and other kinds of assistance while the moving parent is pursuing educational or occupational opportunities. California is an expensive and sometimes difficult place to raise a family. As the trial court found and the Court of Appeal recognized in this case, appellant=s proposed move to Ohio was advanced in good faith. This case is, therefore, a straightforward application of *Burgess* that will not afford this Court an opportunity to contribute anything of substance to California=s child custody law.**

<u>CONCLUSION</u>

***Burgess* was a faithful interpretation of California=s statutory law. It remains consistent with the most probative scholarship on parent-child relationships. Because it requires no judicial revision and there are no other issues in this case that merit a hearing, we respectfully recommend that the Court deny review.**

On behalf of myself and the following persons, I am

Very truly yours,

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I am employed in the city of Davis, County of Yolo, State of California. I am over the age of 18 and not a party to this action; my business address is: 1949 5th Street, Suite 101, Davis, California 95616.

On August 19, 2002, I served the document(s) described as: **Letter Brief Amici Curiae Recommending Denial of Review in *Marriage of LaMusga*** in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

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