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The San Diego Family Law Council For Children Newsletter

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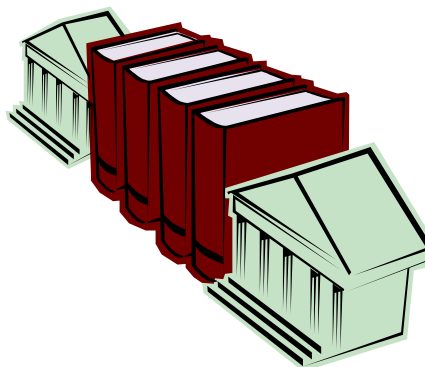
THREE YEARS AND GOING STRONG!!!

It's hard to believe. The San Diego Family Law Council For Children has celebrated its third year of educating and informing the San Diego community about the issued of dual-household children. Starting a new organization such as the Family Law Council isn't easy. It is only with the on-going support of our founders, Board of Directors and the family law community that the Council continues to thrive. In our short existence, we've put on an informative, well attended and well-received seminar for attorneys, begun a book distribution program, published a quarterly newsletter and maintained a web site that now receives over 10,000 hits per month. The SDFLCC website is becoming a relied upon resource for access to and information about the many people and programs in our community that work with parents and children of dual-household families. Our plans for the coming year include hosting a conference for parents and professionals (at which continuing education units will be provided) on the issue of the importance on the issues related to maintaining positive parent-child relationships in both the mother's and father's homes as well as maintaining our ongoing programs. We're doing well but we can do better! The involvement of other dedicated attorneys, therapists and mediators is vital to the health of the Council and its ongoing programs. Please get involved, lend your ideas, your expertise and your passion. Become an active, contributing and be a part of the San Diego Family Law Council for Children.

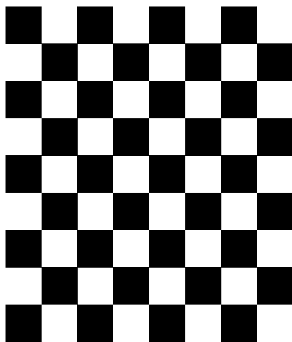
Educating

And

Informing



In Feburary, 2004, the California Chapter of the Association of Family and Conciliation Courts held its annual conference. This conference, entitled **21st Century Solutions for 21st Century Families, included** a plenary session that addressed **Attachment in Divorcing Families: Problems and Solutions.** The presenters were Nancy Oleson, Ph.D. (olesonphd@aol.com) of San Rafael and Leslie M. Drozd, Ph.D. (ldrozdphd@aol.com) of Newport Beach. Mary has been asked to share with us some of the information presented.



An Interview With Mary Swenson, MFT.

Mary Swenson is a licensed Marriage and Family Therapist who was a Supervising Counselor at Family Court Services in San Diego until her retirement in 2002. Since then she has worked as a part-time mediation counselor at FCS and has remained active in the California Chapter of AFCC (Association of Family and Conciliation Courts), where she currently serves as secretary of the state board. AFCC is an interdisciplinary organization that brings together Judges, Attorneys and Mental Health Professionals.

Donna Mallen: Please explain for our readers what "attachment" means in the context of child development?

Mary Swenson: A definition of attachment is "a specific tie which one person forms to another person that is enduring over time and space." During infancy, children form attachments with those who are available to them, attentive to them and responsive to them. Attachments are usually with the parents, but can also develop with others, such as extended family and caregivers. Aside from consistent care, these people provide protection from danger and threat. If the parent or caregiver has secure adult attachments,* they are much more able to foster secure attachments with the child. As children develop, they are increasingly able to leave those persons to whom they are securely attached for longer periods of time, as long as they are able to come back for "reconnection." Ideally, there is a balance between independence and connection to others for the child. A source for more information about brain development in terms of the relationship between the child and their attachment figure(s) is Daniel J. Siegel, The Developing Mind: How Relationships and the Brain Interact to Shape Who We Are and The Developing Mind: Toward a Neurobiology of Interpersonal Experiences. * There is a website with an Attachment Style Questionnaire that one can fill out regarding themselves and get feedback after submitting. Please see http://www.web-research-design.net/cgi-bin/crq/crq.pl

DM: Why would it be important to take attachments into consideration when developing a parenting plan when the parents will no longer be living together in the same household?

MS: Children need to feel secure and to be cared for, attended to and responded to. When their home is divided they need that in both homes. I am a firm believer that children can be attached to more than one person, ideally both parents and maybe some others. In custody cases we need to look at the child's relationship with both parents. Have they both been available, attentive and responsive? If that is the case, I believe there is some flexibility in developing parenting plans. Children seem to be more secure when they are in familiar surroundings and routines, but if the attachment is there, surroundings and routines can be duplicated as much as possible for the security of the child. Joan Kelly presented at the same conference and spoke of maximizing the different "kinds of times" children spend in each home. For example instead of always spending meal time (such as every Wednesday from 4 to 8 PM with a parent), their needs are better served by spending a variety of "times," depending of course on everyone's schedule. For example there is playtime, structured time, sleep time and mealtime. I still believe that it is better not to transfer newborns from place to place in the very early months, but even with an infant, a secure attachment can form with consistent, frequent and relatively short contact with the other parent (usually the one who cannot breastfeed). For example, the other parent can spend time with the infant for one to two hours, three or four times a week, simply holding, interacting with and responding to the child. The specific hours of these "times" can also be varied.

DM: Does a child normally develop an attachment with more than one person?

MS: I don't like to touch the word "normal," but I think children can and do develop attachments to more than one person and benefit greatly in their lives from being able to do so.

DM: What can parents do to ease the transition between the homes when shared parenting plans are in place?

MARY SWENSON, MFT (CONTINUED)

MS: Parents who can communicate and can focus on their children and their needs and developmental tasks can do many things. A child will feel more secure if their routine and environment is not radically different from one home to the other. Beginning in early teens or before, it is important for a child's development for him or her to be able to reach outside their immediate family and connect with peers. If parents are able to live in the same general area and can both support these activities, the child benefits.

DM. Do we know whether there is less disruption for a child when there are siblings who move back and forth between the two households with each other?

MS. I think it goes without saying that siblings can help with transitions. It is like actually transferring part of their environment with a child.

DM. What can we include in our custody-sharing plans to foster the attachments that the child has developed or needs to develop?

MS. Each family has to be looked at individually, of course. We need to look at the children and their attachments to each parent and to others. If they seem secure and the adults are available, attentive and responsive to the child, there should be considerable flexibility in developing parenting plans. There are practical things that need to be considered too. For example, you can't just assume there can be true shared parenting when the parents live a considerable distance apart or one parent has a job that requires them to be at work at 5 or 6 in the morning, if this necessitates the child being awakened to accommodate this.

DM. Have the studies shown any long-term effects on the children when attachment is disrupted?

MS. Disrupting attachments would affect anyone, but I think that is a whole other subject. The presenters also addressed disruption of attachment in cases of domestic violence and child abuse. A reference for more information on that is the National Library of Medicine web site, Pub Med, at http://www.ncbi.nlm.nih.gov/entrez/query.fcgi and entering *Felliti* under "author name."

DM. Are there any other comments you would like to add regarding the families we work with in Family Court?

MS. I know I am an optimist, but I truly believe that many of the families who come to Family Court can focus on their children with a little help and subsequently move on, feeling like they are in control of their future. It is important that we make sure they feel listened to and tell them that the Court, the attorneys and the mediators really don't want to make decisions about their children for them. They are the only mom and dad their children have and they do know the children best and what is best for them. We should be facilitating that level of thinking. With parenting classes and resources like Kid's Turn, we can do a lot.

VISIT THE SDFLCC WEBSITE!

www.sdcouncil4children.org

The Council maintains an up-to-date website the discussed Council activities, programs and projects. In addition, the website includes links to other websites providing resources for step-parenting, anger management, domestic violence, supervised visitation, counseling services and parenting classes. You'll also find a bibliography of helpful current books and articles for children, parents and professionals related to issues involved in disputed child custody. Log on and check it out!

IN re MARRIAGE OF LAMUSGA: BURGESS CLARIFIED

-by Enrique Monteagudo, J.D.

On April 29, 2004, during our monthly meeting, SDFLCC Vice President Barney Connaughton, Esq. announced the news. The *LaMusga* case had been decided. With this cutting-edge opinion released only hours before, not much was known about it other than the trial court decision had been affirmed and the *Burgess* rule had been clarified. The Supreme Court explained that the policy of *Burgess* was not meant to be a broad authorization of move-aways, where the noncustodial parent failed to carry the heavy burden of proving “bad faith” or “detriment making a custody change essential”. Rather, *Burgess* was a decision in support of deference to the “wide discretion” given to the trial courts. More importantly, the *LaMusga* 6-1 majority held that the focus of a move-away analysis should not be the presumptive rights of the moving parent, but instead, the needs and concerns of the child. This was a good day for kids! This article will give an overview of Justice Moreno’s majority opinion, Justice Kennard’s dissent, and will identify what may in the future be called the “*LaMusga* move-away test” (pronounced la-mu-SHAY)

MAJORITY OPINION

Trial Court’s Wide Discretion

In his majority opinion, Justice Moreno first clarified the meaning of *Burgess*, reconciling it with the recent legislative change to Family Code §7501. Section 7501 both authorizes the court to restrain move-aways and affirms *Burgess* as state policy. Here, the Supreme Court generally held that the ruling of *Burgess* was meant to reaffirm the trial court’s wide discretion in move-away cases to fashion a parenting plan that will reflect the best interest of the child. The *LaMusga* Court also emphasized that the circumstances surrounding move-aways are often “heart-wrenching”, “reminding us that this area of law is not amenable to inflexible rules.”

After articulating the *Burgess* policy of the trial court’s wide discretion in move-away cases, the majority went on to illustrate it with several appellate decisions that applied the rules stated in *Burgess*. In eight of ten decisions, the Court of Appeal upheld the decision of the trial court, and deferred to its sound judgment in considering all factors relevant to the particular child’s best interest. With these cases, the majority offered a spectrum of fact patterns where the relevant factors: favored denying a move, “only slightly favored” a move, and favored allowing a move. Next, the majority distinguished the two cases where the trial court’s exercise of discretion was reversed. The Court explained that those cases involved “unusual circumstances”. In one reversed case, the trial court order resulted in separating four siblings. In the other reversed case, the trial court had failed to determine whether the proposed move would be detrimental to the welfare of the children. [Remanded for evidentiary hearing]. Together, these cases showed the *Burgess* holding [permitting a move-away] is to be narrowly construed to its facts, and generally stands for the policy of deference to a trial court’s principled balancing of all relevant considerations unique to each case.

Interestingly, although each illustrative case had unique facts, certain themes reoccurred often. Specifically, the courts of appeal were often faced with protecting the child’s custodial stability with his/her primary caretaker at the expense of physically separating the child from the noncustodial parent. The majority, here, repeatedly focused on the fact that the custodial parent, in those cases allowing the move-away, was supportive of the child’s relationship with his/her other parent. The majority cited and seemed to place great weight on the statutory policy of assuring that children have frequent and continuing contact with both parents, and encouraging parents to share the rights and responsibilities of child rearing. (Fam. Code § 3020 & § 3040). The majority also placed great weight on whether or not the custodial parent had interfered with the child’s relationship with the noncustodial parent. In other words, the *LaMusga* majority could also be interpreted as advising: “if a custodial parent wants to move, there should be a history of fostering the child’s relationship with his/her other parent.”

Detriment Þ Best Interest

After explaining how the appellate decisions subsequent to *Burgess* indeed support the policy of the trial courts’ wide discretion in dealing with move-away cases, the *LaMusga* Court went on to clarify the “detriment test” of *Burgess* and its relation to the need for continuity and stability in custodial arrangements. Under *Burgess*, a change of custody in a move-away case requires that the child will suffer detriment rendering the change “essential or expedient” The Court explained that the “detriment test” does not require the noncustodial parent to carry the great burden of proving a change of custody is “essential”. Rather, the noncustodial parent need only persuade the court that some detriment will occur, thus triggering a “changed circumstances” de novo review of the custody order. Then, the noncustodial parent must show that a change of custody would be in the child’s best interest.

In supporting the trial court’s determination of the LaMusga boys’ best interest, the Court first affirmed the importance of existing custodial relationships in general. Then it explained, the proposed move would be “extremely detrimental” to their welfare because it could result in the loss of their relationship with their noncustodial parent. Again, the majority focused on the custodial parent’s failure to foster and encourage a healthy relationship between the children and their other parent. The majority held: while the loss of a child’s relationship with his/her noncustodial parent does not “mandate” a change of custody, it is sufficient reason where it is in the children’s best interests in light of all the relevant factors. Thus, the *Burgess* “detriment test” can be met, disallowing a move-away of the child, where the trial court finds some detriment will occur and a custody change is in a child’s best interest.

Bad Faith Þ Trial Court Can Consider Reasons for Move

Additionally, the Court addressed whether trial courts may consider the custodial parent’s reasons for a proposed move. The majority held that a trial court may consider all the reasons for the proposed move, even where there exist good faith reasons for the move. The Court cautioned against “absolute concepts of good faith versus bad faith” as “human beings may act for a complex variety of sometimes conflicting motives.” In discussing the subtleties of the instant move, Justice Moreno pointed out, “on the surface” the reasons for the move were not in bad faith, but “underneath”, however, the motive to get away from the noncustodial parent had always been present. Nonetheless, the majority made it clear that the reasons for the move are only one factor to consider in light of all the relevant factors. Further, the Court declined to extend this analysis to cases where a motive to minimize parental contact results from an existing pattern of family abuse or substance abuse problems.

La Musga Decision—Continued

With this decision, the Supreme Court clarifies *Burgess* to stand for the general proposition: trial courts have wide discretion to exercise sound judgment when deciding move-away cases. Further, it specifies that a de novo custody review is appropriate where some detriment to the child can be shown, and it strongly encourages custodial parents to encourage their children to have relationships with the other parent, where appropriate.

DISSENTING OPINION

In his dissenting opinion, Justice Kennard discussed the detriment caused by changing custody from the child's primary caretaker to his/her other parent. He first pointed out that the Supreme Court has stressed the "paramount need for continuity and stability in custody arrangements." Next he stated "the trial court's explanation for its ruling provides no assurance that the trial court gave any weight to the importance of continuity and stability in custody arrangements." While the dissent did not claim that the trial court improperly weighed the children's relationship with the noncustodial parent as more important than their need for custodial stability, it did warn that "all exercises of discretion must be grounded on in reasoned judgment guided by [the applicable] legal principles and policies". On the premise that the trial court did not even consider the factor of custodial stability, Justice Kennard thus concluded the trial court abused its discretion.

Although, the dissent opposes "judicial discretion … without restraint," this is not inconsistent with the majority opinion. As the majority acknowledges, although "we must permit our superior court judges […] to exercise their discretion to fashion orders that best serve the interests of the children," such discretion must be guided by statute and legal principle. Additionally, the majority stated: "there is nothing in the record before us that indicates that the superior court failed to consider the children's 'interest in stable custodial and emotional ties'." [Justice Kennard's response was that "it is equally true that nothing in the record indicates that the court *did* consider this interest."]

In effect, the dissent differs only on procedural issues, and finds much support in the majority opinion. Since the majority agrees with the importance of custodial stability, at issue is whether a reviewing court can impute reasons for a holding where they cannot be found in the record. The majority holds that a reviewing court can impute rationale, whereas the dissent concludes otherwise. Nonetheless, Justice Moreno adds: "In future cases, courts would do well to state on the record that they have considered this interest in stability."

LAMUSGA MOVE-AWAY TEST

Finally, the *LaMusga* opinion goes far to increase judicial efficiency and predictability by providing an eight-part test for move-away cases. The majority stated: "Among the factors that the court should ordinarily 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:"

the children's interest in stability and continuity in the custodial arrangement;]

the distance of the move;

the age of the children;

the children's relationship with both parents;

the relationship between the parents including, but not limited to, their ability to communicate and cooperate effectively and their willingness to put the interests of the children above their individual interests;

the wishes of the children if they are mature enough for such an inquiry to be appropriate;

the reasons for the proposed move; and

the extent to which the parents currently are sharing custody.

Clearly, this test was not intended to be exclusive, but it is a baseline from which trial courts should start their analysis. Further, it should serve as an aid to both parents and practitioners, presumably by harmonizing their arguments. Accordingly, the trial court's difficult task of balancing all relevant competing interests will be made easier, or at least more efficient, where the parties are speaking to the same points.

In conclusion, *LaMusga* is a good case for kids. It keeps the court's focus on a child's interests. It encourages parents to share. It recognizes the importance of, and affirmatively protects, a child's interest in having both parents. And finally, it has the potential to reduce domestic conflict by giving greater predictability in the family courts.