LaMusga: Evolutionary or Revolutionary?[1]

By Garrett C. Dailey[2]

On April 29, 2004, for many people the world changed. The Supreme Court released *In re Marriage of LaMusga*[3] and the landscape for move-away cases was transformed. But how dramatic was that change? Was it, as mother's supporters claimed, "the worst day in the history of California's children,"[4] or a call for fairness and balance in which children's best interests would be individually considered rather than being conclusively presumed to be served by moving with the primary custodial parent? The reaction to the opinion was much like listening to the President's press conference. Those on his side of the aisle think it brilliant, balanced and fair, while those on the other think it terrible. One thing was clear: after *LaMusga* trial courts have the authority to prevent move-aways that they feel are not in the best interests of children.

The perception is that *LaMusga* overruled *Burgess*[5]. In fact, what it overruled was the "Myth of *Burgess*." Read carefully, *Burgess* is a balanced opinion that did not create a quasi-conclusive presumption that custodial parents can always move. In the same vein, *LaMusga* is a balanced opinion that reaffirms the presumptive right to move and the importance of the relationship between children and their custodial parents. Summed up into one sentence, *LaMusga* holds that trial courts are imbued with fundamental discretion to make whatever orders are required to serve the best interests of the children before them. This includes restraining move-aways.

Mother's-rights supporters have petitioned the Supreme Court for a rehearing in *LaMusga* that as of the date this article was written is still pending. Their fundamental arguments are that *LaMusga* overruled *Burgess* and failed to heed the Legislature's clear mandate in SB156 that *Burgess* reflected the state's public policy. Where did *LaMusga* do either? When one compares the fundamental holdings in the two opinions one is struck by a paradox –they are indistinguishable. For example:

The moving parent bears no burden to establish move necessary:[6]

- "[A] parent seeking to relocate does not bear a burden of establishing that the move is 'necessary' as a condition of custody." (*Burgess* at pp. 28-29.)
- "[A] custodial parent does not have to establish that a planned move is 'necessary....'" (*LaMusga* at p. 1078.)

The custodial parent has a presumptive right to move away with children:

- "[T]he trial court must take into account the presumptive right of a custodial parent to change the residence of the minor children, so long as the removal would not be prejudicial to their rights or welfare." (*Burgess* at p. 32.)
- "A parent with custody of minor children has a 'presumptive right' to change the children's residence. [Citations.] A noncustodial parent opposing such a change of residence bears the initial burden of showing that the move will cause some detriment to the children." (*LaMusga* at p. 1104.)
- "The mother — as the parent with primary physical custody of the children — had a presumptive right to change the children's residence unless the proposed move 'would result in "prejudice" to [the children's] "rights or welfare." [Citation.]'" (*LaMusga* at p. 1094.)

Bright line rules are inappropriate:

- "[B]right line rules in this area are inappropriate: each case must be evaluated on its own unique facts." (*Burgess* at p. 39.)
- "[T]his area of law is not amenable to inflexible rules." (*LaMusga* at p. 1101.)

Standard of appellate review:

- "The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test. The precise measure is whether the trial court could have reasonably concluded that the order in question advanced the 'best interest' of the child. We are required to uphold the ruling if it is correct on any basis, regardless of whether such basis was actually invoked." (*Burgess* at p. 28.)

Importance of child's relationship with custodial parent:

- "[T]he paramount need for continuity and stability in custody arrangements—and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker—weigh heavily in favor of maintaining ongoing custody arrangements." (*Burgess* at p. 32, *LaMusga* at p. 1093.)

Effect of move on child's relationship with noncustodial parent:

- "A trial court may consider the extent to which the minor children's contact with their noncustodial parent will be impaired by relocating." (*Burgess* at p. 37.)

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- ✦ "The likely impact of the proposed move on the noncustodial parent's relationship with the children is a relevant factor in determining whether the move would cause detriment to the children...." (*LaMusga* at p. 1078.)

Factors court may consider in assessing prejudice from move:

- ✦ In assessing "prejudice" to the child's welfare as a result of relocating, trial court may consider:
  - Distance of move;
  - Child's existing contact with both parents;
  - Impairment of child's contact with their noncustodial parent;
  - Child's age;
  - Child's community ties, including social relationships and circle of friends;
  - Child's sports or academic activities within a school or community;
  - Child's health and educational needs; and
  - Child's preferences (where appropriate).

  (*Burgess* at pp. 37, 39, and fn. 11.)
- ✦ Among the factors that the court ordinarily should consider when deciding whether to modify a custody order in light of the custodial parent's proposal to change the residence of the child are the following:
  - Child's interest in stability and continuity in the custodial arrangement;
  - Distance of the move;
  - Child's age;
  - Child's relationship with both parents;
  - Relationship between the parents including:
    - Ability to communicate and cooperate effectively
    - Willingness to put the interests of the children above their individual interests;
  - Child's preferences (where appropriate); and
  - Extent to which the parents currently are sharing custody.

  (*LaMusga* at p. 1101.)

If one accepts this hypothesis, namely that *LaMusga* was reaffirming and interpreting *Burgess*, then why have we all been laboring under the misconception for the last eight years that absent bad faith, custodial parents had a virtually absolute right to move-away with their children? As Gary LaMusga argued in his Petition for Review, lower courts had been misinterpreting *Burgess* for years. The confusion was caused by one page in the opinion where the Court unwittingly engrafted the "essential or expedient" language from *Carney*[7] onto Fam. Code §7501. There was nothing in the statute's legislative history to warrant this interpretation. This language was taken out of context and elevated to *the* holding in *Burgess*. The other 17 pages of the opinion and dissent were ignored. The Courts of Appeal viewed this as almost a jurisdictional hurdle that the noncustodial parent had to get over before the court could consider the best interests of the child. *LaMusga* brought balance back into the process by explaining: "A change in custody is 'essential or expedient' within the meaning of *Burgess*, ... if it is in the best interests of the child."[8]

"[J]ust as a custodial parent does not have to establish that a planned move is 'necessary,' neither does the noncustodial parent have to establish that a change of custody is 'essential' to prevent detriment to the children from the planned move."[9]

Thus, in many ways *LaMusga* is evolutionary. It did not in any way overturn *Burgess*. In fact, it strongly reaffirmed the fundamental holding of *Burgess*, namely that the courts' paramount concern should be for the best interests of the child. What *LaMusga* did overrule was the "Myth of *Burgess*." No longer would the noncustodial parent be required to show that the proposed move made it essential to change custody immediately without considering the effects of the move itself – an impossible burden.

Thus, it is the effect of *LaMusga* that is revolutionary – not the legal reasoning. Its basic message to the lower courts is that there are no bright line, inflexible rules and "this time we mean it."

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3 *In re Marriage of LaMusga* (2004) 32 Cal. 4th 1072, 12 Cal.Rptr. 3d 356, 88 P.3d 81.

4 Mercury News, April 30, 2004.

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

6 The uncodified portion of SB156 states:
"Existing law, as established in *In re Marriage of Burgess* (1996) 13 Cal.4th 25, provides that when a judicial custody order is in place, a custodial parent seeking to relocate bears no burden of establishing that it is necessary to do so."

7 *In re Marriage of Carney* (1979) 24 Cal.3d 725, 157 Cal.Rptr. 383, 598 P.2d 36.

8 *In re Marriage of LaMusga, supra* at p. 1098.

9 Id. at p. 1078.