

IN THE SUPREME COURT OF CALIFORNIA

In re the Marriage of

SUSAN POSTON NAVARRO (LAMUSGA)

Appellant

and

GARY LAMUSGA,

Respondent - Respondent

Supreme Court
Case No. S107355

Court of Appeal
Case No. A096012

Contra Costa County
Superior Court
Case No. D95-01136

**AMICI CURIAE BRIEF OF
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KELLY, PH.D., JAMES H. BRAY, PH.D., ET AL.,
ON BEHALF OF LAMUSGA CHILDREN**

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Brief of Amici Curiae On Behalf of Minor Children

Re: In re the Marriage of Susan Poston Navarro (LaMusga) and Gary

LaMusga

Introduction

Amici are submitting this brief in response to the amici curiae brief filed by Judith Wallerstein and five other mental health professionals (two psychiatrists, two psychologists, and one registered nurse) in support of the Appellant, hereinafter referred to as the “Wallerstein et al. Brief.” Amici are 18 social science researchers and authors, and 10 mental health forensic practitioners, (many of whom are also accomplished authors) of great experience and accomplishment. The individual biographies of Amici can be found at the end of this brief. As these biographies make clear, Amici are in a very strong position to interpret and summarize for the Court the relevant research and typical clinical practice of those who work with families in this milieu.

We are both pleased and concerned that social science research and evidence are being considered by and relied upon by Courts (e.g. Baures vs Lewis¹) as they decide their weighty matters, especially with regard to

¹ Baures v. Lewis, 167 N.J. 91;770 A.2d 214 (N.J. 2001).

divorcing families. We are pleased because this substantial volume of empirical literature can and should provide invaluable guidance to Courts as they consider how to optimize children's best interests. Simultaneously, however, we are concerned because of the possibility that any given purported summary can be incomplete, selective, idiosyncratic, or even deliberately biased. This is possible even for the most distinguished writers, and regardless of how well intentioned. The best safeguard against this possibility is a summary that has the consensual endorsement of a large number of experienced and respected social science researchers, as well as enlightened consumers or practitioners of this literature, in this case mental health professionals, such as custody evaluators, mediators, etc. who work with divorcing and divorced families.

We are united in our judgment that the Wallerstein et al. Brief offers a skewed and misleading account of the social science evidence relevant to this case. Although it purports to be an objective summary of knowledge, the brief runs counter to the prevailing opinions of the majority of experts who conduct divorce research and of those who apply this research to their clinical and forensic practices. We make this statement notwithstanding the fact that several of the current co-Amici are former collaborators and co-authors with Wallerstein. Others are the authors or investigators Dr.

Wallerstein cites in support of her position; the authors themselves, instead, view their work as portrayed here. We argue below that Wallerstein et al. present research findings out of context, select a few statements of the court-appointed custody evaluator to create an impression markedly different from his overall opinions, and overlook significant aspects of the case at bar. With the best interests of thousands of children at stake, we believe that the Court deserves a more complete, accurate, and balanced overview of the current state of scientific research relevant to the issues involved in relocation cases.²

Although we note the applicability of psychological research to the case at bar, unlike Wallerstein et al, we refrain from offering a specific recommendation to the Court regarding custody of the LaMusga children or advocating for any particular outcome in this case because we believe that it is inappropriate for mental health professionals to make such specific recommendations on ultimate issues when they have not personally evaluated the children or their parents. Nevertheless, we trust that the perspective summarized below, the mainstream and consensus view of the

² We have seen numerous cases in which a child's relationship with a parent disintegrated following relocation. Although descriptions of such cases are emotionally compelling, as scientists we believe that we can best contribute to the decisions facing this Court by presenting empirical research rather than anecdotes, personal opinions, and ideological positions.

scientific literature, will assist the Court in making the difficult decisions it faces regarding the LaMusga children and in shaping law that secures the best interests of children.

The Benefits of Preserving Children's Relationships with Both Parents

A central issue in deciding relocation cases concerns the relative importance to the children of their relationship with their primary custodial parent versus their noncustodial parent. Some courts have construed *Burgess*³ to give little weight to the risk of damage that a relocation can impose on the children's relationship with their nonmoving parent and on their development in such areas as peer relations and scholastic achievement.

A narrow interpretation of *Burgess* may be traced to the influential brief filed in *Burgess* by Wallerstein.⁴ Her brief in that case emphasized the "primary psychological parent" doctrine and cited the central importance of

³ *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 51 Cal.Rptr.2d 444, 913 P.2d 473.

⁴ Judith S. Wallerstein, *Amica Curiae Brief of Dr. Judith S. Wallerstein, Ph.D.* filed in Cause No. S046116, *In re Marriage of Burgess*, Supreme Court of the State of California, Dec. 7, 1995. *See also* Judith S. Wallerstein & Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L. Q. 305 (1996).

maintaining the stability and continuity of “a family unit” comprising the primary custodial parent and his or her children. The brief failed to regard the nonresidential parent and child as another family unit that also warranted stability and continuity, except when there was dual residence. Instead, the brief argued that the custodial parent was the central influence on children’s adjustment and that “frequent and continuing contact between father and child is not a significant factor in the child’s psychological development. . . .”⁵

Citing only 10 studies in her Table of Authorities, of which 7 were from her Center, Wallerstein ignored a large body of evidence discrediting the notion that children have only one psychological parent. The “case studies” presented in the brief were anecdotal accounts of cases in which she had never interviewed or assessed the fathers. She disregarded a substantial literature that documents the harmful impact of the loss of important relationships and demonstrates that children do better when two competent parents (married or divorced) are involved in their lives than when the children are raised by single parents.⁶ Wallerstein ignored even

⁵ *Id.* at 18.

⁶ Paul R. Amato & Joan G. Gilbreth, *Nonresident Fathers and Children’s Well-Being: A Meta-Analysis*, 61 J. OF MARRIAGE AND THE FAMILY 563-70 (1999); HENRY B. BILLER, FATHERS AND FAMILIES:

her own research project's results that contradicted the position she advocated in *Burgess*:

Our findings regarding *the centrality of both parents* to the psychological health of children and adolescents alike leads us to hold that, where possible, divorcing parents should be encouraged and helped to shape postdivorce arrangements which permit and *foster continuity in the children's relations with both parents*.⁷ [Emphasis added.]

If the Court recognizes the central importance of both parents to the children's welfare, it cannot interpret *Burgess* as a bright-line test that

PATERNAL FACTORS IN CHILD DEVELOPMENT (1993); E. Mavis Hetherington, *Should We Stay Together for the Sake of the Children?*, COPING WITH DIVORCE, SINGLE PARENTING, AND REMARRIAGE (E. Mavis Hetherington, ed., 1999); MICHAEL E. LAMB (ED.), THE ROLE OF THE FATHER IN CHILD DEVELOPMENT (1997); Michael E. Lamb, *Non-custodial Fathers and Their Impact on the Children of Divorce*, THE POST-DIVORCE FAMILY: RESEARCH AND POLICY ISSUES (Ross A. Thompson and Paul R. Amato, eds., 1999); Michael E. Lamb, *Noncustodial Fathers and Their Children*, HANDBOOK OF FATHER INVOLVEMENT: MULTIDISCIPLINARY PERSPECTIVES (C. S. Tamis-LeMonda & N. Cabrera, eds., 2002); ROSS D. PARKE, FATHERS (1981); Joseph H. Pleck, *Paternal Involvement: Levels, Sources, and Consequences*, THE ROLE OF THE FATHER IN CHILD DEVELOPMENT (Michael E. Lamb, ed., 1997); Ross Thompson & D. Laible, *Noncustodial Parents*, PARENTING AND CHILD DEVELOPMENT IN NONTRADITIONAL FAMILIES (Michael E. Lamb, ed., 1999); RICHARD A. WARSHAK, THE CUSTODY REVOLUTION (1992).

⁷ JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, SURVIVING THE BREAKUP 149, 311 (1980).

assumes that children's best interests are necessarily served by maintaining only the family unit with the primary custodial parent. Rather, it is essential that the Court undertake a case by case inquiry of the potential hazards that relocation poses to the children's best interests, an approach consistent with that of the trial court in LaMusga.

The Wallerstein brief in *Burgess* argued that children's relationship with only one parent was central to their welfare. The Wallerstein et al. Brief in LaMusga echoes this sentiment and continues to discount the value of children's frequent contact with the noncustodial parent. But the results of Wallerstein's own studies provide ample evidence to the contrary.

At five years [the] positive contribution of the father's role emerged with clarity. Specifically, good father-child relationships appeared linked to high self-esteem and the absence of depression in children of both sexes and at all ages. We were interested to find this significant link in both sexes up to and including those in the thirteen-to-twenty-four age group.⁸

* * *

⁸*Id.* at 219.

It is noteworthy that the divorce appeared not to diminish the importance of the psychological link between father and child. This connection was especially obvious at the five-year mark in those children who were between nine and twelve, or entering adolescence. Children in this age group took intense pleasure in the visiting and when they were not visited they grieved. It seemed possible, in fact, that in this nine-to-twelve-year-old group the visiting father might sustain a youngster even in the care of a disorganized mother.⁹

[Emphasis added.]

In her *Burgess* brief Wallerstein asserted, “There is no evidence in my own work of many years, including the 10- and 15-year longitudinal study, that frequency of visiting or the amount of time spent with the non-custodial parent over the child’s entire growing-up years was significantly related to good outcome in the child or adolescent,”¹⁰ In a 1980 publication, however, Wallerstein and her coauthor Kelly noted:

In the youngest children the good father-child relationship was closely related to a regular and frequent visiting schedule

⁹ *Id.* at 219.

¹⁰ Wallerstein, *supra* note 4, at 17.

and to a visiting pattern that included continuity and pleasure in the visiting. For most children, this meant overnight and weekend stays.¹¹

* * *

Boys and girls of various ages who had been doing poorly at the initial assessment were able to improve significantly with increased visiting by the father. Similarly, visits by the father which increased after the first year diminished loneliness among the older youngsters and adolescents. Those children who had been fortunate enough to enjoy a good father-child relationship on a continuing basis over the years were more likely to be in good psychological health.¹²

* * *

Aside from pleas to reunite their parents, the most pressing demand children brought to counseling was for more visiting. . . . The intense longing for greater contact persisted

¹¹WALLERSTEIN & KELLY, *supra* note 7, at 219.

¹²*Id.* at 219.

undiminished over many years, long after the divorce was accepted as an unalterable fact of life.¹³

* * *

Brief contacts were valued by youngsters only if there were many of them and they included midweek meetings as well as overnight weekend stays.¹⁴

* * *

A rethinking of visiting issues must include the concept that both parents remain centrally responsible for and involved in the care and psychological development of their children.¹⁵

The Wallerstein and Kelly findings parallel current understanding of parent-child relationships after divorce. The legislature's mandate to support frequent and continuing contact is supported by many subsequent studies that demonstrate a link between frequency of children's contact with divorced fathers and children's behavior, emotional health, satisfaction with custodial arrangements, and academic achievement.¹⁶ For example, data

¹³*Id.* at 134.

¹⁴*Id.* at 138.

¹⁵*Id.* at 134.

¹⁶Lise M.C. Bisnaire, Philip Firestone, & David Rynard, *Factors Associated with Academic Achievement in Children Following Parental*

from interviews with over nine hundred parents found that regular visitation “was a compelling factor” predicting children’s adjustment.¹⁷ The

Separation, 60 AM. J. ORTHOPSYCHIATRY 75 (1990); John Guidubaldi & Joseph D. Perry, *Divorce and Mental Health Sequelae for Children: A Two-Year Follow-up of a Nationwide Sample*, 24 J. AM. ACAD. CHILD PSYCHIAT. 531 (1985); J. M. Healy, Jr., J. E. Malley, & A. J. Stewart, *Children and Their Fathers After Parental Separation*, 60 AM. J. ORTHOPSYCHIATRY 531 (1990); E. Mavis Hetherington, Martha Cox, & Roger Cox, *Effects of Divorce on Parents and Children*, in NONTRADITIONAL FAMILIES: PARENTING AND CHILD DEVELOPMENT (Michael E. Lamb ed., 1982). Doris S. Jacobson, *The Impact of Marital Separation/Divorce on Children: I. Parent-Child Separation and Child Adjustment*, 1 J. OF DIVORCE 341 (1978); Lawrence Kurdek, *Custodial Mothers’ Perceptions of Visitation and Payments of Child Support By Noncustodial Fathers in Families with Low and High Levels of Preseparation Interparent Conflict*, 9 J. OF APPLIED DEV. PSYCHOL. 315 (1988); DEBORAH A. LEUPNITZ, *CHILD CUSTODY: A STUDY OF FAMILIES AFTER DIVORCE* (1982); Eleanor E. Maccoby, Christy M. Buchanan, et al, *Postdivorce Roles of Mothers and Fathers in the Lives of Their Children*, 7 J. FAM. PSYCHOL. 24 (1993); R. Neugebauer, *Divorce, Custody, and Visitation: The Child’s Point of View*, 12 J. OF DIVORCE 153 (1989); Jessica Pearson & Nancy Thoennes, *The Denial of Visitation Rights: A Preliminary Look at its Incidence, Correlates, Antecedents, and Consequences*, 10 LAW & POL’Y 363 (1988); Rhona Rosen, *Children of Divorce: What They Feel About Access and Other Aspects of the Divorce Experience*, 6 J. CLIN. CHILD PSYCHOL. 24-27 (1977); Virginia Shiller, *Joint Versus Maternal Custody for Families With Latency Age Boys: Parent Characteristics and Child Adjustment*, 56 AM. J. ORTHOPSYCHIATRY 486 (1986); WALLERSTEIN & KELLY, *supra* note 7; Richard A. Warshak, *Father-custody and Child Development: A Review and Analysis of Psychological Research*, 4 BEHAVIORAL SCIENCES & THE LAW 185 (1986); Richard A. Warshak & John W. Santrock, *The Impact of Divorce in Father-Custody and Mother-Custody Homes: The Child’s Perspective*, in CHILDREN AND DIVORCE 29 (Lawrence A. Kurdek, ed., 1983).

¹⁷ Jessica Pearson & Nancy Thoennes, *Custody After Divorce: Demographic and Attitudinal Patterns*, 60 AM. J. ORTHOPSYCHIATRY 233, at 246 (1990).

beneficial effects of father involvement are most apparent, especially for boys, when the mother values the father-child relationship, the children witness little overt conflict between parents, and the father is reasonably well-adjusted, supportive, and authoritative. Similarly, the major review of the literature cited by Wallerstein et al., a meta-analysis of 63 studies, found that active involvement (including authoritative discipline, emotional support, and help with homework and projects) by competent divorced fathers was linked to more positive adjustment in their children.¹⁸

We agree with Wallerstein et al. that the literature is inconsistent with respect to the impact of father-child contact. When frequency of contact is assessed independent of other important factors, we would not expect all studies to arrive at consistent findings. The degree to which such contact is positive, neutral, or negative in any one family depends on a number of factors, such as the manner in which the contact is structured, the types of activities that fathers share with their children, whether the contact disrupts the children's social lives and extracurricular activities (which is more likely to occur with relocation), the mother's attitude toward the contact, and the father's treatment of the children. As noted by Kelly and Lamb in a recent literature review:

¹⁸ Amato & Gilbreth, *supra*, note 6, at 557.

In earlier studies, researchers such as Furstenberg, Morgan and Allison (1987) found no relationship between frequency of father-child contact and child adjustment, in part because the quality of fathering and the child-father relationships were not assessed, and most of the children spent little or no time with their fathers. Gender and age may be important variables, as well. Boys and younger children in one study had better adjustment with frequent and regular contact with their fathers than did girls and older children (Stewart, Copeland, Chester, Malley, & Barenbaum, 1997).¹⁹

One of the studies not cited by Wallerstein et al., illustrates well the complexity of the relationships between children's psychological development and frequency and amount of contact with the nonresident parent.²⁰ Each of the following factors was associated with a better relationship between the child and the non primary residential parent (father or mother): frequent and longer visits, living closer to each other,

¹⁹ Joan B. Kelly & Michael E. Lamb, *Developmental Issues in Relocation Cases Involving Young Children: When, Whether, and How?* 17 JOURNAL OF FAMILY PSYCHOLOGY 196, 193-205 (2003).

²⁰ K. Alison Clarke-Stewart & Craig Hayward, *Advantages of Father Custody and Contact for the Psychological Well-Being of School-Age Children* 17 J. APPLIED DEV. PSYCHOL. 239 (1996).

participating in a wide variety of activities, spending holidays together, and the child having previously been in the custody of that parent. Girls who shared more activities with, and lived closer to, the nonresident parent also had a better relationship with the custodial parent.

On other measures of adjustment, such as mood and behavior problems, Clarke-Stewart and Hayward found that children's well-being was related, not to the frequency of visits, but to type of contact. The investigators concluded, "Apparently it is important for children that their nonresidential parent continue to act like a 'full-service' parent rather than simply taking trips to Disneyland or McDonalds—no matter how frequent these trips are."²¹

A U.S. Department of Education report, also overlooked in Wallerstein et al., underscores the importance of the type of involvement a divorced father has with his children. This study provided national survey data on nearly 17,000 children.²² The focus was on the extent and influence of parents' participation in four typical school activities: attending a school

²¹ *Id.* at 260.

²² Christine Winquist Nord, DeeAnn Brimhall, & Jerry West, *Fathers' Involvement in Their Children's Schools*, U.S. DEPARTMENT OF EDUCATION, NATIONAL CENTER FOR EDUCATION STATISTICS (NCES #98-091) (1997). <<http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=98091>> and <<http://nces.ed.gov/pubs98/fathers/>> [last accessed 7/21/03].

or class event; attending a regularly scheduled parent-teacher conference; attending a general school meeting; and volunteering at the school. The results showed that whether or not the mother is remarried, “The involvement of nonresident fathers in their children’s school appears to be particularly important for children in grades 6 through 12, reducing the likelihood that the children have ever been suspended or expelled from school or repeated a grade.”²³ To a lesser, but still significant, degree, when noncustodial fathers participated in school activities, their children were more likely to get As, enjoy school, and participate in extracurricular activities. Whether or not the father participated in school activities was more influential than the frequency of father-child contact. The results are summarized as providing “strong evidence that nonresident fathers’ involvement in their children’s schools is important to children, particularly to older children.”²⁴ These results provide a powerful argument against postdivorce living arrangements that preclude both parents’ attendance at school activities.

Studies that fail to detect a link between noncustodial father-child involvement and children’s adjustment, the authors of the Department of

²³*Id.* at x.

²⁴*Id.* at 76.

Education report suggested, may be using inadequate measures of involvement. They concluded, “It is not contact, per se, that is important, but rather other dimensions of involvement that go along with contact that are beneficial to children’s lives. Indeed, contact may be a mixed blessing if the contact is enough to tantalize children but not enough to satisfy.”²⁵

As the studies discussed above demonstrate, the highest quality relationships are maintained with access arrangements that promote a breadth of involvement between parent and child. Though this may not be tied in a perfect linear relationship to the frequency or amount of contact, the schedule of contacts does need to afford opportunities for each parent’s involvement in the child’s daily life and routines, including supervision of homework and chores, setting and enforcing limits, arranging and supervising interactions with peers, and dealing with conflicts.

A multidisciplinary group of eighteen experts²⁶ summarized the literature with this carefully worded consensus statement: “Nonresidential parents who maintain parental roles (providing guidance, discipline, supervision, and educational assistance) may affect their children more

²⁵*Id.* at 75-76.

²⁶ It is interesting to note that the original consensus conference actually included 21 prominent scholars. Judith Wallerstein and Carol Bruch were two of the three who declined to sign the consensus statement.

profoundly than those who are limited to functioning as occasional visiting companions.”²⁷ Parent-child contacts that are restricted to weekends and, in many relocation cases, only school vacation periods, are not generally conducive to “full-service” parenting. They usually result in a decline in the depth and richness of the relationship. If the children have a strong relationship with their father, and the mother can be relied upon to foster and support the children’s positive feelings about and communication with their father, the relationship may be sustained in spite of the distance and time between contacts. But the risk of further damaging an already vulnerable relationship must be assessed on a case by case basis.

Research on The Impact of Relocation on Children

The social science that informed *Burgess* included only indirect, limited, and controversial evidence about the potential effects of relocation on children. In the absence of direct studies, policy regarding relocation has been advanced by extrapolating from other research.²⁸ The few studies in

²⁷ Michael E. Lamb, Kathleen J. Sternberg, & Ross A. Thompson, *The Effects of Divorce and Custody Arrangements on Children’s Behavior, Development, and Adjustment*, 35 FAMILY AND CONCILIATION COURTS. REVIEW 393, 398 (1997).

²⁸ William G. Austin, *A Forensic Psychology Model of Risk Assessment for the Child Custody Relocation Law*, 38 FAMILY AND

the divorce literature that touched on relocation (none of which were cited in the Wallerstein *Burgess* brief or the Wallerstein et al. Brief in LaMusga) generally found negative effects. Pearson and Thoennes reported, "Along with visitation, favorable adjustment patterns were also associated with fewer changes in the child's life (e.g., moving and changing schools). . . ." ²⁹

A smaller study of ninety children, thirty of whom were from divorced mother-custody homes, found a relationship between preschool children's aggression and the number of times they moved.³⁰ Another study of a group of seventy-nine school-age children, forty from divorced mother-custody homes, reported that more environmental changes in the divorce group were

CONCILIATION COURTS REVIEW 192-207 (2000); William G. Austin, Relocation Law and Threshold of Harm: Integrating Legal and Behavioral Perspectives, 34 FAMILY LAW QUARTERLY 63-82 (2000); Marion Gindes, *The Psychological Effects of Relocation for Children of Divorce*, 15 J. American Academy of Matrimonial Lawyers 119-148 (1998); Wallerstein, *supra* note 4; Richard A. Warshak, *Relocation Litigation: A Social Science Critique of Burgess v. Burgess*, Expert Witness Manual (Richard Orsinger ed., State Bar of Texas, 1999); Richard A. Warshak, *Relocation Litigation and Children's Best Interests: Revisiting Burgess*, 4 STATE BAR OF TEXAS SECTION REPORT: FAMILY LAW 8-12 (1999); Richard A. Warshak, *Social Science and Children's Best Interests in Relocation Cases: Burgess Revisited*, 34 FAMILY LAW QUARTERLY 83-113 (2000).

²⁹ Jessica Pearson & Nancy Thoennes, *Child Custody and Child Support After Divorce*, in JOINT CUSTODY AND SHARED PARENTING 185 (Jay Folberg ed., 1991)

³⁰ William F. Hodges et al., *The Cumulative Effect of Stress on Preschool Children of Divorced and Intact Families*, 46 J. MARRIAGE & FAM. 611 (1984).

associated with more problems in the areas of depression, social withdrawal, aggression, and delinquent behavior.³¹ As a group, these studies provide support for the common sense notion that children's psychological well-being is challenged by the numerous changes accompanying relocation. These include disrupting familiar routines, changing schools and neighborhoods, leaving friends and familiar care providers, and, most important, disrupting the ongoing contact with the other parent. However, none of these studies were specifically designed to assess the long-term effects of relocation on children.

Research with military families, such as the one study cited by Wallerstein et al., is of little use in situations such as LaMusga because of the obvious differences between an intact military family and a family where the parents are divorced and one parent wants to move the children away from the other parent. When a parent is away in the military, the absence is understood by all to be temporary and is not a source of conflict between the parents. Furthermore, while the parent is away, the remaining parent generally props up the children's positive feelings about the other parent, and helps them anticipate with excitement his or her return to the

³¹ Arnold L. Stolberg & James M. Anker, *Cognitive and Behavioral Changes in Children Resulting from Parental Divorce and Consequent Environmental Changes*, 7 J. DIVORCE 23 (1983).

home. This type of positive support may not be evident in a divorced family facing a potential relocation. Even if the move is not motivated by a desire to separate the children from their other parent, the move would not be proposed unless the moving parent placed a higher value on the anticipated gains of the move than on the nonmoving parent's regular involvement in the fabric of the children's lives. If the moving parent harbors much resentment toward the remaining parent, the children are not likely to receive positive support for their relationship with the nonmoving parent. In such cases, the children are likely to suffer the loss of a meaningful and rewarding relationship with the absent parent.

The first direct evidence on relocation comes from a study by Braver, Ellman, and Fabricius, published recently in a prestigious American Psychological Association peer-review journal.³² This study used a wide range of outcome measures to examine 602 college students whose parents were divorced, 170 of whom had relocated with one parent more than an hour's drive away from the other parent. The students whose divorced parents remained in the same geographical vicinity had more positive

³² Sanford L. Braver, Ira M. Ellman, & William V. Fabricius, *Relocation of Children After Divorce and Children's Best Interests: New Evidence and Legal Considerations* 17 JOURNAL OF FAMILY PSYCHOLOGY 206-219 (2003).

outcomes than those who had a parent relocate either with or without the children. The outcomes included less hostility, inner turmoil, and divorce-related distress, and better reported global health, all of which predict lower risk of premature mortality. The students who did not experience the relocation of a parent regarded their parents more favorably as sources of emotional support and role models, and they received from their parents more financial help with and worried less about college expenses. Consistent with this is a prior finding that the less contact children had with their fathers while growing up, the less their fathers contributed to college expenses.³³

Although the authors were careful to label their findings as correlations that did not allow absolute conclusions about the direction of causality, in the context of prior research showing a link between less time spent with the noncustodial parent and weaker parent-child relationships, Braver et al. concluded that the most probable interpretation was that moves contributed to the less favorable outcomes. Regardless of the direction of causality, the study suggests that there is no basis to assume that a move intended to benefit the custodial parent will necessarily benefit the children.

³³ William V. Fabricius, Sanford L. Braver, & K. Deneau, *Divorced Parents' Financial Support of Their Children's College Expenses*, 41 FAMILY COURT REVIEW 224-241 (2003).

They interpreted their findings to suggest that, from the point of view of the expected detriment to the child, the best policy may be to discourage divorced parents from relocating. They suggested that this could be accomplished through conditional change-of-custody orders (in which a change of primary custody takes place only if the custodial parent moves; such orders are not allowed in some jurisdictions), and they cited data showing that if such orders were imposed, they would be effective deterrents to the moves in up to two-thirds of cases.³⁴

Recent analyses,³⁵ together with this latest study, support the importance of careful inquiry into the potential detriment of a relocation for any particular child. Given the absence of any research that demonstrates net benefits to children of relocating away from a parent, and the overwhelming evidence of the importance of two parents to children's optimal development, the most prudent policy would be to encourage parents to remain in the same geographical area and thereby spare their children fragmentation in their living routines and the challenges to maintaining a meaningful relationship with an absent parent.

³⁴ Sanford L. Braver, Jeffrey T. Cookston, & Bruce R. Cohen, *Experiences of Family Law Attorneys with Current Issues in Divorce Practice* 51 FAMILY RELATIONS 325-334 (2002).

³⁵ Kelly & Lamb, *supra* note 19; Warshak, *supra* note 28.

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

Application of *Burgess* to LaMusga

Consistent with the narrow construction of *Burgess* advocated by Wallerstein et al., the Court of Appeal in LaMusga repeatedly referred to concerns about disrupting the "children's existing environment," the "existing custodial arrangement," "a stable and continuous custody arrangement."³⁶ From the psychological point of view, there are two central problems with the Court of Appeal's approach.

First, although *Burgess* correctly underscored the importance of protecting children's critical psychological attachments, it is a mistake to assume that maintenance of the legal status of the designated custodial parent is equivalent to preserving the existing "environment" and custodial "arrangements." This fails to recognize the children's reality. From the

³⁶ Marriage of LaMusga, 2002 Cal.App.Unpub. LEXIS 1027.

children's vantage point, the existing environment and the existing custodial arrangements consist of their home with their mother and their home with their father and their experience of each parent's involvement in their life. Because a relocation necessarily alters the stability of the child's environment, it is essential to carefully investigate the risk of substantial detriment to the children. Such an inquiry is supported by *Burgess* and is reflected in the lower court's trial and decision in *LaMusga*. The language of *Burgess* makes clear that it was not intended to reduce what is inherently a complex decision to a bright-line rule in relocation cases.

The second major problem with the Court of Appeal's reasoning is that it fails to recognize that maintaining the stability and continuity of a parent-child relationship is in children's best interests only to the extent that the relationship is healthy and conducive to their welfare. A parent whose close relationship threatens to cripple the children's development of age-appropriate autonomy, or a parent who fails to promote the children's relationship with their other parent and actively stimulates and reinforces the children's negative attitudes toward the other parent, demonstrates severe deficits in the ability to provide adequate care for these aspects of the children's psychological needs.

Eschewing a more nuanced inquiry into the best interests of the LaMusga children, Wallerstein et al. maintain that, “From a psychological point of view, this case is not a difficult one. In light of the mother’s close attachment and connection with the boys, their tenuous and difficult relationship with their father, and their own expressed desires to remain in the same family unit, there is no psychological justification for refusing to allow the requested move, or to condition permission to move on a change in custody.”³⁷ Such a simplistic approach belies the complexity of the issues before the Court. Each of these three factors merits consideration in greater depth.

Mother’s Close Attachment to the Children

A close attachment can be beneficial to children, but it can also be harmful. In some families a parent is so closely tied to the children that the adult expects the children to share his or her feelings. Psychologists often refer to this type of parent-child relationship as “enmeshed.” In such relationships children often feel obliged to tell the favored parent what they think that parent wants to hear. If the favored parent is eager to hear complaints about the other parent, the children oblige by expressing

³⁷ Wallerstein et al. Brief, page 26.

negative attitudes. Although a close attachment gives a parent more influence over the children, the manner and direction in which this influence is exercised determines the extent to which the attachment is healthy or unhealthy. In divorced families, there is a particular risk if one parent harbors much anger toward the other and is gratified when the children share this anger. The children learn to tell the favored parent what they think he or she wants to hear.

In his evaluations, Dr. Stahl went beyond simply identifying the mother's close connection to the children.³⁸ He investigated the manner in which this closeness is expressed and the impact on the children. Based on all the information available to him, Dr. Stahl concluded that Ms. Navarro

³⁸ Despite Wallerstein et al.'s heated criticism of the court-appointed evaluator, Dr. Phillip M. Stahl, he was in a stronger position to make recommendations to the court than is typical for a custody evaluator. To begin with, Dr. Stahl is a well-known authority on the subject of conducting custody evaluations. He has written two well-received treatises on the topic (CONDUCTING CHILD CUSTODY EVALUATIONS, 1994; COMPLEX ISSUES IN CHILD CUSTODY EVALUATIONS, 1999), trains mental health professionals throughout the country, and is frequently invited to lecture on this topic at professional conferences. By all apparent indications, he conducted his work in this case according to the same high standards he promulgates in his writing and teaching. Furthermore, he had the benefit of knowing this family over a five-year period and conducting three evaluations. This provides a much broader foundation for his opinions than is usually enjoyed by court-appointed custody evaluators. As such, it makes sense that courts considering the fate of the LaMusga children would weigh heavily the findings and opinions of Dr. Stahl.

was overly enmeshed with her children and that this was to their detriment.³⁹

Strained Parent-Child Relationships

In viewing LaMusga as a simple case (what they refer to as a “psychological ‘nobrainer’”),⁴⁰ Wallerstein et al. assume that a difficult father-son relationship necessarily argues in favor of allowing relocation of the children away from the father. A more nuanced approach to custody decisions examines and takes into consideration the reasons for the difficulties in the parent-child relationship, the likely impact of the proposed relocation on the relationship, and the relative value to the children of healing their relationship with their father.

Significant difficulties in a child’s relationship with a divorced parent can occur for several reasons. When the difficulties are primarily the result of severely deficient parenting, as in the case of abusive, violent, neglectful, or severely mentally ill parents, allowing relocation away from such a parent is likely to be in children’s best interests.⁴¹ But, when the

³⁹ RT, pp. 37-40.

⁴⁰ Wallerstein et al. Brief, page 40.

⁴¹ Alison Clark-Stewart, Deborah L. Vandell, Kathleen McCartney, Margaret Owen, & Cathryn Booth, *Effects of Parental Separation and*

difficulties are traced to a more complex set of factors, the court must entertain the possibility that allowing the relocation would be detrimental to the children. Severe detriment is particularly likely when the moving parent has an overly enmeshed relationship with the children, has an inadequate appreciation of the importance of the nonmoving parent in the lives of the children, and exercises significant influence over the children's attitudes toward the nonmoving parent. When the moving parent's influence on the children's attitudes is already evident, and that parent does not believe it is

Divorce on Very Young Children, 14 JOURNAL OF FAMILY PSYCHOLOGY 304-326 (2000); E. Mark Cummings & P. Davies, CHILDREN AND MARITAL CONFLICT (1994); S. Dickstein, R. Seifer, L. Hayden, M. Schiller, Arnold Sameroff, G. Keitner, I. Miller, S. Rasmussen, M. Matzko & K. Magee, *Levels of Family Assessment: II. Impact of Maternal Psychopathology on Family Functioning*, 12 JOURNAL OF FAMILY PSYCHOLOGY 23-40 (1998); Robert E. Emery, M. Waldron, K. M. Kitzmann, & J. Aaron. *Delinquent Behavior, Future Divorce or Nonmarital Childrearing, and Externalizing Behavior among Offspring: A 14-year Prospective Study*, 13 JOURNAL OF FAMILY PSYCHOLOGY 568-579 (1999); G. I. Keitner & I. W. Miller, *Family Functioning and Major Depression: An Overview*, 147 AMERICAN JOURNAL OF PSYCHIATRY 1128-1137 (1990); Kelly & Lamb, *supra* note 19 at 198; A. Krishnakumar & C. Buehler, *Interparental Conflict and Parenting Behaviors: A Meta-analytic Review*, 49 FAMILY RELATIONS 25-44 (2000); A. Lieberman, & P. Van Horn, *Attachment, Trauma, and Domestic Violence: Implications for Child Custody*, 7 CHILD & ADOLESCENT PSYCHIATRIC CLINICS OF NORTH AMERICA 423-443 (1998); Kathleen J. Sternberg, *Fathers, the Missing Parents in Research on Family Violence*, THE ROLE OF THE FATHER IN CHILD DEVELOPMENT (Third Edition) (Michael E. Lamb, ed., 1997); Kathleen J. Sternberg and Michael E. Lamb, *Violent Families*, PARENTING AND CHILD DEVELOPMENT IN "NONTRADITIONAL" FAMILIES (Michael E. Lamb, ed., 1999).

in the children's best interests to have a relationship with the other parent or has a history of attempting to limit the children's contact with the other parent and/or denigrating the other parent, the Court must consider the probability that relocation poses significant hazards to the children's immediate and long-term psychological adjustment and development. If psychotherapeutic treatment intended to remedy parent-child conflicts is interrupted by a relocation, and the children are not given the opportunity to have very frequent experiences with the rejected parent, the problems in their relationship with the nonmoving parent are much more likely to become entrenched and impair the children's ability to give and receive love from the absent parent. In such a case the relocation accomplishes a *de facto* termination of a parent-child relationship.

Weighing the pros and cons of the relocation from the point of view of the children's best interests, the court-appointed custody evaluator, after knowing this family for five years and conducting three separate evaluations, recommended that their best interests would be served by remaining in close proximity to their father. He opined that the children could suffer the permanent disruption of their relationship with their father if they lived with their mother in another state apart from him. A primary

consideration for Dr. Stahl was the mother's inability or unwillingness to promote a healthier relationship between the children and their father.

Wallerstein and Blakeslee have written about the long-term damage that can result in families where one parent uses the children to express hostility toward the other parent. Introducing the term "Medea syndrome" to refer to parents who use their child to exact revenge on their former spouse, they wrote, "They exact it by destroying the relationship between the other parent and the child. In so doing, they severely damage and sometimes destroy the child's psyche as well. . . . I have seen a great deal of evidence that Medea-like anger severely injures children at every age."⁴² Note the reference to the *destruction*, rather than the temporary *interruption*, of the parent-child relationship. Underscoring this point they added,

When one or both parents act the Medea role, children are affected for years to come. Some grow up with warped consciences, having learned how to manipulate people as the result of their parents' behavior. Some grow up with enormous rage, having understood that they were used as

⁴²JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE at 196 (1989).

weapons. Some grow up guilty, with low self-esteem and recurrent depression. . . .⁴³

Wallerstein et al. discount the possibility that the mother in this case contributed to the children's negative attitudes about their father and they cite a recent study by Johnston to support their notion that the father in this case is responsible for the children's negative attitudes.⁴⁴ Johnston did not study the *causes* of children's rejection of a parent; she studied features that accompany such rejection. Johnston stated that the study "was a concurrent analysis of family relationships and does not allow for a more definitive test of causal predictions."⁴⁵ Not surprisingly the study found that rejected parents had difficulty displaying warmth to children who were rejecting their overtures and treating their parents with rudeness and gross disrespect. Johnston explained that "this could well be a consequence of the child being difficult and rejecting of the parent."⁴⁶

⁴³ *Id.*

⁴⁴ Janet R. Johnston, *Parental Alignments and Rejection: An Empirical Study of Alienation in Children of Divorce*, JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW (in press).

⁴⁵ *Id.*

⁴⁶ *Id.*

Wallerstein et al. dismiss as unsupported by the literature Dr. Stahl's recommendations for increasing the children's contact with their father. Yet, the type of recommendation made by Dr. Stahl is consistent with the consensus of research on overcoming children's rejection of loving and competent divorced parents.⁴⁷ In particular, it is supported by the findings of the largest empirical study of children who reject a parent (overlooked by Wallerstein et al.), a 12-year study of 700 children which was sponsored and published by the American Bar Association.⁴⁸

Naturally, none of the amici in this case are in as good a position to offer a complex and sophisticated understanding of the factors and

⁴⁷ Richard A. Warshak, *Bringing Sense to Parental Alienation: A Look at the Disputes and the Evidence* (2003) 37 FAMILY LAW QUARTERLY (in press).

⁴⁸ STANLEY S. CLAWAR & BRYNNE V. RIVLIN, CHILDREN HELD HOSTAGE: DEALING WITH PROGRAMMED AND BRAINWASHED CHILDREN (ABA 1991). We recognize that, as an early study in the field, it is heavily descriptive, and the description of procedures does not make clear exactly how the data were analyzed and what procedures were used to ensure the reliability of the results. Nevertheless, because of the wealth of experience reflected in the large number of families studied, and the detailed and sophisticated analysis of the problem, this study's observations and conclusions merit significant weight. According to Gold-Bikin, "This treatise is based on years of experience counseling families in divorce and evaluating children during custody litigation. It should provide guidance to the bar, bench, and mental health professionals in ascertaining whether a child has been intentionally brainwashed or alienated from one parent by the other parent. . ." Lynn Z. Gold-Bikin, Foreword to *Id.* at ix.

processes affecting the parent-child relationships in this family as is the court-appointed evaluator who knew this family over a five year period and evaluated them three times. Based on all the evidence, including the testimony of the evaluator and the school teacher, the trial court agreed with the court-appointed evaluator that relocation would be harmful to the LaMusga children and would preclude the type of time-share schedule that was necessary to support their relationship with their father.

Children's Expressed Desires

The third factor that Wallerstein et al. believe makes LaMusga an easy decision is that the children have expressed a preference to remain with their mother if she moves and have expressed negative attitudes about their father. The children complained that their father is mean, they attempted to exclude him from certain events, and Garrett listed his stepfather as his natural father on a school genealogy project.⁴⁹

Child custody evaluators generally agree that children's feelings should be considered when formulating schedules of contact with parents

⁴⁹ RT, p. 55/17-21.

who live apart.⁵⁰ Honoring children's right to be heard, though, is not as simple and clear-cut a guideline as Wallerstein et al. suggest. Once again, the determination of children's best interests requires a more nuanced approach; courts cannot simply grant children's stated wishes. Warshak has recently outlined the various risks and rewards of giving children a voice during custody litigation.⁵¹ Unless one assumes that children's words always express their genuine thoughts and feelings, and that children always know and always want what is best for them, in order to assess the proper weight to give children's stated wishes it is important to understand the basis for their statements. This is consistent with California law which instructs the court to "consider and give due weight to the wishes of the child."⁵² This does not mean that children's stated wishes should dictate custody determinations.

Even when a child's preference to be with a parent is stable and long-term, it may not reflect the child's best interests as understood by

⁵⁰ Marc J. Ackerman, *DOES WEDNESDAY MEAN MOM'S HOUSE OR DAD'S?* (1997); Richard A. Gardner, *FAMILY EVALUATION IN CHILD CUSTODY MEDIATION, ARBITRATION, AND LITIGATION* (1989).; JONATHAN W. GOULD, *CONDUCTING SCIENTIFICALLY CRAFTED CHILD CUSTODY EVALUATIONS* (1998); STAHL, *supra* note 38.

⁵¹ Richard A. Warshak, *Payoffs and Pitfalls of Listening to Children*, 54 *FAMILY RELATIONS* (2003, in press).

⁵² Family Code, § 3042(a).

objective observers. For instance, a boy may have a close identification with a father who treats the mother with violence and disrespect. The boy's closer tie to his father may be long-standing and may lead the boy to express a preference for a parenting plan that maximizes time with his dad while minimizing time with his mom. Such a plan is likely to further entrench the boy's unhealthy identification. Another example is a boy who is chronically overly enmeshed with and dependent on his mother. His parents' divorce presents him with an opportunity to spend more time alone with his father and achieve a more age-appropriate degree of psychological autonomy. Yet, the boy fears separation from his mother and expresses a strong preference to spend all his free time with her and none with his father. Honoring this child's current preferences may handicap his future emotional development.

A simplistic approach to "hearing the child's voice" fails to recognize the tension that exists between empowering children and placing them in the middle of their parents' disputes. The more weight accorded children's stated preferences, the greater the risk of children being manipulated or pressured by parents. If we delegate too much authority to children rather than assist their coping, we may burden them with an inappropriate degree of power.

A fairly robust finding in the divorce and parenting literature, and one with which Wallerstein et al. agree, is that children do best in authoritative structures (those that combine warmth and control) both at home and in school.⁵³ Although most children complain about not having as much control over their lives as they wish, from the standpoint of developmental psychology, empowerment of children must be carefully tied to their level of maturity; giving children too much authority can create excessive anxiety, a narcissistic sense of entitlement, and impaired relations with adults. Children raised in non-authoritative environments are more likely to be impulsive, aggressive, and irresponsible.⁵⁴

When children express strong preferences in a custody dispute, the Court should entertain several alternative possibilities. Rather than hearing a child's voice, the parents, evaluator, and Court may be receiving a distorted broadcast laced with the static of a charged emotional atmosphere.

⁵³ Diana Baumrind, *Current Patterns of Parental Authority*, 4 (1, Pt. 2) DEVELOPMENTAL PSYCHOLOGY MONOGRAPHS (1971); Hetherington, Cox, & Cox, *supra* note 16; John W. Santrock & Richard A. Warshak, *Father Custody and Social Development in Boys and Girls*, 35(4) JOURNAL OF SOCIAL ISSUES 112-125 (1979); John W. Santrock, Richard A. Warshak, & Gary L. Elliott, *Social Development and Parent-child Interaction in Father-custody and Stepmother Families*, NONTRADITIONAL FAMILIES (Michael E. Lamb, ed., 1982).

⁵⁴ Baumrind, *supra* note 53; E. MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED at 130-133.

Or, the voice may be delivering a script written by another. Or, it may reflect the desire to placate, take care of, or pledge loyalty to a parent. When the evidence shows that children speak in a voice that is not their own or that does not advance their best interests, courts must take this into account when making custody determinations.

In her *Burgess* brief, Wallerstein expressed an opposite concern, “It is disrespectful of the child’s humanity to view the child as a puppet and to attribute the child’s responses to manipulation by adults as if a child had no mind or heart of her own. Unfortunately, the courts are all too willing to see the child’s responses as reflecting adults’ manipulation.”⁵⁵

We know of no research that supports the statement that courts are too willing to attribute children’s responses to manipulation. But there is an extensive body of scientific research that documents and elucidates the ways in which children’s beliefs, attitudes, and memories can be altered under the influence of authority figures.⁵⁶ These studies were first published

⁵⁵ *Burgess Amica Curiae Brief*, *supra* note 4, at appendix B, Case 1, at 10.

⁵⁶ See, e.g., Stephen J. Ceci & Maggie Bruck, *The Suggestibility of the Child Witness: A Historical Review and Synthesis*, 113 PSYCHOL. BULLETIN 403-439 (1993). This article received two prestigious awards; it was named one of the 20 outstanding articles in *Child Psychiatry and Child Development* and was awarded a prize by the American Psychological

in academic (as opposed to clinical) journals that meet the most rigorous standards of scientific methodology, have very high rejection rates for submitted manuscripts, and thus enjoy reputations of the highest stature. They provide a scientific foundation for understanding how children can be manipulated by adults in general to develop negative attitudes about other people. Two methodologically rigorous studies have extended prior research by demonstrating that coaching and misinformation provided specifically by parents (as opposed to research interviewers) can corrupt their children's eyewitness reports.⁵⁷ These research findings help to explain how one parent could exert enough influence over a child to cause that child to lose affection and respect for the other parent.⁵⁸ When viewed in a wider context, the idea that parents can influence their children to

Association for the best article dealing with child abuse. Reviews and citations to these studies also can be found in STEPHEN J. CECI & MAGGIE BRUCK, *JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY* (1995). This award-winning book is published by the American Psychological Association.

⁵⁷Debra Ann Poole & D. Stephen Lindsay, *Interviewing Preschoolers: Effects of Nonsuggestive Techniques, Parental Coaching, and Leading Questions on Reports of Nonexperienced Events*, 60 J. EXPERIMENTAL CHILD PSYCHOL. 129-154 (1995); Debra Ann Poole & D. Stephen Lindsay, *Children's Eyewitness Reports After Exposure to Misinformation From Parents*, 7 J. EXPERIMENTAL PSYCHOL: APPLIED 27-50 (2001).

⁵⁸ It bears emphasis that such influence is only one possible source of parent-child conflicts.

develop irrational aversions toward other people seems not at all controversial. It is well-known that under the influence of their parents (whether or not the parents are conscious of this influence) children develop prejudices against people of other races or cultures.

Kernberg, one of Wallerstein's co-authors on the LaMusga brief, recognized a child's responses as the result of adult manipulation in another context. Discussing the case of Elián Gonzales, she described the process by which a child's benevolent experience of his relatives, including his father, is "minimized or even negated" to the point where the "children sense that they have to abide to the expectations of the adults around him."⁵⁹

In her earlier work with Kelly, Wallerstein sounded a more cautious note about listening to children, "Although the wishes of children always merit careful consideration, our work suggests that children below adolescence are not reliable judges of their own best interests and that their attitudes at the time of the divorce crisis may be very much at odds with their usual feelings and inclinations."⁶⁰ Wallerstein and Kelly also wrote, "Several of the youngsters with the most passionate convictions at the time

⁵⁹ Quoted in Leslie Knowlton, *The Resilience of Children in the Face of Trauma* (2001, April) 18 PSYCHIATRIC TIMES 3.

⁶⁰ WALLERSTEIN & KELLY, *supra* note 7 at 314.

of the breakup later came shamefacedly to regret their vehement statements at that time. . . .”⁶¹

Even adolescents cannot always be counted upon to exercise good judgment with respect to custody choices. Despite the relative cognitive maturity of adolescents, their judgments are highly vulnerable to outside influences. At times they show extreme deference to others’ views. Other times they make choices primarily to oppose another’s preferences.⁶² Both of these dynamics can result in the formation of an unhealthy alliance with one parent against the other. Grisso points out that the preferences of adolescents often are unstable.⁶³ Choices made early in the process of identity formation often are inconsistent with choices that would be made when a coherent sense of identity is established, generally not before age 18. For these reasons, even the preferences of adolescents merit cautious scrutiny rather than automatic endorsement.

⁶¹ *Id.* at 315.

⁶² Lawrence Steinberg & E. Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW AND HUMAN BEHAVIOR 249-272. (1996).

⁶³ Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOLOGY, PUBLIC POLICY, AND LAW 3-32 (1997).

Studies of children's attitudes about their parents' divorce consistently reveal that most children long for more time with each parent and wish their parents would reunite.⁶⁴ Another study found that three out of four college students who grew up in divorced families thought that the best parenting plans were those that gave children equal time in each parent's home.⁶⁵ Considerable research has indicated that many children, particularly boys, want more time with their fathers than is traditionally allotted and that children and young adults described the loss of contact with a parent as the chief negative aspect of divorce.⁶⁶ The desire to be with a divorced parent is normative, not the desire to avoid a parent. When a child rejects a parent, rather than assume that the rejection is reasonable or that it is unreasonable, child custody evaluators should examine the reasons behind the child's negative attitude. The possible contributions of the

⁶⁴ WALLERSTEIN & KELLY, *supra* note 7; Warshak & Santrock, *supra* note 16; William V. Fabricius and Jeff A. Hall, *Young Adults' Perspectives on Divorce: Living Arrangements*, 38 FAM. & CONCILIATION COURTS.. REVIEW 446-461 (2000); Rhona Rosen, *Some Crucial Issues Concerning Children of Divorce*, 3 J. DIVORCE 19-25 (1979).

⁶⁵ Fabricius & Hall, *supra* note 64.

⁶⁶ *Id.*; Healy et al., *supra* note 16; Hetherington, *supra* note 6; Hetherington et al., *supra* note 16; Lisa Laumann-Billings & Robert Emery, *Distress Among Young Adults from Divorced Families*, 14 JOURNAL OF FAMILY PSYCHOLOGY 671-687 (2000); WALLERSTEIN & KELLY, *supra* note 7; Warshak & Santrock, *supra* note 16.

rejected parent should be considered, along with the possibility that the child's voice is being distorted by the manipulations of a parent, the child's own maladaptive reactions, or a combination of the two.⁶⁷

Wallerstein et al. believe that the trial court exhibited a "judicial attitude that children are not worth listening to."⁶⁸ Had this been the case, we do not think the court would have appointed a noted expert to interview the children and incorporate the knowledge gained from those interviews in his recommendations. The trial court listened to the LaMusga children. The court was not, as Wallerstein et al. maintain, "oblivious to both the needs and desires of the children."⁶⁹ But the court did distinguish between the children's stated desires and their needs. Though the children revealed a disturbing rejection of their father, their wish to avoid him was not endorsed by the evaluator or the court.

At four years old, Garrett objected to his father's visits at preschool complaining that he could not "be me" during these visits.⁷⁰ Regardless of how one interprets this complaint, it represents an abstract concept beyond

⁶⁷ Warshak, *supra* note 51.

⁶⁸ Wallerstein et al. Brief, page 33.

⁶⁹ *Id.* at 33.

⁷⁰ AA 48:8-23.

the cognitive grasp of preschoolers. As such, Dr. Stahl is justified in entertaining the likelihood that the child's expressions of animosity toward his father have been influenced by someone with greater cognitive capacity than a four-year-old. Considering the mother's objections to the father's volunteering in school and going on field trips,⁷¹ unless there was another adult with whom the child identified who voiced objections to the father's involvement with his child at school, Dr. Stahl's inference that the mother was influencing her children's negative attitudes is reasonable. The school teacher's testimony about the mother's lack of support for the children's relationship with their father supports Dr. Stahl's position.⁷² According to the teacher, this mother so opposed the father's presence at school that she intended to "dock" him time during court-ordered scheduled contacts to offset the additional time he spent with the children on field trips or volunteering in the classroom.⁷³ It is not unreasonable to assume that when the child similarly objects to the father's presence in school, the child is identifying with his mother's negative attitude about the father's contributions to his son's emotional welfare.

⁷¹ AA, p 162-163.

⁷² AA p. 200, ¶5-7, AA, p. 204, ¶24

⁷³ RT p.16:10-25; AA, p. 201 ¶11

When a parent's attitudes and behavior taint the children's relationship with their other parent, just as with physical abuse the damage to the children is the same whether or not it is inflicted with conscious awareness and whether or not it is intentional. When parents are unable or unwilling to provide for their children's welfare, the Court is obligated to intervene to protect the children.

In LaMusga the custody evaluator and the trial court determined that the detriment to the children was significant and should be remedied. Amici Wallerstein and Lewis favor a laissez-faire approach when children are overly identified with a parent's negative attitudes about the other parent. Based on a sample of approximately 26 children described as "aligned" with one parent, they advise that, "There is great advantage in allowing natural maturation to take its course and to avoid overzealous intervention to break these alliances, which are usually strengthened by efforts to separate the allies."⁷⁴ But Clawar and Rivlin, based on their ABA-sponsored study of 700 children, reached the opposite conclusion:

Of the approximately four hundred cases we have seen where the courts have increased the contact with the target parent

⁷⁴JUDITH S. WALLERSTEIN, JULIE M. LEWIS & SANDRA BLAKESLEE, *THE UNEXPECTED LEGACY OF DIVORCE—A 25 YEAR LANDMARK STUDY* 116 (2000).

(and in half of these, over the objection of the children), there has been positive change in 90 percent of the relationships between the child and the target parent, including the elimination or reduction of many social-psychological, educational, and physical problems that the child presented prior to the modification.⁷⁵

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⁷⁵CLAWAR AND RIVLIN, *supra* note 48 at 150.

Conclusion

The authors of this brief wish to convey their deep concern over the children in this case. From their preschool days to the present, their relationship with their father has labored under formidable obstacles. The Court's decision will either enhance the children's opportunities to be able to receive and give love to their two natural parents, or it will dramatically increase the risk that the children will lose their connection to one of the two people in the world who have the deepest commitment to their welfare.

We believe that the more nuanced approach that we have advocated above, one that regards relocations decisions as complex and involving multiple factors, is more in keeping with the spirit of *Burgess* and more likely to result in decisions and policy that safeguard the best interests of children. Although a case by case, sensitive, and comprehensive inquiry of the potential detriment to children of living far apart from a parent is less expedient than relying on bright-line rules, we believe that children deserve no less from the adults entrusted with their welfare.

Closing Statement

Amici hope that the views expressed above will assist the Court in rendering an opinion in this case and in shaping law that safeguards the best interests of the children of the State of California. We appreciate the opportunity of briefing the Court on these matters.

Respectfully submitted,

Signature Page 48

Richard A. Warshak, Ph.D.

A handwritten signature in black ink, appearing to read 'D. Eisenberg', with a stylized flourish at the end.

Donald S. Eisenberg (SBN 68859)
Attorney for *Amici Curiae*,
Richard A. Warshak, Ph.D., et al

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Amici hope that the views expressed above will assist the Court in rendering an opinion in this case and in shaping law that safeguards the best interests of the children of the State of California. We appreciate the opportunity of briefing the Court on these matters.

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Richard A. Warshak, Ph.D.

Signature Page 47

Donald S. Eisenberg (SBN 68859)
Attorney for Amici Curiae,
Richard A. Warshak, Ph.D., et al

PROOF OF SERVICE

I, declare as follows:

I am over eighteen years of age and not a party to the within action; my business address is P.O. Box 11204, Oakland, CA; I am employed in Alameda County, California. I am familiar with my employer's practices for the collection and processing of materials for mailing with the United States Postal Service, and that practice is that materials are deposited with the United States Postal Service the same day of office collection in the ordinary course of business.

On July 25, 2003, I served a copy of the following document(s): **AMICI CURIAE BRIEF OF RICHARD A. WARSHAK, PH.D., SANFORD L. BRAVR, PH.D., JOAN B. KELLY, PH.D., JAMES H. BRAY, PH.D., WILLIAM G. AUSTIN, PH.D., ET AL., ON BEHALF OF LAMUSGA CHILDREN**

On the addressee(s):

X **BY MAIL** -- by placing a true copy of the above-referenced document(s) enclosed in a sealed envelope, with postage fully prepaid, in the United States mail at Oakland, California, addressed as set forth below, on the date set forth above.

 BY FACSIMILE -- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below, on the date set forth above, before 5:00 p.m.

California Supreme Court (via hand-delivery, original + 14 copies)
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San Francisco, California 94102

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Contra Costa Superior Court
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on July 25, 2003, at Oakland, California.



CECIL WEEFUR

APPENDIX

Statements of Interest of *Amici Curiae*

Appendix

Statements of Interest of Amici Curiae

Researcher/Authors or Practitioner/Authors

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

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

Senate Judiciary Committee on the change in the Colorado relocation statute from a presumption in favor of relocation by the residential parent to a best interests of the child standard. **Dr. Austin's vitae is attached to the Application as Exhibit A.**

Sanford L. Braver, Ph.D. is Professor of Psychology at Arizona State University, where he has been for over 30 years. For over 20 years he has explored the dynamics of divorcing families with the support of 15 peer-reviewed Federal research grants, totaling almost \$15 million. He has published nearly 80 peer-reviewed professional articles and chapters and has written three books, including Divorced dads: Shattering the myths, and the forthcoming The Legacy of Divorce: Controversies, Clarifications and Consequences. He is in demand as a speaker and presenter, and as a consultant to numerous state and federal entities. He is on the Editorial Board of *Fathering and Family Court Review*, and regularly peer-reviews grant proposals for Federal grant agencies. **Dr. Braver's vitae is attached to the Application as Exhibit B.**

James H. Bray, Ph.D. is an Associate Professor in the Department of Family and Community Medicine, Baylor College of Medicine in Houston, Texas. Dr. Bray has published and presented numerous works in the areas of divorce, remarriage, and adolescent substance use. He was the principal investigator of the NIH study, Developmental Issues in StepFamilies Research Project. He has received

numerous awards including election to National Academies of Practice for Psychology and the Heiser Presidential Award for Advocacy on Behalf of Professional Psychology from the American Psychological Association. Dr. Bray is on the Council of Representatives for the APA and was a candidate for President of the APA. **Dr. Bray's vitae is attached to the Application as Exhibit C.**

Dr. David Demo is a researcher who has studied divorce, single-parent families, and parent-child relationships for over 20 years. He is currently Professor and Chair of the Department of Human Development and Family Studies at The University of North Carolina-Greensboro. He has published extensively on children's and parents' adjustment to divorce, single-parent families, and stepfamilies. Dr. Demo has also worked in divorce education programs for divorcing parents. He is a Fellow of the National Council on Family Relations and a member of the editorial board for the Journal of Marriage and Family.

Robert Emery, Ph.D. is Professor of Psychology and Director of Clinical Psychology Training at the University of Virginia and Director of the University's Center for Children, Families, and the Law. He has or is serving on the editorial board of eight professional journals and has been a member of the Social Sciences and Population grant review study section of the National Institutes of Health.

Dr. Emery's research focuses on family relationships and children's mental

health, including parental conflict, divorce, child custody, family violence, and associated legal and policy issues and he is the author of over 90 scientific publications. He also has written the following books: Marriage, Divorce, and Children's Adjustment, Abnormal Psychology, Essential of Abnormal Psychology and Renegotiating Family Relationships: Divorce, Child Custody, and Mediation. He continues to engage in a limited practice as a clinical psychologist and divorce mediator.

Dr. William V. Fabricius is Associate Professor of Psychology at Arizona State University. He studies children's social-cognitive development, young adults' perspectives on their parents' divorces, and the impact that fathers have on adolescent development. He has published 35 scholarly articles, and has been the principal investigator on research grants totaling over \$250,000 from the National Institute of Child Health and Human Development and the National Institute of Mental Health for basic research in social-cognitive development. He is a co-investigator (with Dr. Sanford Braver) on a research grant totaling over \$1.6 million from the National Institute of Mental Health to study Anglo-American and Mexican-American fathers and step-fathers over a 5-year period as their children enter their teenage years.

Dr. Michael Gottlieb practices forensic and family psychology in Dallas. He is Board Certified in Family Psychology and is a Fellow of the American

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

Dr. John Guidubaldi is Professor of School Psychology at John Carroll University, Professor Emeritus from Kent State University, and Psychologist at Western Reserve Academy--an independent secondary school. He has authored more than 70 scholarly publications. He served as editor of Highlights Magazine's Newsletter of Parenting, editor of The School Psychology Digest, President of the Portage County Family Counseling Agency, President of the National Association of School Psychologists, and Director of several research grants, including a longitudinal study of divorce with 699 children from 38 states, studies of father involvement in urban centers, a study of divorce in China involving 2,000 families, and a study of judicial deviations from child support guidelines in 1,000 Ohio families. He was a U.S. Commissioner of Child and Family Welfare, a

member of the Ohio Task Force on Family Law and Children, and a member of the Ohio Advisory Council for Child Support Guidelines.

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

Marsha Kline Pruett, Ph.D., M.S.L. is Research Scientist in Law and Psychiatry at the Yale School of Medicine in the Department of Psychiatry and the Yale Child Study Center. She has twenty years of clinical experience with individuals, couples, families, and children, as well as certificates in both Family Therapy and Divorce Mediation. Dr. Kline Pruett has been Primary Investigator on numerous state and federal grants, and is also known nationally for the development,

implementation, and evaluation of preventive interventions. She was a member of the original research team headed by Judith Wallerstein and Janet Johnston, with whom she spearheaded early research on joint custody and marital conflict in California. Her writings include numerous original articles published in scientific journals, and book chapters. She recently co-authored a book, *Your Divorce Advisor*.

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

Dr. Jay Lebow is a Senior Therapist and Research Consultant at The Family Institute at Northwestern and Adjunct Associate Professor at Northwestern University. He is a diplomate in Family Psychology of the American Board of Professional Psychology. He is President-Elect of the Division of Family

Psychology of the American Psychological Association and has served on the board of directors of the American Family Therapy Academy and the American Board of Family Psychology. He has written over 100 articles and book chapters. His writing on the evaluation and treatment of families in which there are disputes over child custody and visitation includes a chapter describing issues in remarriage families in *The Scientific Basis of Child Custody Decisions*, and chapters describing his model for intervention in the *Comprehensive Handbook of Psychotherapy* and *The Journal of Family Psychology*. He also has presented on the subjects of child custody evaluation and methods of intervention in these disputes at numerous national and international meetings.

Dr. Patrick McKenry is a professor of human development and family science at the Ohio State University. He has been conducting research in the area of divorce for over 25 years. His research has focused on the etiology of divorce, divorced mediation, divorce education, gender and ethnic variations in divorce adjustment. He has published over 100 journal articles and book chapters on divorce and related topics. In addition, he has co-authored three books: Divorce: A Major Life Transition, Families and Change, and Families Across Time: A Lifecourse Perspective. He is a fellow of the National Council on Family Relations and has won the Ohio State University Alumni Award for Research Excellence. He serves on the editorial board of four major journals in his field: *Family Relations*,

Journal of Adolescent Research, Marriage and Family Review, and Journal of Family Issues.

Dr. Kay Pasley (Associate Dean for Research and Graduate Studies, School of Human Environmental Sciences, and Professor of Human Development and Family Studies, University of North Carolina at Greensboro) has been involved in the study of marital transitions since 1977. Her research has focused on marital processes in remarried families and fathering after divorce with a focus on men's motivations for continuous involvement. She has published more than 50 articles and 30 book chapters, as well as three books on remarriage and stepparenting. She is a Fellow in the National Council on Family Relations, and currently serves as Editor of *Family Relations: Interdisciplinary Journal of Applied Family Science*.

Isolina Ricci has over 30 years of experience as a practitioner, author, researcher, and administrator in the field of divorce, custody, parenting, mediation, research, and family law. Her book, MOM'S HOUSE, DAD'S HOUSE, remains a classic. In addition to her research and work with families, she also headed the Statewide Office of Family Court Services and was the Assistant Director of the Center for Families, Children and the Courts for the CA Judicial Council. She is the recipient of the Distinguished Service Award for Mediation from the Academy of Family Mediators, was one of the first eight "Masters" selected for the American

Association of Marriage and Family Therapists inaugural series, and is a Rockefeller Bellagio Scholar.

John W. Santrock, Ph.D. is Professor of Psychology at the University of Texas at Dallas, where he has served as Chair of the Psychology Program. His divorce and custody research is widely cited and emphasizes the complexity of factors in children's adjustment to divorce. He is formerly a member of the editorial boards of the two leading research journals in child development and the recipient of a National Institute of Mental Health grant to study children in stepfamilies. Dr. Santrock is perhaps the leading author of psychology textbooks, having authored 70 texts including *Child Development, 10th Ed.* (2004), *Life-Span Development, 9th Ed.* (2004), *Adolescence, 9th Ed.* (2003), *Educational Psychology, 2nd Ed.* (2004), *Children, 6th Ed.* (2002), and *Psychology, 7th Ed.* (2003).

Dr. Richard A. Warshak is a clinical, consulting, and research psychologist and Clinical Professor at the University of Texas Southwestern Medical Center. He has written two books and more than forty articles and chapters published in scientific and legal journals and books, including four specifically on relocation. He serves on the Editorial Board of the Family Court Review, and is an Editorial Reviewer for two more professional journals. He directed the Texas Custody Research Project and was Co-Principal Investigator of the NIMH Stepfamily Project. His landmark custody research is cited often in the scientific literature and in

courtrooms and legislatures throughout the world. He has more than a quarter century of experience evaluating and treating children, adults, and families and consulting to attorneys and custody evaluators. **Dr. Warshak's vitae is attached to the Application as Exhibit E.**

Practitioners Who Apply Research in Their Family Forensic Practice

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

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

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

Lyn R. Greenberg, Ph.D., specializes in work with children and families involved with the courts. She performs child custody evaluations, evaluations of alleged abuse, and specialized treatment for court-involved children and families. She has written and presented both locally and nationally on forensic psychology, professional ethics, child custody evaluation, facilitating the adjustment of children and divorce. and court-related treatment. Her publications include (with Jonathan Gould) "The treating expert: A hybrid role with firm boundaries," and she has articles in press on interviewing children in child custody evaluation, professional ethics, and treatment of court-involved families . Dr. Greenberg chairs the Forensic Committee of the Los Angeles County Psychological Association, and is a Member of the (Southern) Children's Issues Committee of the CA State Bar Association.

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

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

Eva Baranoff McKenzie, Ph.D. is a clinical and forensic psychologist in the state of California who has conducted custody evaluations for the past 16 years. She has conducted over 500 custody evaluations. She invests significant time in staying current with the research on child development, trauma, parenting and custody arrangements in order to provide the most informed recommendations possible regarding families experiencing divorce.

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

Gary R. Rick, Ph.D. has been conducting child custody evaluations and performing other forensic tasks for 22 years. He has conducted about 300 evaluations and his practice has been 95% custody for the past several years.

Dr. Jan Tyler is a forensic psychologist, licensed in the State of Vermont, with over fifteen years of clinical and forensic experience. She has performed over 150 custody evaluations, and testified numerous times as an expert witness in child

development, parenting, child sexual abuse, and custodial matters. Dr. Tyler on the Editorial Board of the Journal of Child Custody. She has given several workshops on child custody and visitation for the National Business Institute, presented at the Association of Family and Conciliation Courts Fifth Annual Symposium on Child Custody Evaluations, and given several local presentations in these matters.