Number S090699

IN THE

SUPREME COURT OF CALIFORNIA

ALEX MONTENEGRO,

Plaintiff and Respondent,

vs.

DEBORAH DIAZ,

Defendant and Appellant.

After a Decision by the Court of Appeal
Fourth Appellate District, Division Two
Case No. E025810

# MOTION FOR RECONSIDERATION OF APPLICATION TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF LESLIE ELLEN SHEAR, J.D., CFLS*; LEVITT AND QUINN FAMILY LAW CENTER, INC.; ASSOCIATION OF CERTIFIED FAMILY LAW SPECIALISTS, INC.; HAROLD J. COHN, J.D., CFLS; DOUGLAS DARNELL, PH.D.; ROBIN DRAPKIN, PH.D.; LYN GREENBERG, PH.D.; LEE LAWLESS, J.D., CFLS; HUGH MCISAAC, M.A.; NANCY OLESON, PH.D.; PHILIP M. STAHL, PH.D.; PETER WALZER, J.D., CFLS; RICHARD WARSHAK, PH.D.; LEONARD WEILER, J.D., CFLS; AND LINDA WISOTSKY, J.D., CFLS; IN SUPPORT OF MINOR CHILD GREGORY MONTENEGRO

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**MOTION FOR RECONSIDERATION OF APPLICATION TO FILE AMICI CURIAE BRIEF ON BEHALF OF MINOR CHILD GREGORY MONTENEGRO**

TO THE HONORABLE CHIEF JUSTICE RONALD GEORGE, AND HONORABLE ASSOCIATE JUSTICES:

*Amici Curiae* Leslie Ellen Shear, Levitt & Quinn Family Law Center (a non-profit law firm representing poor and low income family law clients), Association of Certified Family Law Specialists, *et al.* respectfully request that this Court reconsider its prior decision denying the application of some of these *amici* as untimely and accept the brief which accompanies this motion.

The bases of this motion are:

a. The brief will make subtantial and valuable contributions to the Courts decision in this matter, and
b. The delays in completing the brief and securing approval of all *amici*, particularly the two non-profit entities, were unavoidable.

*Amici* have no relationship or and have had no contact with the parties to this action or their attorneys and have no personal interests in the outcome. This brief is not submitted at the request of any of the parties. Rather, as the organizations and individuals who joined to submit this brief realized that the case was going forward before this Court, they began efforts to organize a group of *amici* and develop a brief which would be of maximum value to this Court. *Amici* are mindful of the impact that the *amici* briefs had in this Court's consideration of *Marriage of Burgess*. They do not represent a "cause" or subset of competing interests. Rather, they are representative of the legal and mental health professionals and scholars who work day in and day out with the families who litigate custody. The brief is an all-volunteer effort offered as a public service to the children of the State and to this Court. The *amici* include a non-profit family law center serving poor and low income clients, the Association of Certified Family Law Specialists, family lawyers with special interest and expertise in children's issues, former family court services personal, and mental health professionals in private practice.

This brief does not duplicate the briefs of the parties or the briefs of the other *amici*. It was drafted in conjunction with the other *amicus* briefs for the purpose of addressing issues not briefed by those *amici.* Harold J. Cohn asks this Court to recognize that his brief deliberately excluded the issues covered by this brief to avoid duplication.

The decision of this Court is gravely important to the welfare of this State's children. Those children will be better served if this Court considers the voices of *amici.* The organizations and individuals who submit this brief represent a broad range of experience and expertise in the legal, psychological, and practical dimensions of child custody. The Court could look at this brief as extra work weighing down a heavy calendar, or as the equivalent of a free staff attorney, with specialized child custody expertise

providing research and access to references which would not otherwise be available to the Court.

***The Brief Will Make a Substantial, Valuable and Unique Contribution***

***to the Court's Consideration of This Matter***

***and Thus to the Lives of the Children Whose Lives Will Be Impacted by the Decision***

This is the only *amicus* brief which addresses the differential impact of the changed circumstances test on poor, low income and modest means families, and nonmarital families. It is the only *amicus* brief to address issues of parental alienation. The brief specifically addresses the needs of the new, more specialized family courts including Unified Family Courts, Domestic Violence Courts, and Family Law Drug Courts which employ models of therapeutic jurisprudence. A comparison of the Table of Contents for this brief with those previously submitted will demonstrate the unique perspective we offer this Court.

Half of the children in California will spend part of their childhoods in a non-marital family setting. Thus tens of thousands will be affected by this Court's decision. This year noted family law commentator Stephen Adams began his annual family law updates with a discussion of the *Montenegro* case and the importance of *amicus* briefs in the evolution of doctrines which protect California's children. This case is critically important to California's children. The Court will not have a complete picture of the potential impact of this vitally important case if it does not consider this brief.

The statutory mandate that custody orders protect children's best interests (Family Code §3040[1]) has been gradually swallowed up by expansion of the judicially-created changed circumstances doctrine. Recent expansions of the changed circumstances rule leave children unprotected and ignore the statutory mandate to protect children's best interests.. Such outcomes are supported by paradoxical explanations that it is in the best interest of children to ignore their best interests. The Court of Appeal's opinion in the case now before this Court shows how the expansion of the changed circumstances doctrine places California's children at risk. In the case before this Court a family law judge, faced with alienating and withholding behavior by a young child's mother, utilized commonly employed educational -therapeutic interventions in an effort to help the mother recognize and promote the child's need for both parents and compliance with court orders. When those efforts failed, he changed custody. The Court of Appeal held that the trial judge should have ignored the child's best interests and left him in the custody of his mother. Alienation is a form of psychological abuse. The Court of Appeal held that the child must remain in an abusive placement because the abuse existed at the time of the prior order.

The decision of the Court of Appeal illustrates the vast divide between the sophisticated and nuanced body of knowledge and interventions that researchers, mental health professionals, family lawyers, and

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[1] Former Civil Code §4600.

family court judicial officers have been developing over the past several decades, and the trends in California appellate court doctrines. "[T]raditional legal approaches may create new barriers to relationships and exacerbate problems within families." State of Kentucky, Rules of Court 429 (Jefferson County Family Court Mission Statement) (1997). This brief is offered to acquaint this court with relevant highlights of the rich body of research and experience which is available to improve our ability to help the children of the 21st century. A brief review of the table of authorities will provide a sense of the scope of the research and analysis which went into this brief.

*Amicus* Levitt and Quinn Family Law Center joins in this brief because of the vital importance of this Court's decision to children growing up in poor and low income families, whose unique needs are not addressed in the other briefs.

> Almost 75 percent of American children living in single-parent families will experience poverty before they turn eleven-years-old, compared to only 20 percent of children in two-parent families (Footnote omitted.). Indeed, virtually all of the increase in child poverty between 1970 and 1996 was due to the growth of single-parent families (Footnote omitted.). Children who grow up absent their fathers are also more likely to fail at school or to drop out (Footnote omitted.), experience behavioral or emotional problems requiring psychiatric treatment (Footnote omitted.), engage in early sexual activity (Footnote omitted.) and develop drug and alcohol problems (Footnote omitted.).
>
> Wade F. Horn and Isabel V. Sawhill, *Making Room For Daddy: Fathers, Marriage and Welfare Reform* (To Appear In: The New World of Welfare: Shaping a Post-TANF Agenda for Policy) http://www.spp.umich.edu/Conferences/Horn-Sawhill.pdf

The changed circumstances test has a differential impact on poor and low income families because of the circumstances under which their initial orders are developed and the limited professional resources available to them. The impact of a parenting plan which does not reflect a poor child's best interests is greater, because such children are far more vulnerable. *Amicus* Levitt and Quinn Family Law Center represents parents in poor and low income families. *Amica* Leslie Ellen Shear is court-appointed counsel for children in poor and low income families. *Amicus* Association of Certified Family Law Specialists has an extremely active minor's counsel committee and includes many children's lawyers in its membership. The interests of the 20.3% of California's children who live at or below the poverty level and the interests of the 46% of California's children who live in low income families[2] are addressed in the accompanying

---

[2] "The poverty threshold for a family of four with two children was $16,700 in 1999. 20.3% of California's children live in poverty. This indicator represents the percentage of children under the age of 18 living at or below the poverty level. The percentage of children living below the poverty level remains high in California relative to other states. California's average year rank between 1997 and 1999 was 45th of 50 states and the District of Columbia. Its average year rank between 1994 and 1996 was also 45th of 50 states and the District of Columbia.

"…

"[46%] of children and young adults under the age of 19 living at or below 200% of the poverty level, or $32,900 for a family of four in 1998. California's average year low-income children rank

brief, and are not specifically addressed in the other *amici* briefs submitted in this matter. The changed circumstances doctrine has the greatest adverse effect on young children, who have rapidly changing developmental stages and needs and will spend most of their lives within the scope of custody plan. Children Now (*supra.*) observes,

> Young children are the poorest age group among all Californians; they are more likely to be poor than older children, adults and seniors. Yet, they are in the most vulnerable stage of development, with their environment having a substantial impact on how they grow, how well they learn and how they interact with others. Research unequivocally shows that growing up in poverty affects children's cognitive and physical development. Moreover, living with very limited economic resources has an especially profound impact on children in their earliest years.

This Court is vitally interested in meeting the needs of children whose developmental courses are threatened by the twin risk factors of poverty and fragile family structure.

> The public turns to the state's courts for solutions to an ever broadening range of disputes affecting their lives and their families. The demand for court-linked services continues to grow each year, and more people than ever cannot afford attorneys to help them.
>
> Judicial Council of California, 2001 Annual Report 9 (2001)
> http://www.courtinfo.ca.gov/reference/documents/ar2001-1.pdf

Neither of the other *amicus* briefs address the relationship between the changed circumstances doctrine and the efforts of the Court to respond to the needs of alienated children. *Amici* Richard Warshak, Douglas Darnell and Nancy Oleson have published books and articles on parental alienation and bring a unique perspective to the Court's consideration of these issues. *Amici* Lyn Greenberg and Philip Stahl have published books and articles which address alienation issues. This brief brings specialized expertise on alienation issues to this Court's consideration of the changed circumstances doctrine.

California's courts and the Judicial Council's Center for Children, Families and the Courts have been leaders in models of therapeutic jurisprudence[3], and problem-solving courts. The *Montenegro* doctrine

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between 1996 and 1998 was 41st of 50 states and the District of Columbia. Its average year rank between 1993 and 1995 was also 41st of 50 states and the District of Columbia."

Children Now, *State of Our Children 2000 California: How Young People Are Faring Today*
http://www.childrennow.org/california/rc-2000/soc-2000.pdf

[3] "For more than a decade, legal scholars, psychologists, and academics have been writing about something they call "therapeutic jurisprudence," a new way of looking at many of the cases and proceedings that judges deal with daily. Despite the existence of several books and more than 200 articles on therapeutic jurisprudence, a LEXIS search shows only one published state or federal court decision even mentioning the term—and that was only because it cited to statistics from an article that had "therapeutic jurisprudence" in its title.

"The American Judges Association has recognized the potential value of therapeutic jurisprudence (TJ for short) for our work. The AJA has a committee on TJ issues and has arranged for a special TJ educational conference for its May 2000 midyear meeting. To coincide with that conference, we are devoting this issue of Court Review to an exploration of TJ and its potential applications."

threatens those courts. This brief discusses the statutory best interests mandate and the judicially created changed circumstances doctrine through the lens of therapeutic jurisprudence. The concept and implementation of therapeutic jurisprudence is an essential element for California's family courts. William Schma encourages his fellow jurists to think therapeutically,

> Q: "The role of the law in society is _____." If you thought "to heal," close this journal and go to your next. You won't find much here you haven't thought about. Everyone else, read on to explore an emerging role for courts and judges in this new millennium.
>
> The topic of this special issue of *Court Review* is "Therapeutic Jurisprudence," or "TJ" as it is commonly known. No single definition of TJ captures it fully. One author offers the following definition as best capturing the essence of TJ: "the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects." (footnote omitted) It is the study of the role of law as a healing agent, and it offers fresh insights into the role of law in society and those who practice it.
>
> TJ can be thought of as a "lens" through which to view regulations and laws as well as the roles and behavior of legal actors – legislators, lawyers, judges, administrators. It may be used to identify the potential effects of proposed legal arrangements on therapeutic outcomes. It is useful to inform and shape policies and procedures in the law and the legal process. TJ posits that, when appropriate, the law apply an "ethic of care" to those affected.
>
> TJ does not "trump" other considerations or override important societal values such as due process or the freedoms of speech and press. It suggests, rather, that mental and physical health aspects of law should be examined to inform us of potential success in achieving proposed goals. It proposes to consider possible negative psychological effects that a proposal may cause unwittingly. TJ doesn't necessarily dominate, when considering a law, or a legal decision, or course of legal action.
>
> It is important for judges to practice TJ because – like it or not – the law does have therapeutic and anti-therapeutic consequences. This is empirical fact.
>
> William G. Schma, *Judging For the New Millennium*, 37 Court Rev. 4 (2000) http://aja.ncsc.dni.us/courtrv/review.html

This brief describes the practical consequences for California's innovative problem solving courts, such as Unified Family Courts, Family Law Drug Courts and Domestic Violence Courts. The failure of various branches of the judiciary to work harmoniously towards the same goals is noted by Deborah J. Chase, Sue Alexander & Barbara J. Miller in *Community Courts and Family Law*, 2 J. of the Center for Children, Families & the Courts 37, 44 (2000),

> …[F]rom a systemic viewpoint, a prominent characteristic of the majority of family law courts, just as in criminal justice, is its disarray. There is lack of coordination and fragmentation of issues related to families.

Appellate courts are too often "out of the loop" and unaware of the dramatic changes in the field of child custody both in scholarly views and in practice. They cannot rely on private counsel to have intense familiarity with the professional literature. Acceptance of this brief gives the Court the fruit of specialized research and analysis which the Court's caseload, and the absence of experienced custody lawyers on the

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Steve Leben, *Editor's Note*, 37 Court Rev. 1 (2000) (http://aja.ncsc.dni.us/courtrv/review.html)

Court's staff, preclude the Court from otherwise considering. Chase *et. al.* urge adoption in family law of "a broader community justice paradigm that focuses on problem solving, practices therapeutic jurisprudence, and coordinates with community services." (*supra.* at 45). The model stresses periodic compliance reviews and modification of orders in the face of noncompliance with therapeutic interventions. The other *amicus* briefs do not address these questions. The brief specifically discusses the role of incremental and escalating interventions, and how a *Montenegro*-style changed circumstances test would cripple the ability of trial courts to use such therapeutic approaches. The brief gives this Court the tools to integrate principles of therapeutic jurisprudence into its consideration of issues which are vitally important to the welfare of California's children.

*Amica* Leslie Ellen Shear has published three articles discussing the evolution of custody law from a one-time choice between two parents to development, implementation and adaption of a comprehensive parenting plan. *Amicus* Hugh McIsaac helped develop modern Family Court Services programs in Los Angeles, and across the country. He and *Amica* Leslie Ellen Shear were active in the drafting of California's joint custody statutes. The evolution of custody law is not discussed in the other *amicus* briefs, but is necessary to this Court's contextual understanding of the relationship between the best interests mandate and the changed circumstances doctrine.

*Amica* Mary-Lynne Fisher was one of the attorneys for the father in *Marriage of Carney*. This brief reviews the underlying principles of *Carney* – recognition of children's psychological attachments and sensitivity to the critical aspects of parenting as they apply to modification proceedings.

This brief is an all-volunteer effort *Amici* Shear is a sole practitioner and has devoted well in excess of a hundred hours to researching and drafting the brief, circulating it for comments, and working with the Boards of ACFLS and Levitt and Quinn while representing family law litigants, manging a solo practice, acting as a Special Master/Parenting Plan Coordinator, conducting private and court-connected mediations, working to develop the next family law specialization exam, co-chairing the annual conference of AFCC, an Association of Family Court and Community Professionals (California Chapter) and editing its newsletter, serving on the Los Angeles County Bar Family Law Section and shepherding a child through the college application and financial aid process. The brief is a labor of love and community service for the benefit of the children of the State. Many nights and weekends have gone into its development. A review of the Table of Authorities will suggest the comprehensive and time-consuming nature of the social science research.

Gathering a group of *amici*, circulating drafts of the brief, editing it in response to the comments of each of the *amici* and securing final approval from the two non-profit entities has proved to be a prolonged and time-consuming task. Emailing began shortly after the *Montenegro* decision was published, but until early drafts of the brief were completed, no one was able to commit. While both

ACFLS and Levitt and Quinn expressed interest in the brief at the earliest stages, the process of obtaining formal approval from these non-profit entities with all volunteer boards of directors was time-consuming and never-ending. Coincidentally, that process resulted in final approvals by both entities on April 5, 2001. The Boards of these organizations meet infrequently. When ACFLS met on March 24, the Board conditioned approval on review of the final text of the brief by the chair of the *amicus* committee and several board members. That review and approval were not granted until April 5, 2001. Levitt & Quinn's Board approval could not be secured until April 5. 2001

The entire process was on hold for the week of April 2 because *Amica* Leslie Ellen Shear was unable to work due to illness, and spent a day in the hospital for a CT scan to investigate a pelvic mass (unrelated to the viral illness). Upon Ms. Shear's return to work, she prepared the tables, proofread the brief, drafted this motion and had the motion and brief printed, while catching up on the work for clients which had gone undone during her illness.

## ***Conclusion***

> Judith S. Kaye, Chief Judge of the state of New York wrote recently about the emergence of what she terms "hands-on courts."
>
> She makes these useful observations: In these new courts, judges are active participants in a problem-solving process..... What's so different about this approach? First is the court's belief that we can and should play a role in trying to solve the problems that are fueling our caseloads. Second is the belief that outcomes – not just process and precedents – matter.
>
> William Schma, *Therapeutic Jurisprudence*, in Knowledge Management Office of the National Center for State Courts, Report on Trends in the State Courts http://www.ncsc.dni.us/KMO/Projects/Trends/99-00/articles/Therapeutic_Justice.htm

*Amici* believe that this brief will make important, valuable and unique contributions to the development of this Court's opinion and to the future of California's problem-solving family courts. We ask the Court to consider the circumstances under which it was drafted and approved, and to accept it at this time.

April 16, 2001

RESPECTFULLY SUBMITTED,

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## GREGORY'S STORY: STATEMENT OF THE CASE[4]

Like a third of all American children, Gregory Montenegro was born to unmarried parents. Deborah Diaz and Alex Montenegro had dated, but never lived together. Gregory lived with his mother for his first two years of life, during which time his father visited. An overnight visit which his father said was agreed upon and his mother said was without her consent triggered a crisis. Alex filed the first of three requests for custody of Gregory, whose next three years of life were punctuated by his father's repeated returns to Court in dogged efforts to play a meaningful role in Gregory's upbringing.

As Gregory grew older, the schedules in the stipulated orders were adjusted, increasing the time that he spent in his father's care. Gregory's mother was unremittingly hostile to his father, denying visits, engaging in alienating behavior and making unilateral decisions about his schooling. Alex Montenegro persisted. Judge Fred Mandabach ordered Deborah and Alex to participate in a therapeutic intervention (parent education/mediation) during which time she demonstrated that she had no intention of changing either her attitude or behavior. By the third application for court orders regarding his custody, Gregory was no longer a toddler. At five years of age, he was about to start kindergarten. His father had married. Gregory had one sibling in his father's home, and another baby was expected. This time his father's request for an alternating week parenting plan resulted in an award of primary custody to Alex. Judge Fred Mandabach noted that Alex was the parent best able to share Gregory and parent cooperatively.

The Fourth District reversed, holding that since there had been two prior judicial determinations, the Court could not consider Gregory's best interests unless Alex proved a change of circumstances. The appellate court further held that there was insufficient evidence to establish a change of circumstance. Gregory's developmental progress from toddler to kindergartener, his father's marriage, the birth of a sibling, Gregory's long exposure to parental conflict and Deborah's stubborn resistance to therapeutic interventions did not constitute the requisite change of circumstances. Applying "the deferential abuse of discretion" standard, the Court of Appeal found that, as a matter of law, Judge Mandabach was precluded from considering Gregory's best interests. This Court granted review.

Much of the Court of Appeal opinion is devoted to differential legal standards for various stages of custody litigation. However, the stage of the case bears no relationship to the child's experience, needs or welfare. By statute, all custody determinations must be based upon the child's best interests.

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[4] This summary is derived from the Court of Appeal Opinion. *Amici* have no other data about the facts of the case. *Amici*'s interest in this case is restricted to the evolution of a child-centered standard for modification proceedings rather than the result in this individual case.

> [T]he future of custody laws lies in perfecting the best interests standard, not in abandoning it for simpler alternatives that lack a child-centered justification.
>
> Barbara Bennett Woodhouse, *Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard,* 33 Family Law Quarterly 815 (1999)

Stability, the rationale for the changed circumstances doctrine, is but a single component of best interests analysis. Child custody law must be child-centered.

## INTRODUCTION:

## COMING BACK TO COURT AND CHILDREN'S BEST INTERESTS

*Changing Families: Who Are the Children and Families Whose Lives Will Be Shaped by This Decision?*

> Changes over the last few decades in the structure and function of the American family, as well as the relative complexity of contemporary family legal issues, challenge judges to adopt an appropriate jurisprudential philosophy that addresses these transformations. The tremendous volume and breadth of family law cases now before the courts, coupled with the critical role of the family in today's society to provide stable and nurturing environments for family members, require that judges understand relevant social science research about child development and family life. This informed perspective can assist decisionmakers to dispense justice aimed at strengthening and supporting families.
>
> Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective* (1997) (http://www.law.indiana.edu/ilj/v72/no3/babb1.html)

The decision in this case, refining the definitions of "best interests" and "changed circumstances," will profoundly influence the life course of half the future adult population.[5] [6]

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[5] 1998 census figures show that 28% of all children live with only one parent at any given time. Another 2% live with grandparents and no parent. This statistic also fails to include children in the care of guardians, foster homes and institutional placements. Approximately half of all married persons will divorce. A substantial number of children who were living in a marital family in 1998 will experience parental divorce during their minority. Many of the children living with two parents will experience the separation of their parents. One third of all children are born to unmarried parents.

[6] "In 1960, the total number of children in the United States living absent their father was less than 10 million. Today, that number stands at over 24 million (Footnote omitted.), representing nearly four out of every ten children in the United States. And things are getting worse, not better. By some estimates, *60 percent of children born in the 1990s will spend a significant portion of their childhood in a home without their father*.

"For over one million children each year, the pathway to a fatherless family is divorce.

"…The second pathway to a fatherless home is out-of-wedlock childbearing."

Wade F. Horn and Isabel V. Sawhill, *Making Room For Daddy: Fathers, Marriage and Welfare Reform* 1(To Appear In: The New World of Welfare: Shaping a Post-TANF Agenda for Policy) http://www.spp.umich.edu/Conferences/Horn-Sawhill.pdf [Emphasis added.]

> Changes are … striking from the perspective of the children and who heads the households. … [I]n 1972 less than 5% of children under age 18 were living in a household with only one adult present. By the mid-1990s this had increased to 18-20%. Similarly, the % of children in the care of two adults who are not currently married, but had been previously married, rose from less than 4% in 1972 to 9% in 1998. Also, the % being raised by two parents with at least one having been divorced has tended upwards, starting at 10% in 1972, reaching a high of 18% in 1990, and standing at 12% in 1998.
>
> Conversely, while in 1972 73% of children were being reared by two parents in an uninterrupted marriage, this fell to 49% in 1996 and was at 52% in 1998. Thus, the norm of the stable, two-parent family was close to becoming the exception for American children rather than the rule.
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> Tom W. Smith, *The Emerging 21st Century Family,* (National Opinion Research Center, University of Chicago, 1999) http://www.norc.uchicago.edu/online/emerge.pdf 3-4

Half[7] of our children will spend at least part of their childhoods in a family setting other than the marital family. These children experience multiple risk factors as they grow up. They need the best understanding and protection of their needs that legal and mental health professionals can provide. Who are the 21st Century children and families whose lives will be shaped by the *Montenegro* decision?

Most custody research focuses on children of divorce. But parentage cases like this one represent a growing percentage of the family law caseload. One third of all children are born outside of marriage and will spend their entire childhoods in formal or informal custody plans.[8] Gregory Montenegro's family structure is typical for such families. Nonmarital families are referred to as "'fragile families' to underscore that they are families and that they are at greater risk of breaking up and living in poverty than more traditional families."[9] Most births to unmarried parents are unplanned, suggesting that a substantial number of these children are not being raised in a two-parent household for substantial portions of their childhoods. Half of these non-marital births are not first births[10] – these children are born into complex

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[7] U.S. Commission on Child & Family Welfare, Parenting Our Children: In the Best Interests of the Nation: A Report to the President and Congress 11 (1996).

[8] "…[D]uring the last generation, childbearing increasingly became disconnected from marriage. In 1960 only 5.3% of births were to unmarried mothers while by 1996 over 32% of all births were outside of marriage." Tom W. Smith, *The Emerging 21st Century American Family*, *supra*. 3

[9] Bendheim-Thoman Center for Research on Child Wellbeing, Princeton University and Social Indicators Survey Center, Columbia University. Fragile Families Brief, *Dispelling Myths About Unmarried Fathers*, http://crcw.princeton.edu/CRCW/papers/researchbrief1.pdf May 2000.

[10] Elizabeth Terry-Humen, Jennifer Manlove & Kristin A. Moore., *Births Outside of Marriage: Perceptions vs. Reality*, Child Trends Research Brief 3, 6 (2001) http://www.childtrends.org/PDF/rb_032601.pdf

and changing family constellations. Even when the children are born to unmarried parents who live together, the family structure is unlikely to endure. "Cohabiting relationships are fragile and relatively short in duration, with less than half lasting five years or more. (Footnote omitted.) Cohabiting families are also more likely to be economically disadvantaged than married families. (Footnote omitted.)" Elizabeth Terry-Humen *et. al., Births Outside of Marriage: Perceptions vs. Reality*, *supra.* 4 [Emphasis added.]

Such families are often less equipped to establish their own custody arrangements without ongoing professional and court assistance.[11] Unlike divorcing couples, they have little or no experience at the give and take necessary for coparenting. They are less likely to know each other well and often have higher levels of distrust. Interviews with unmarried parents at the time of the child's birth, identify risk factors for future conflicts over the father's role, and over child support. The Fragile Families and Child Wellbeing Study found,

> Attitudes on rights and obligations … vary according to relationship status. Unwed mothers are less likely than married mothers to say that fathers do not have a right to visit their child, even when the fathers pay child support. However, unwed mothers that do not have a romantic relationship with the baby's father report substantially higher opposition to fathers' rights than do either other unwed mothers or married mothers. … To assess the potential for conflict between parents we examined the extent to which couples disagreed about nonresident fathers' obligations and rights. Ten percent of parents disagreed about whether nonresident fathers should pay child support. Between 3 to 6 percent of couples are potentially at risk of greater conflict over visitation rights and 8 percent are potentially at risk of greater conflict over decision-making rights.
>
> Once again, these results vary by relationship status. Disagreements are low among parents as long as they remain in a romantic relationship, and results even suggest that unwed parents are more accepting of fathers' rights than are married parents. Among parents whose romantic relationship has ended, however, disagreements over visitation or decision-making rights are substantially higher. Nearly 20 percent of mothers in this category object to fathers' having decision making rights. Because fathers' rights to the child are linked to the relationship with the mother, and because young, unwed parents'

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[11] Bendheim-Thoman Center for Research on Child Wellbeing, Princeton University and Social Indicators Survey Center, Columbia University. Fragile Families Brief, *New Parents' Attitudes Towards Fathers' Rights and Obligations* 2 (2001) http://crcw.princeton.edu/CRCW/papers/researchbrief2.pdf.

"The Fragile Families and Child Wellbeing Study was developed to provide information about unmarried parents and their children. The study is following a cohort of parents and their newborn children for at least four years, examining the relationships within these families and seeing what factors (including governmental policy) may push them closer together or pull them apart. Data are being collected in twenty U.S. cities with populations over 200,000. The data are representative of nonmarital births in each city, and the full sample will be representative of all nonmarital births in large cities in the U.S. The current analysis is based on baseline data collected in the first seven cities (Austin, TX, Detroit, MI, Baltimore, MD, Newark, NJ, Oakland, CA, Philadelphia, PA, and Richmond, VA)."

relationships are often fragile, their children are at risk of being exposed to parental conflict in the future.

The study also found "that unwed fathers usually hold 'high hopes' about their continued involvement with their child. Unfortunately, many of these fathers are ill prepared to take the childrearing responsibility afterwards." This finding suggests that courts must function therapeutically, with incremental interventions, to help equip unwed fathers for involvement in childrearing, and adapt parenting plans to reflect growing skills.

The children most impacted by the *Montenegro* decision are exposed to multiple risks.

> …[C]hildren born to unmarried parents … are at a distinct disadvantage as they move through life. Statistically, mothers who bear and raise children without the support of a husband are more likely to be poor and to report greater stress than their married counterparts, and their children are more likely to have academic and behavioral problems. Research findings show that wanted children raised by both of their biological parents in a low-conflict marriage have an easier lot in life and the best chance for healthy development. (Footnotes omitted.) We recognize that many children will not be raised in families that meet all of these criteria, and that many children raised in other circumstances develop well.
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> Elizabeth Terry-Humen, *et. al., Births Outside of Marriage: Perceptions vs. Reality*, *supra.* at p.7

Children of divorce also face cumulative risks which will be ameliorated or exacerbated by this Court's decision in *Montenegro*. Like children of unmarried parents, these children are much less likely to enjoy the active care of their fathers in their lives. The reduced standard of living experienced by the post-divorce family is well-documented. Many children of divorce have experienced the deleterious effects of unresolved marital conflict before their parents separated. Joan B. Kelly, *Marital Conflict, Divorce and Children's Adjustment*, 7 Child & Adolescent Psychiatric Clinics of North America (Child Custody) 299 (1998). Nor will parental separation and divorce mark the only changes in their family structure. E. Mavis Heatherington, who has devoted her career to the study of the impact of divorce on children, observes that,

> Because the rate of divorce is even higher in remarriages than in first marriages, 1 out of 10 children will experience at least two divorces of their residential parents before reaching the age of 16. More parents and more children are going through a series of transitions and organizations of the family associated with notable challenges and changes in roles and relationships and life experiences that can undermine or enhance the well-being of family members.
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> E. Mavis Heatherington, Coping With Divorce, Single Parenting, and Remarriage: A Risk and Resiliency Perspective viii (1999)

The reach of this Court's decision will not just be those families who seek the assistance of the court in developing, implementing and adapting parenting plans. As Mnookin and Kornhauser[12] taught us two decades ago, parties (and parents) bargain in the shadow of the law. Precedent and statutes shape private decisionmaking, as well as judicial decisionmaking. Courts influence social norms. Thus the decision rendered in this case will impact most children who live outside the marital family.

American family life has experienced profound changes over the past few decades. The lives of 21st Century children, and the society in which they live, differ in many ways from those of preceding generations.

> The changes that the family has been experiencing have in turn transformed society. As Meng-tzu has noted "the root of the state is the family" and the transplanting that the family has been undergoing has uprooted society in general. Some changes have been good, others bad, and still others both good and bad. But given the breadth and depth of changes in family life, the changes both for the better and the worse have been disruptive. Society has had to readjust to continually evolving structures and new attitudes. It is through this process of structural and value change and adaptation to these changes that the modern, 21st-century family is emerging.
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> Tom W. Smith, *The Emerging 21st Century Family, (supra.)* 21

Social science expertise has grown during the period in which families experienced rapid change. The child development and family systems knowledge available to this court in considering the meaning of "best interests" and the role of "changed circumstances" far exceeds that available to prior courts. Twenty-first Century courts also differ significantly from prior eras, as they integrate the concept of therapeutic jurisprudence and new kinds of courts into the traditions of the Anglo-American legal system.[13]

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[12] Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: the Case of Divorce* 88 Yale Law Rev. 950 (1979). See also Kressel, Kenneth, The Process of Divorce: How Professionals and Couples Negotiate Settlements, Northvale, NJ, Aronson: 1997, 1985

[13] "Therapeutic jurisprudence is the study of the role of the law as a therapeutic agent. It is an interdisciplinary enterprise designed to produce scholarship that is particularly useful for law reform. Therapeutic jurisprudence proposes the exploration of ways in which, consistent with principles of justice and other constitutional values, the knowledge, theories, and insights of the mental health and related disciplines can help shape the development of the law. Therapeutic jurisprudence builds on the insight that the law itself can be seen to function as a kind of therapist or therapeutic agent. Legal rules, legal procedures, and the roles of legal actors (such as lawyers and judges) constitute social forces that, whether intended or not, often produce therapeutic or antitherapeutic consequences. Therapeutic jurisprudence calls for the study of these consequences with the tools of the social sciences to identify them and to ascertain whether the law's antitherapeutic effects can be reduced, and its therapeutic effects enhanced, without subordinating due process and other justice values." Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence,* 3 Psychology, Public Policy & the Law 184 (1997). See also William G. Schma, *Judging For the New Millennium*, 37 Court Rev. 4 (2000)

> Therapeutic jurisprudence seeks to apply social science to examine law's impact on the mental and physical health of the people it affects. (Footnote omitted.) It recognizes that, whether we realize it or not, law functions as a therapeutic agent, bringing about therapeutic or antitherapeutic consequences.
>
> Winick, *supra.*

The decision of this Court in *Montenegro* will have therapeutic or iatrogenic consequences for tens of thousands of children and their families each year. This brief identifies and explores the potential therapeutic and antitherapeutic consequences of different views of "best interests" and "changed circumstances."

*Using 21st Century Jurisprudence and Child Development Knowledge to Serve 21st Century Families*

> The time frame of the court system and court policy is "the present." Court orders are shaped for the here and now in the life of the child and the family. But the time of childhood extends into a long future, and the child is ever changing. How to reconcile these two frames of reference in policies that will protect the growing child remains an unsolved issue in court policy and practice.
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> Judith S. Wallerstein, *Children of Divorce: A Society in Search of Policy*, in Mary Ann Mason, Arlene Skolnick & Stephen D. Sugarman, All Our Families: New Policies for a New Century 68 (1998)

Both trial courts and appellate courts must employ an "ethic of care" in all decisions involving children. Family law courts, particularly when they make decisions about children, are pioneers in therapeutic jurisprudence. The needs of children, family and the community will be best served if appellate courts also view their work from the perspective of therapeutic jurisprudence. Amy D. Ronner, *Therapeutic Jurisprudence on Appeal,* 37 Court Rev. 64 (2000) http://aja.ncsc.dni.us/courtrv/ review .html. The promise of the best interests mandate goes unfulfilled if not informed by the best and most current social science knowledge. Judicial exegesis of the best interests standard cannot be limited to an examination of statutes and precedent, since social science knowledge is growing and society is changing. Courts are recognizing that the judiciary must look to sources in addition to precedent if they are to serve children's best interests.

> The task of jurisprudence for legal realists is a practical aim to ensure that judicial decisionmaking promotes social welfare and increases the predictability of legal outcomes. (Footnote omitted.) This focus on the functional effects of judicial decisionmaking requires sufficient knowledge of the social sciences to enable judges to understand social policy implications when fashioning legal remedies. (Footnote omitted.) Legal realism has dominated judicial decisionmaking in most areas of the law. (Footnote omitted.) *Family law* (Footnote omitted.) *jurisprudence, however, reflects the law's inconsistency with families' real life experiences and with relevant social science*

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http://aja.ncsc.dni.us/courtrv/review.html and *Therapeutic Jurisprudence*, in Report on Trends in the State Courts http://www.ncsc.dni.us/KMO/Projects/Trends/99-00/articles/Therapeutic_Justice.htm

*research in child development and family relations.* (Footnote omitted.) Historically, judges have attempted to fashion morality in the determination of family legal issues rather than to devise legal remedies that accommodate how families live. (Footnote omitted.) This approach to decisionmaking must change if family law jurisprudence is to effectuate the well-being of families and children. A new approach to family law jurisprudence can assist decisionmakers to account for the realities of families' lives when determining family legal issues.

The lack of legal realism in family law is troublesome given the extent of court involvement in the lives of families and children. A recent Wall Street Journal article has revealed that family law cases constitute about thirty-five percent of the total number of civil cases handled by the majority of our nation's courts, a percentage which constitutes "the largest and fastest growing part of the state civil caseload." (Footnote omitted.) The focus of judicial decisionmaking in family law needs to become how the state intervenes in family life, rather than whether the state ought to intervene, (Footnote omitted.) as court involvement itself constitutes state intervention.

Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence…* (*supra.*) [Emphasis added.]

Acting in accordance with principles of therapeutic jurisprudence, appellate courts must test evolving doctrines against the best and most current social science knowledge. The "snippets" of social science knowledge which trickle down into the legal system are incomplete and inadequate, and often produce unintended adverse consequences. Gary B. Melton, Reforming the Law: Impact of Child Development Research (1989). In parsing the concepts of best interests and changed circumstances, this Court must take a more comprehensive and complex view.The changed circumstances rule has its origins in a controversial psycholegal construct – the psychological parent – which does not represent current thinking about child development.[14] Children, families and society will be best served if this Court considers contemporary social science perspectives and shapes its decisions affecting children and families from the perspective of therapeutic jurisprudence.

*Therapeutic Jurisprudence Requires a More Flexible Approach to Modification*

The direction in which the changed circumstances test is evolving in California appellate courts is inconsistent with the legislative mandate that custody determinations be based upon the child's best

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[14] Pamela Casey and David Rottman, in a report funded by the California Judicial Council, set forth "Guidelines for Applying Therapeutic Jurisprudence Principles to the Courts," which include this principle,

A therapeutic jurisprudence examination of legal rules, procedures, and roles should be done in the context of social science theory and empirical information.

The application of therapeutic jurisprudence principles requires a disciplined, systematic, and ongoing investigation of the relevant empirically-based literature and not mere reliance on anecdote, intuition, and passing fads disguised as sound theories. Anecdote and intuition may suggest potential therapeutic options, but the validity of such options should be assessed before their endorsement.

interests. The Courts are rapidly increasing the number of children whose best interests may be ignored because the changes in their lives, and in their developmental needs, do not meet the changed circumstances standard. The Legislature did not authorize exclusion of these children from the protection of the Family Code. While most states employ some version of the changed circumstances doctrine, there is considerable variance.

> Whatever initial custody and visitation arrangements are approved or decreed by the Court, parents may return to court to request a change in those arrangements if circumstances change. Most States require that the changed circumstances be material or substantial before they will consider a change in arrangements. *Courts have differing interpretations of this standard.* Some will consider modifications on the basis of the changing developmental stages of the child. Others have more exacting standards, such as by requiring physical moves that alter the ability of parents to comply with child access provisions of orders, or requiring evidence that the current custody arrangement is harmful to the child.
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> U.S. Commission on Child & Family Welfare, Parenting Our Children: In the Best Interests of the Nation: A Report to the President and Congress 18 (1996) [Emphasis added.]

*Montenegro* offers the opportunity for California to pioneer a 21st Century view of the changed circumstances doctrine which is apt to be emulated around the country.

The same circumstances which necessitate a modification for one child, may not be as important in the life of another. Heatherington, *supra.* (at p. x.) encourages "…a keener awareness of the great diversity there is in response to experiences in different types of families and the role that risk and protective factors play in shaping these outcomes. It is the diversity, rather than the inevitability, of outcomes for family processes and the adjustment family members in divorced, single-parent, and remarried families that is striking."

For example, residential relocation may trigger a need for modification of one child's parenting plan but not another's. Factors such as the child's developmental status, concept of time, resilience, temperament, experience of prior life stressors, adaptability, social skills, supportive relationships in the community, and myriad other factors will compel different outcomes for similar fact patterns. Deciding which fact patterns constitute a change of circumstances in the abstract ignores crucial individual differences and needs. Adherence to the best interests standard requires individualized determinations, looking at the impact of the changes for this particular child. Children are not fungible. While we, as a society, can set broad social policy goals for our children, each child's best interests can only be met if she is seen as a unique individual.

The Court of Appeal decision in *Montenegro* loses track of the purposes of the best interests mandate because it fails to look at the law through a lens of therapeutic justice, and because it reinforces

an obsolete and oversimplified view of children's needs. Legal argument obscured, rather than illuminated, social policy goals in the Court's decisionmaking process. A rigid changed circumstances rule does not serve the social policy of promoting healthy outcomes for children. Consequently, such a standard cannot be inferred from the statutory best interests mandate.

> One of the central premises of child custody law has been the permanence of custody awards. Permanence and certainty are supposed to be the end products of adjudication. In child custody law the changed circumstances rule prevents relitigation absent a substantial change. The changed circumstances rule's intention is to stabilize children's placements with their "primary" caretakers and to prevent disgruntled litigants from relitigating. Recent appellate cases have held that moves by "custodial" mothers do not constitute such a change. (Footnote omitted.)
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> Parents who recognize that the parenting plan is not meeting their children's needs are not distinguished from the conflict "junkies" In fact, one of the most common measures of high parental conflict and pathology is relitigation.
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> Just as the roles of parents in intact families shift over time, so the roles of parents in dual-residence families must reflect today's reality, not that at the time of some initial determination. A family may decide that mom won't re-enter the workforce until the child starts school. Once the child is in school, mom's career may become more demanding. At the same time, Dad may have achieved sufficient career flexibility that he becomes more involved, coaching teams, driving car pools and traveling with adolescents to look at prospective colleges. In another family, it may be dad who takes the early childhood career break. Each family not only allocates parental roles differently than the next family, but those roles are continuously adapted within the same family over time. Decision-makers seldom take the potential for this kind of change into account.
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> Recognition of the "winner-take-all" stakes of our current system leads many to litigate custody unnecessarily, or insist upon court-ordered time with children that they find difficult to exercise. Under the present state of the law, lawyers advise their clients to establish control over the children at separation and to do their best to establish themselves as primary caretakers. Recent relocation decisions by appellate courts pressure fathers of infants and toddlers to seek equal time shares as the only practical way to restrict a mother's subsequent ability to move the children to a distant community.
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> The changed circumstances rule is inconsistent with the best interests standard. Apart from the dynamic nature of family life, the rule fails because it assumes that the initial parenting plan was made thoughtfully by persons who knew the family well and had great expertise in tailoring parenting plans to the needs of children. Instead most parenting plans are created by agreement of the parents relying upon perceived norms or the advice of counsel that the current dominant arrangement is most likely to be adopted if the case is litigated. Even if the original decision is made by one of the most psychologically sophisticated family court judges it is likely to be based upon very limited information. Limited family and court resources force the reduction (and distortion) of complex life stories into easily digestible fact patterns. Even if the family can afford evaluation, that evaluation is likely to be a snapshot rather than a home video unless the family has substantial funds.
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> Leslie Ellen Shear, *From Competition to Complementarity: Legal Issues and Their Clinical Implications in Custody,* 7 Child & Adolescent Psychiatric Clinics of North America (Child Custody) 311, 327-328 (1998)

In an increasing number of cases, the children are under the age of six.[15] During the first few years of life, children undergo exceedingly rapid developmental changes which frequently require sensitive adaptations of their residential or visiting arrangements. These children's parenting schedules must evolve with their increasing maturity. Parenting arrangements may need to be revisited at other developmental milestones, such as the start of elementary school, middle school, and, again, in adolescence. Changes in family structure, relocation, changes in parental availability, and other life changes may trigger a need for a change. Relitigation is not necessarily evidence of dysfunction or high conflict.

> [T]he child needs to know that the custody and visitation decisions can be altered. A family needs to know that the decisions may need to be altered as a child's developmental needs change. We have, unfortunately, for a lot of reasons which you all understand, gotten into the assumption that once a decision is made, it's cast in concrete. Now, obviously, many of the good mediators and the good systems say, 'Come back and let's look at it again,' but what people feel primarily when they come back and look again is failure. … I want to present it from a different point of view. That if people need to come back…it's not only because something has gone wrong, but that it's because something has gone very right, and that parents have become aware of the changing developmental needs of their children…
>
> Children change. A five-year-old is not a ten-year-old is not a 15-year-old, and your attachments change, the qualities change, your needs change. And we ought to think about changing custody according to that… . The issue of thinking about changes must come in if you're really thinking about a child's point of view.
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> Dorothy Huntington, *Divorce and the Developmental Needs of Children, in Mediation of Child Custody and Visitation Disputes*, Transcripts from the California Chapter AFCC Vallombrosa Retreat (1981))[16]

In many cases the parent seeking adaptation of the parenting plan is the parent most attuned to the child's changing developmental needs. As a society, we need to assist parents in meeting those needs, not castigate them for voicing concern. If this Court adopts the views of the Court of Appeal, courts will be prevented from revising poorly thought-through arrangements, including those drafted by *pro pers*, unsupervised paralegals and drafting services, and others who do not have adequate expertise or familiarity with the particular children. It will preclude revisiting children's needs as they mature. Children's best interests will be subordinated to other considerations. If we deny the resources of the courthouse to these families, children's best interests will be ignored.

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[15] Mary Ann Whiteside, *An Integrative Review of the Literature Pertinent to Custody for Children Five Years of Age and Younger*, 1996, Judicial Council of California Administrative Office of the Courts, pp.13-14 (available on-line at www.courtinfo.ca.gov).

[16] Available in PDF format on the AFCC-CAL Best Works CD from afcccal@aol.com.

The U.S. Commission on Child & Family Welfare (*supra.* at p. 37) found the need for periodic adaptation of children's parenting arrangements so compelling, that it came close to recommending periodic court reviews in every case,

> The Commission debated whether to recommend automatic, periodic court reviews of parenting plans, but decided that the initiation of such reviews should be left up to parents. Allowing parents to decide when to review the plan is more responsive to the needs of individual families and less costly to the system. Some parents may never feel the need to review their parenting plan, while others may require frequent scrutiny of the plan. Parents should specify in the initial parenting plan those events that would trigger reviews. At the same time, the plan should provide that returning to court for further dispute resolution efforts when parents do not agree on particular changes remains an option as well.

This Court should adopt the Commission's recommendation that parenting plans be reviewed in response to parental request. Implicit in the child-centered, needs-based best interests standard is the promise of individualized determinations. The maternal preference represented society's global assessment that children's needs would be best met by their mothers except in extraordinary circumstances. The best interests test promises each child that her parenting plan will look to her unique needs and her parents' unique capacities and limitations, and will recognize the changes in the child and her world which influence what parenting plan is in her best interests at any given point in time.

The trial court in *Montenegro* might well have balanced the need of an infant and toddler for maintaining attachment to his mother differently than the needs of a kindergartener for intellectual stimulation, developing strong values, protection from parental animosity, meaningful relationships with his siblings, and being raised by the healthier of his two parents. A child's best interests at birth are not necessarily his best interests five years later. An infant who will benefit from nursing may spend more time in the care of his mother, while developing a strong attachment with his father. As he moves into toddlerhood, his mother's capacity to nurse him becomes less critical to his well-being and other factors come into play. When he starts school, his needs could well be different than they were in infancy and toddlerhood. In *Lester v. Lenanne* (2000) 84 Cal.App.4th 536, the Court took great pains to facilitate the opportunity for the baby to establish strong reciprocal relationships with each parent, only to fall back on the "primacy" of the maternal relationship because she had the larger timeshare, starting at birth.[17]

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[17] The holding in *Lester v. Lenanne* which precludes "pre-birth" orders is contrary to public policy. Researchers into father involvement in childrearing in unmarried families see contact between father and baby at the hospital as key to promoting committment, father involvement and economic support. Bendheim-Thoman Center for Research on Child Wellbeing, Princeton University and Social Indicators Survey Center, Columbia University. Fragile Families Brief, *Dispelling Myths About Unmarried Fathers*, *supra.* at 2, observing, "The birth of the baby appears to present a "magic moment"

*Montenegro* and *Lester* now stand for the untenable proposition that unmarried mothers are entrusted with primary custody permanently, regardless of all other factors, because at birth infants have special physical and psychological needs for maternal care. Thus the maternal preference has returned, under cover of the changed circumstances rule. As discussed above, a third of all American children are born to unmarried parents, and even those unmarried parents who live together when the child is born usually separate within the first five years. It is rare for a child under the age of five to be placed in the primary custody of her father. If the parenting plans established in infancy and early childhood are difficult to modify, the net effect is resurrection of the maternal preference for all children born into nonmarital families. Such a policy is contrary to the statutory requirement that custody determinations not be based upon gender. Family Code §3040(1). The Legislature clearly intended that modifications are to be made when they are in a child's best interests. Family Code §3088 ("An order for the custody of a minor child entered by a court in this state or any other state may …be modified at any time to an order for joint custody in accordance with this chapter.") provides for orders such as that requested by Alex Montenegro. Joint custody remains an option at any stage of a child's life. Similarly, Family Code §3087 places no obstacles in front of the court's consideration of whether a joint custody order should be modified to meet the child's best interests.

This Court has an opportunity to refine the changed circumstances doctrine so that it is consistent with the best interests mandate. The doctrine should protect parenting plans in which the child is flourishing and encourage modifications of parenting plans which do not meet the children's needs. Thus the rule would look to the individual child's needs and well-being, rather than to external events, in deciding whether modification is appropriate. A parent (or minor's counsel) seeking modification would have to show that the plan is not meeting the child's needs, rather than pointing to a discrete and dramatic

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for unmarried fathers and their families, and programs should endeavor to take advantage of this important time for new parents."

"…most fathers appear to be very involved and to be committed to helping raise the child, even among unmarried fathers and even among many of the fathers who are not residing with the mothers. This differs markedly from stereotypical images of absent or "deadbeat" dads. The policy and programmatic challenge that remains is to translate the high levels of early paternal involvement and good intentions into beneficial outcomes for children."

Bendheim-Thoman Center for Research on Child Wellbeing, Princeton University and Social Indicators Survey Center, Columbia University. Fragile Families Brief, *Father Involvement, Maternal Health Behavior And Infant Health* (2001) http://crcw.princeton.edu/CRCW/papers/researchbrief5.pdf

event.[18] The version of the changed circumstances test embodied in the now-vacated *Montenegro* decision ignores the underlying public policy of the best interests mandate, i.e. individualized, child-centered parenting arrangements for children of binuclear families.

Changes in children's lives and welfare which necessitate modification of a parenting plan are often incremental and cumulative, rather than dramatic and discrete. Best interests determinations are complex and multidimensional. The party seeking a modification should have the burden to establish that the change is likely to produce material improvement for the child. The passage of time, occurrence of identifiable events or child's failure to flourish under the plan could all be grounds for modification. Modification proceedings, like initial OSC's and trials, should keep a clear focus on children's needs rather than parental desires. The need to show a *nexus* between the child's well-being and the proposed orders will preclude applications by parents who just have a different point of view than the trial judge did. A rule which focuses on children's needs and parental capacity to meet those needs, coupled with the gatekeeping provided by parent education, mediation, therapeutic interventions, and evaluation services, would effectively limit litigation to those cases which truly need a judicial determination.

Most families make adaptations and adjustments to their parenting plans over time without recourse to the court. A small percentage of families need the assistance of the court. For such families, a request for modification can be a warning sign of problems which must be taken seriously.

Restrictions on custody modifications are highly criticized by Dr. Judith Wallerstein, whose *amica curiae* brief strongly influenced this Court's views in *Marriage of Burgess* (1996) 13 Cal.4th 25.

> It is in fact misguided to expect that arrangements made at the time of the breakup will effectively shape the child's future. What influences the child are the long-term circumstances of life during the postdivorce years. As couples exit the courthouse steps, profound changes in parent-child relationships lie ahead. Parenting in the post-divorce family is far less stable than parenting in the functioning intact family. Visiting or custody arrangements that work immediately after the divorce when both parents are single often collapse when a new wife or husband has priorities that may not include time or sacrifices on behalf of children from the former marriage. Everything changes when a second marriage fails, or when the individual circumstances of each parent zig and zag, or when the child gets older and has different needs plus a mind of her own.... The course of parent-child relationships is far less predictable than either the parents or the courts acknowledge.
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> To help parents and children in divorcing families, our courts and mental health professionals associated with the legal system need a more realistic view of the post-

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[18] *Amici* Harold Cohn and Shelley Albaum argue persuasively that the prior order should be presumed correct, and that the party seeking modification has the burden of showing that the child's best interests are not served by the existing arrangement. This allocation of the burden of proof serves a gatekeeper function while not abandoning children's welfare.

> divorce family. Parent educators should address the long-term needs of children and help parents anticipate the changes and stresses ahead as they try to meet those challenges. Although discouraging conflict is important, parent education courses should prepare mothers and fathers for the long haul. They will be coparents for many years, meeting the challenges of sole or joint custody, visiting and myriad financial and emotional crises that inevitably arise until the child becomes an adult.
>
> … Courts are guilty of one other unforeseen consequence stemming from their rigid policies. Children locked into inflexible, court-ordered visiting arrangements until age eighteen grow up rejecting the parent who insisted on the plan.…
>
> …[J]oint custody is helpful to some children and detrimental to others. It can help some at one age and be harmful at a later age. …
>
> Finally, judges, attorneys, mediators, and the mental health professionals who work in the courts should consider building in means to follow up their actions. For example, when young children are required to fly unaccompanied to maintain visiting, both children and parents should be expected back in court one year later to review the impact of the traveling on the child's feelings and general adjustment. Unlike the fields of medicine and psychology, courts have no built-in review processes at their disposal. Flawed court orders or mediated agreements remain hidden because their results are not regularly held to the light and examined. Rulings in family law – with their long-term consequences for children – have a complexity that requires an assessment that goes beyond questions of following laws appropriately. It would be very helpful and reassuring to parents, to the courts themselves, and to society as a whole if court polices and related practice had a built-in, regular review process. Such assessments might lead to important changes that would greatly improve the quality of the children's lives.[19]
>
> Judith S. Wallerstein, Julia M. Lewis & Sandra Blakeslee, *The Unexpected Legacy of Divorce: A 25 Year Landmark Study* 311-313 (2000)

Children can outgrow their parenting plans at about the same rate that they outgrow their shoes.[20] Divorce is not a discrete event, but a process which has a different impact on children and their parents at different ages and post-divorce stages. Only a dynamic, rather than static, view of children's needs can meet the best interests standard.

**THE EVOLVING BEST INTERESTS PARADIGM:**

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[19] Amici do not propose that the courts institutionalize periodic reviews in most cases. However, application of a rigid changed circumstances test would preclude such court-ordered reviews where appropriate and necessary. Many families enter into flexible arrangements and make informal adaptations on their own. Many others could, if adaptation of existing parenting plans was seen as normal and healthy, rather than as always necessitating a battle. Parents should be encouraged to review their plan at intervals, and mediation and other dispute resolution services should be offered to provide assistance with adaptation and implementation of the parenting plan. Similarly, asking a Court to resolve a parental disagreement about which plan would be best should not be seen as a vicious contest, but a reasonable approach to resolving different perspectives.

[20] Presentation, Second World Congress on Family Law and the Rights of Children and Youth, June, 1997; Judith S. Wallerstein & Julia Lewis, *The Long-Term Impact of Divorce on Children: A First Report From a 25-Year Study,* 36 Family & Conciliation Courts Rev. 368, 382 (1998)

## AWARDING CUSTODY AND VISITATION BECOMES

## CREATING, IMPLEMENTING AND ADAPTING PARENTING PLANS

> Child custody law, both in its conceptual basis and in its reality of practice, is clearly an evolutionary process that reacts to the changing landscape of contemporary families. It reflects the collective thoughts of the legal and psychological communities. Reactive in nature and a product of the legislative process of compromise, child custody laws typically lag behind the changing needs of the families they are designed to serve. Positively stated, child custody laws and the ability to change them provide us with a rare opportunity to impact families in a beneficial manner as families go about the business of reorganizing their roles and responsibilities.
>
> Robert Tompkins, *Parenting Plans: A Concept Whose Time Has Come*, 33 Family & Conciliation Courts Rev. 286 (1995)

> …[T]he old language of custody no longer corresponds to our new understandings or our experience. Language, as every child knows, is as organic as any neurobiological function. The very concept of custody is renewed to accommodate new research and intervention strategies based on increasingly compelling clinical and legal insights into divorce, foster care, and adoption. …[I]nterdisciplinary understandings [are] necessary to sustain best practices for children and their families.
>
> Kyle D. Pruett & Marsha Kline Pruett, *Preface*, 7 Child & Adolescent Clinics of North America (Child Custody) xii (1998)

The evolving nature of child custody determinations requires this Court to revisit the premises underlying the changed circumstances doctrine, and to refine its understanding of "best interests." The changed circumstances doctrine, as presently interpreted, ignores the true nature of contemporary custody decisionmaking and the realities of life in a binuclear family. Where once child custody meant choosing between the parents, now child custody means development, implementation and adaptation of a parenting plan. When parents live apart, the task which faces the family (and the Court) is to develop, implement and adapt a parenting plan which allocates parental responsibilities and authority (Family Code §3040 (b.). The task is not to choose which parent should be awarded custody.[21] The changed

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[21] The State of Washington has amended its statutes to eliminate these terms. For a study of the success of Washington's paradigm shift see Diane N. Lye, *Washington State Parenting Act Study: Report to the Washington State Gender and Justice Commission and Domestic Relations Commission* (1999) http://www.courts.wa.gov/reports/parent/home.cfm; See also Robert Tomkins, *Parenting Plans – a Concept Whose Time Has Come*, 33 Family & Conciliation Courts Rev. 286 (1995); Leslie Ellen Shear, *Life Stories, Doctrines and Decisionmaking: Three High Courts Confront the Move-away Dilemma*, 35 Family & Conciliation Courts Rev. 439 (1996); Leslie Ellen Shear, *Painting Family Portraits for the New Paradigm: The Modern Art of Parenting Plan Evaluations*, ABA Family Law Section and American Psychological Association Conference on Children and Divorce (1997); Leslie Ellen Shear, *From Competition to Complementarity: Legal Issues and their Clinical Implications in Custody*, Kyle Pruett & Marsha Kline Pruett, Eds., Child & Adolescent Psychiatric Clinics of North America: Child Custody 311 (1998).

circumstances test, as interpreted by the Court of Appeal in *Montenegro*, is an artifact of an obsolete paradigm.

> The current criterion – the best interests of the child – may serve either the "better parent" test or the "best arrangements" question. That is why it is so well situated between the legal paradigms of adversarial and conciliatory family law. It is ambiguous, and this ambiguity enables it – for the time being at least – to serve as a kind of paradigmatic ligament.
>
> This shift of operational question – a sort of "best interests" sleight of hand – is disarmingly simple. However, in order to establish the best parenting arrangements, different custody assessment procedures are required. For example, we no longer need to focus on the question, "To which parent is the child bonded?," because we assume the child will have a meaningful relationship with both parents. We rarely need to conduct psychiatric mental-status examinations of the parents in order to arrive at the best plan for a child, for we are no longer trying to determine who is unfit. Yet these questions are still asked, even under the current "best interests" regime. We do, however, need to define the functions of parenting more than we did in the past. And we need a somewhat longer time frame within which to conduct a "custody" assessment – if we still must call it that – *so that we can probe and experiment and try out possible new arrangements with the family*. Also, we need to be more future oriented: not focused on past behavior, but on present alternatives and future possibilities.
>
> Of course, we also need to use the language of parenting instead of the language of custody. This is not a new language. It is in fact the same language parents use when they live together raising their children. It need only continue to be applied when they live apart raising their children.
>
> Our purpose, then, as family lawyers, family mediators, assessors, and judges must be not merely to settle spousal disputes, but actually to help families in working out their new arrangements. Although parents may come to us in apparent dispute over the custody of their children, they are in reality …parents in need of help in assuming responsibilities for their children – responsibilities that require making new parenting arrangements. What is needed from the court is not so much a determination of custody (if that be needed at all) as an order that clarifies and supports new parenting arrangements.
>
> Because the legal settlement of a custody matter seldom ends the spousal conflict and certainly does not terminate the crisis of adjustment, and because *questions dealing with a child's needs cannot adequately be met with a single decision at a single point in time, a mechanism is needed not only to facilitate the implementation of the plan but also to ensure the inevitable subsequent adjustments to it.*
>
> In this new fashion, we want to emphasize needs and relationships instead of rights and entitlements – and not the simple needs of individuals at law, but the more complex and interacting needs of families in life.
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> Robert L. McWhinney, *The "Winner-Loser Syndrome": Changing Fashions in the Determination of Child "Custody,"* 33 Family & Conciliation Courts Rev. 298, 306-307 (1995) [Emphasis added.]

The U.S. Commission on Child and Family Welfare recommends abolition of the terms custody and visitation altogether because they inaccurately represent the real world of post-divorce parenting.

(U.S. Commission on Child and Family Welfare, Protecting Our Children: In the Best Interest of the Nation: A Report to the President and Congress 30 (1996).)

> The very terms custody and visitation evoke a world in which one parent has "dominion" over the child and the other parent is seen as merely a "visitor" in that dominion. The Commission believes that this mind-set should be changed and these terms replaced with terms that more accurately describe the responsibilities of both parents in providing for their children's care and support.
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> …
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> The Commission agrees with these witnesses that nomenclature should more accurately address the responsibilities of day-to-day parenting and care for children. The Commission recognizes that most State statutes use the terms "custody" and "visitation" and that a change in terminology may therefore require actions of the State legislature. The Commission urges court systems to determine whether they have the authority to change the terminology without – or pending – legislative action, and to do so as promptly as they can. The Commission is convinced that such a change will have a positive impact on parental cooperation and the well-being of children.

For several decades, the term "visitation" has been considered demeaning and evocative of hospitals, and prisons. It suggests casual contact rather than meaningful interaction. "Access" has a similar implication. See, *inter alia*, Gerald Silver & Myrna Silver, Weekend Fathers: for Divorced Fathers, Second Wives and Grandparent Solutions to the Problems of Child Custody (1981), and Warren Farrell, Father and Child Reunion: How to Bring the Dads We Need to the Children We Love (2001), which includes a chapter entitled, "Visitation" Is for Criminals. Farrell suggests substituting the term "parent time." Shear uses the term "responsibility periods."

The old question, custody, could be answered by a binary choice – Mother or Father. The new question, best interests, requires decisionmakers to craft a detailed parenting plan which will evolve to reflect the child's changing needs. Parenting plans have many provisions, including a schedule of parental responsibility.[22] The changed circumstances test, as expressed in cases such as the Court of Appeal

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[22] A parenting plan typically includes the following sections:

a. Factual findings;
b. Jurisdictional findings and rulings;
c. Legal Custody
    a. Orders governing parental access to and duty to exhange information concerning the child, including identification of information to be exchanged and method for exchange, and method for notifying other parent of emergencies involving the child,
    b. Allocation of decisionmaking authority;
d. Basic responsibility schedule;
e. Geographical restrictions, i.e. restraints on moving child's residence outside particular geographic radius or so as to increase distance between homes without written consent of other parent or further order of court;
f. Celebration of holidays, vacations and special days;

decision in *Montenegro,* cannot survive the shift from the old paradigm to modern custody practice without adaptation.

The inflexibility of the old paradigm is itself an impetus for modification attempts. If only one parent wears the "crown" of primary or custodial parent, the other parent is often motivated to mount challenges and seek that role. If there is a primary parent, there must be a secondary parent. That very ranking threatens parental identity, and fails to reflect the complementary roles which parents often play

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g. Logistics including but not limited to
    a. Transportation between the two homes,
    b. Exchanges, including time, location, and conduct to protect children from conflict,
    c. Telephonic communication between parents and children when they are in the other household;
h. Support services such as counseling or therapy for child, parents and/or family; mediation; parent education; domestic violence treatment program, services for children with special needs; appointment of a Special Master/Parenting Plan Coordinator;
i. Conduct restraining orders, such as
    a. Domestic violence restraining orders,
    b. Civility orders,
    c. Orders for the protection of children from exposure to adult conflict,
    d. Orders preventing the children from being used to convey messages from one parent to the other,
    e. Restraints on use/abuse of drugs and alcohol,
    f. Restraints on removal of children outside of the jurisdiction, county, state or country without written consent or further order of court,
    g. Provision for children's clothing and possessions to move freely between homes,
    h. Requirement to maintain child's consistent medical treatment, completion of homework, attendance at enrichment activity, etc.;
j. Automatic consequences for failure to comply with particular orders;
k. Provisions for review and revision.

While not every parenting plan has all of these provisions, most are far more intricate than the "the court awards custody to mother subject to father's right of reasonable visitation" orders that one typically saw in the early 1970's. The field of custody has come a very long way in a very few decades.

See Leslie Ellen Shear, *Painting Family Portraits for the New Paradigm: The Modern Art of Parenting Plan Evaluations*, ABA Family Law Section and American Psychological Association Conference on Children and Divorce (1997); Leslie Ellen Shear, *Drafting Post-Separation Orders Allocating Parental Rights and Responsibilities,* Fifth Annual Los Angeles County Bar Association Family Law Colloquium Handbook: The Child, the Family and the Legal System (1981); Leslie Ellen Shear, *Developing Written Agreements and Working Effectively With Attorneys*, California Chapter Association of Family and Conciliation Courts, Mediation of Child Custody and Visitation Disputes (1981) (Available on the AFCC-CAL Best Works CD); Leslie Ellen Shear, *Drafting Plans Allocating Parental Responsibility*, The Newsletter: Association of Family Conciliation Courts California Chapter (Column ran in quarterly installments from Winter 1981 through Fall 1983); Mimi E. Lyster, Child Custody: Building Parenting Agreements That Work (3rd Ed), (2000); U.S.Commission on Child and Family Welfare, Parenting Our Children: In the Best Interests of the Nation: A Report to the President and Congress, Appendix F (1996).

over the child's lifetime. Warshak (Richard A. Warshak, The Custody Revolution (1992)), introduces the term "flexible custody" to describe

> …a living arrangement that is responsive to changing family needs and circumstances.... The alternative is to stick rigidly to the original plan despite significant changes that make it no longer optimal. This is clearly a disservice to the children. The need to shift custody may grow out of a normal psychological need whose gratification is thwarted by the very structure of traditional sole-custody arrangements.

To the extent that this Court honors the need of children for such flexible custody arrangements, it will reduce the need for litigated modifications and encourage collaborative adaptation of parenting plans.

The U.S. Commission on Child and Family Welfare (at pp. 3, 36-37) recommends:

> Courts should require separating, divorcing and unmarried parents living apart to attempt to develop parenting plans that set forth parental decision-making, parenting time, and residential arrangements for the children. Courts should provide guidance for the development of parenting plans by identifying legal parameters and issues that plans should address and by making forms available to help parents develop the plans.

The Commission found that such plans should include provisions for review of the plan to reflect changing needs, and that the Court should be responsive to the need for subsequent modifications. The Commission considered recommending periodic reviews of all plans, but concluded that some parents may never feel the need for review and others require more frequent scrutiny. States are encouraged to develop standards and procedures for such modifications. The ability to adapt or modify the plan is an essential component of a best interests based custody law. Modification requests may involve one or two details of the plan or propose scrapping the entire plan and starting over.

**PRACTICAL CONSEQUENCES OF *MONTENEGRO* CHANGED CIRCUMSTANCES DOCTRINE**

> There are principles and methods grounded in therapeutic jurisprudence, including integration of treatment services with judicial case processing, ongoing judicial intervention, close monitoring of and immediate response to behavior, multidisciplinary involvement, and collaboration with community-based and government organizations. These principles and methods are now being employed in these newly arising courts and calendars, and they advance the application of the trial court performance standards and the public trust and confidence initiative…
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> 2000 Conference of Chief Justices & Conference of State Court Administrators, *CCJ Resolution 22 COSCA Resolution 4,* 2 J. of the Center for Families, Children & the Courts 2 (2000) http://www.courtinfo.ca.gov/programs/childrenandthecourts/resource/jourvol2.htm

The changed circumstances test, as expressed in the vacated opinions in *Marriage of Congdon* (1999) 70 Cal.App.4th 358 and *Montenegro* and in the published opinion in *Lester v. Lenanne, supra.,* is incompatible with the principles of therapeutic jurisprudence and problem-solving courts used by family courts. Deborah J. Chase, Sue Alexander & Barbara J. Miller, *Community Courts and Family Law*, 2 J. of

the Center for Children, Families & the Courts 37 (2000) Problem-solving courts use incremental interventions, and trial and error. They expect to revisit cases periodically and to review the impact of prior decisions. Under a *Montenegro*-style changed circumstances, such courts cannot exist. The growing changed circumstances doctrine also has various unintended and anti-therapeutic consequences.

The COSCA Resolution encourages "the broad integration over the next decade of the principles and methods employed in the problem-solving courts into the administration of justice to improve court processes and outcomes while preserving the rule of law, enhancing judicial effectiveness, and meeting the needs and expectations of litigants, victims and the community." See also, Carol R. Flango, *Family Focused Courts*, 2 J. of the Center for Families, Children & the Courts 99 (2000) http://www.courtinfo.ca.gov/programs/childrenandthecourts/resource/jourvol2.htm. California's family courts will be disabled from functioning as problem-solving courts if our Supreme Court does not support and encourage this new paradigm.

The ability of the California Courts to explore problem-solving models is directly tied to this Court's definition of best interests and changed circumstances. If this Court adopts the view expressed by the Court of Appeal, the ability of problem-solving courts to innovate and develop more effective approaches will be greatly restricted. This section of the brief is devoted to identifying some therapeutic and problem-solving models presently employed in family courts. Each of these approaches is threatened and compromised by restrictions on modification of parenting plans.

Refining the changed circumstances rule will not result in an exponential expansion of caseloads. Fixing small problems before they escalate is far less time consuming. Moreover, expansion of court-connected and private services to separating and separated parents and their children[23] serves the gate-keeping function once fulfilled by the changed circumstances test. Most parenting plan issues are resolved outside the courtroom. "Interventions for divorcing families developed and adopted on a more wide-scale basis in the past 10 years offer positive alternatives to families going through the divorce process…" Joan B. Kelly, *Children's Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research*, 39 J. of the American Academy of Child & Adolescent Psychiatry 963 (2000).

Parent education, mediation, evaluation and therapeutic interventions are available both at the courthouse and in the community in a broad variety of models. Such programs are successful in diverting substantial numbers of families from the courtroom. Parents who are unable to develop a parenting plan by consensus may be able to do so with professional assistance (advice of counsel, appointment of

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[23] See Family Code §§3111, 3051, 3160 *et. seq.,* 3190. Many counties have also created local rules and programs for parent education.

minors' counsel[24], parent education programs, mediation, and evaluation) offered through the Court's Family Court Services Offices and by private practitioners. Although the quality and models of such interventions vary, some form of professional assistance is available to all parents. To the extent that the programs are adequately funded so that experienced and well-trained professionals can spend enough time with the family for an effective intervention, they serve a highly effective gatekeeper function, reducing the number of cases which must be litigated to those which really need a judge to make a careful decision. See Jessica Pearson, *Court Services: Meeting the Needs of Twenty-First Century Families*, 33 Family Law Quarterly 617 (1999).

The sophistication, variety and availability of services for separated and divorced families has increased over the years but failure to adequately fund them seriously compromises their effectiveness in performing a gatekeeper function, and in assisting families in developing appropriate parenting plans.[25] Abbreviated interventions are less likely to produce a carefully considered plan, and thus increase the likelihood that subsequent modifications will be necessary to serve the children's best interests.

Expansion of the changed circumstances doctrine to greatly restrict modifications has had many unintended consequences which are apparent to family lawyers and mental health professionals, but may not be visible to appellate courts. These real world consequences compromise the goal of serving children's best interests. In medicine, such consequences would be termed "iatrogenic." Considering the

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[24] "A lawyer is often appointed for a child as a means of diverting the case from trial. The Court hopes that he or she will be effective in developing a parenting plan, or will propose resolution of various issues as they arise, that wins acceptance by the adult parties. Although the child's counsel does not have the formal powers of a special master, the role itself, and often the personal characteristics of the lawyer who has been appointed, carries considerable persuasive force." Leslie Ellen Shear, *Children's Lawyers in California Family Law Courts: Balancing Competing Policies and Values Regarding Questions of Ethics*, 34 Family & Conciliation Courts Rev. 256, 261 (1996) for a discussion of the role of minors' counsel in dispute resolution.

[25] In Los Angeles County (which represents one third of California's family law filings according to the 2001 report of the Judicial Council), the birthplace of mandatory custody mediation, the original model offered each family up to six "marathon" bargaining sessions. Mediators saw two families each day, incorporated lawyers and extended family into the process. Former Conciliation Court director Hugh McIsaac counseled that whoever was left out of the process would sabotage the process. Today families wait six or more weeks for a single 90-minute session. Mediators' sophistication suffers from the superficiality of these sessions. Without in-depth interaction with separated and divorced families, they have little opportunity to learn from experience. Abbreviated evaluation models, such as "fast-track" evaluations have also increased in popularity throughout the state. The reliability of such evaluations is reduced, because the recommendations are based upon very limited data and analysis. (Jonathan W. Gould, Keynote Address at Los Angeles County Family Section and Los Angeles County Superior Courts Family Law Departments Annual Child Custody Colloquium (1999).)

changed circumstances doctrine from a perspective of therapeutic jurisprudence, this Court should refine the doctrine to minimize these iatrogenic consequences.

The changed circumstances test encourages "allegation inflation." If the resources of the Court are only available to those who make major allegations, then parents are inclined to escalate the level of the accusations they address at one another. If the only way that one can have a chance to play a larger role in the life of one's child is to denigrate the other parent, then parents are more apt to attack one another rather than emphasize their capacity to work in a complementary fashion.

One of the most troubling practical consequences of the growing changed circumstances doctrine is the obligation of counsel to advise clients to be wary of compromise. The changed circumstances doctrine casts a dark shadow on settlement, negating the value of many of the diversion programs. A parent, like the father in *Montenegro*, who engages in compromise finds himself unable to protect his child from ongoing detrimental conduct when the promised changes are not forthcoming.

A family lawyer cannot advise a parent to try a plan, see if it works and feel confident that there is a safety net if the child's needs are not met. Instead s/he must advise parents that they need a substantial timeshare or they risk having their child relocated with a resultant profound diminishment in coparenting opportunities. This iatrogenic consequence is most onerous in cases involving relocation with infants, toddlers and preschoolers. Young children do not have a sufficiently developed sense of time to sustain relationships with only intermittant contacts. They require extremely frequent, i.e. several times per week, caretaking experiences with a parent in order to establish and maintain attunement, attachment and a strong relationship. Lawyers must advise clients to "go for broke" because the stakes associated with the initial plan have become unreasonably high.

Unrepresented and under-represented litigants (and their children) are even in a worse situation. They rarely understand that the tentative compromises they reach will be etched in stone. They cannot afford a custody evaluation or a trial. They are less likely to have good information about the range of parenting plans available, the needs of children at different ages, or how to create a plan which is a good fit for their children. Under the *Montenegro* doctrine, such children are trapped in inappropriate parenting plans which do not meet their needs because no change of circumstances has occurred which would permit a best interests inquiry.

Evaluators, mediators and parent educators are torn between an ages and stages approach to parenting, and legal system's irrational demand for a plan which requires a crystal ball and a magic wand to protect the child at all stages of development and under most circumstances. This unintended consequence of the changed circumstances rule is contrary to California's public policies that custody determinations be gender-neutral and that children enjoy meaningful relationships with both parents. The

timing of the parental separation, rather than the capacities of the parent and the quality of the parent-child relationships determine the outcome. Since biology places mothers in the primary caretaking role at birth, fathers who have never lived with their children or who separate in the child's first years of life are virtually precluded from becoming custodial parents. For such families, application of the changed circumstances test amounts to resurrection of the maternal presumption. A custodial arrangement which may have been maintained so that the child can breast feed in the first months of life ends up preserved for the next eighteen years, even if another parenting plan would better meet the child's needs.

The changed circumstances rule assumes that the original parenting plan was thoughtfully arrived at[26], and that it protects a child's healthy attachment to a primary caretaker. Family law practitioners recognize that the best predictor of who will end up with custody is who has physical possession of the child at separation. This may be the most controlling parent rather than the most nurturing parent. The process tends to reinforce the *status quo* rather than engage in a thoughtful and careful inquiry into how parental rights and responsibilities should be assigned in order to best meet the child's needs.

Expanded application of the changed circumstances rule has a disparate impact on families with limited financial resources. Upper and middle income families create their parenting plans with the assistance of certified family law specialists, therapists, private mediators, and intensive child custody evaluations. They read popular press books on the needs of children after divorce. They attend private parent education classes for divorcing parents. They are more likely to view a parent education video, such as the outstanding *Children in the Middle* video from the University of Ohio, in the office of their lawyer, mediator or therapist. They can afford long cause hearings in which detailed evidence is presented. Plans created with those resources are more likely to be tailored to the child's needs and less likely to need modification. These same resources are available to them when the plan needs adaptation. Should modification litigation be required, they can hire lawyers who understand and address the "changed circumstances" doctrine, and investigators and expert witnesses to develop evidence in support of the modification request. Their concerns are more likely to be taken seriously. None of these resources are available to most poor and low income parents.

A growing body of research and practice literature is devoted to the identification, care and management of "high conflict" families. The parenting plans in such families may well need fine-tuning, albeit not for the reasons presented by the parents. There is no indication that they are deterred by the

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[26] The Washington State Parenting Act Study, *supra.,* provides a more realistic view of how initial parenting plan orders are developed. Parents received little guidance or assistance in thoughtfully considering alternatives and finding the best fit for their children.

changed circumstances rule. If anything, the changed circumstances doctrine operates paradoxically to escalate conflict. If the only way to obtain review of an unsatisfactory order is to bring out the big guns, then allegations of abuse, neglect, alienation, and parental incompetence will proliferate. This phenomenon is clearly seen in the wake of moveaways – once the possibility of complementary parenting has been eliminated, desperate left-behind parents escalate their allegations against the departed parent.

Other families who do not try to fix parenting plans which no longer meet the needs of their children because power imbalances between the parents, disconnection from social institutions such as courts, or the lack of economic and/or emotional resources make the decision-making process seem more onerous than the *status quo*. Parents are afraid that raising any question about the plan, even informally, may be perceived as aggressive. The high conflict families are making so much noise that we haven't had the time, energy or resources to look at the "conflict avoidant" families. One can only suspect that their children are at even greater risk, particularly when a controlling and abusive parent dominates a timid and passive one. Our policies and procedures should articulate some values and norms for the "do-it-ourselves" families, contain the high conflict families, and provide better resources and a less adversary decisionmaking "tone" for the "conflict avoidant" families. Normalizing the need for adaptation of parenting plans as children mature and families change might remove some of the stigma and the aura of high conflict now associated with proposing appropriate adjustments to children's custody plans.

Another unintended consequence of a rigid changed circumstances rule is an increase in self-help and abductions. One characteristic shared by many abducting parents is a sense of hopelessness about the willingness of the courts to hear and consider their concerns.[27]

Unfortunately, the Court of Appeal's reading of the changed circumstances doctrine to bar consideration of children's needs is not uncommon. This Court must reframe and refine the changed circumstances doctrine so that children's best interests are not subordinated to other considerations.

## ALIENATION, SUBSTANCE ABUSE, DOMESTIC VIOLENCE: INCREMENTAL INTERVENTIONS SERVE CHILDREN'S BEST INTERESTS

[27] Linda K. Girdner & Janet R. Johnston, *Early Identification of Parents at Risk for Custody Violations and Prevention of Child Abduction,* 36 Family & Conciliation Courts Rev. 392 (1998); Geoffrey L. Greif and Rebecca L. Hagar, When Parents Kidnap: The Families Behind the Headlines (1993); Geoffrey L. Greif, *Parental Abduction Justification as Ego Defense,* 33 Family & Conciliation Courts Rev. 317 (1995); Geoffrey L. Greif, *Many Years After the Parental Abduction: Some Consequences of Relevance to the Court System*; 36 Family & Conciliation Courts Rev. 32 (1998); Ernie Alen, *The Kid is With A Parent – How Bad Can It Be?: The Crisis of Parental Abduction*, National Center for Missing and Exploited Children http://www.missingkids.com/download/crisis_of_family_abductions.pdf. Girdner and Johnston, *supra.* describe the kind of specific, strategic integrated legal and therapeutic intervention necessary to prevent such abductions in high risk families.

There are many family circumstances, such as cases of substance abuse, parental alienation or domestic violence, in which the parents, mediators, evaluators and judges need to take a trial and error approach or try a less drastic intervention before making more drastic orders. The increasing rigidity with which the changed circumstances rule is being applied, preclude rather than encourage such staged interventions. This is particularly true in cases of parental alienation like *Montenegro*, where the Court of Appeal pre-empted a trial judge's efforts to use escalating interventions. Escalating interventions are a critical tool in responding to alienation.[28]

> An American Bar Association 800-family study on alienation found,
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> One of the most powerful tools the courts have is the threat and implementation of environmental modification. Of the approximately four hundred cases we have seen where the courts have increased the contact with the target parent (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

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[28] See Kathleen Niggemyer, *Comment: Parental Alienation Is Open Heart Surgery: It Needs More Than a Band-aid to Fix It*, 34 Cal. Western L. Rev. 567 (1998); Mary Lund, *A Therapist's View of Parental Alienation Syndrome,* 33 Family & Conciliation Courts Rev. 308 (1995); Stanley Clawar & Brynne Rivlin, Children Held Hostage: Dealing With Programmed and Brainwashed Children (1991); Elizabeth Ellis, Divorce Wars: Interventions with Families in Conflict, Chapter 8 "Parental Alienation Syndrome: A New Challenge for Family Courts" (2000); Douglas Darnell, *Parental Alienation: Not in the Best Interest of the Children,* 75 North Dakota L. Rev. 323 (1999); Deirdre Conway Rand, *The Spectrum of Parental Alienation Syndrome (Part I)* 15 Am. J. Forensic Psychol.23 (1997); Deirdre Conway Rand, *The Spectrum of Parental Alienation Syndrome (Part II)* 15 Am. J. Forensic Psychol. 39 (1997); Kenneth H. Waldron, Ph.D. and David E. Joanis, J.D., *Understanding and Collaboratively Treating Parental Alienation Syndrome*, 10 American J. of Family Law 121 (1996); Carla Garrity & Mitchell Baris, Caught in the Middle: Protecting the Children of High-Conflict Divorce (1994); Frank S. Williams, *Preventing Parentectomy Following Divorce,* Keynote Address, Fifth Annual Conference, National Council for Children's Rights Washington D.C., (1990) http://www.dads4kids.com/Parentectomy.htm; Janet R. Johnston and Vivienne Roseby, In the Name of the Child: A Developmental Approach to Understanding and Helping Children of Conflicted and Violent Divorce (1997); Anita K. Lampel, *Children's Alignment With Parents in Highly Contested Custody Cases,* 34 Family & Conciliation Courts Rev. 219 (1996); Richard A. Warshak, *Remarriage as a Trigger of Parental Alienation Syndrome*, 28 American J. of Family Therapy 229 (2000) http://mysite.ciaoweb.it/p_pace/sezioni/articoli_scientifici/articoli_internaz/pas26.htm; Michael R. Walsh & J. Michael Bone, *Parental Alienation Syndrome: An Age-Old Custody Problem*, Florida Bar J., 93 (June 1997); Ira Daniel Turkat, *Relationship Poisoning in Custody and Access Disputes* 13 Am. J. of Fam. L. 101 (1999); Ira Daniel Turkat, *Relocation as a Strategy to Interfere with the Child-parent Relationship*, 11 Am. J. of Fam. L. 39 (1996); Ira Daniel Turkat, *Child Visitation Interference in Divorce*, 14 Clinical Psychol. Rev. 73 (1994) http://www.fact.on.ca/Info/pas/turkat94.htm; Ira Daniel Turkat, *Divorce Related Malicious Mother Syndrome*, 10 J. Fam. Violence 253 (1995) http://www.fact.on.ca/Info/pas/turkat95.htm; Ira Daniel Turkat, *Management of Visitation Interference*, 36 Judges' J. 17 (1997) http://www.fact.on.ca/Info/pas/turkat97.htm; Richard Gardner, The Parental Alienation Syndrome (1992).

> reduction of many social-psychological, educational, and physical problems that the child presented prior to the modification.
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> Stanley Clawar and Brynne Rivlin, *Children Held Hostage: Dealing With Programmed and Brainwashed Children* 150 (1991)

The persistence of Gregory Montenegro's mother's hostility, in the instant case, and her unresponsiveness to every intervention that was tried – including the "bully pulpit" of the trial judge – was, in itself, a change of circumstances from the family situation at earlier points. This trial judge would have been subject to far more criticism if he had changed custody without first trying other, less drastic, remedies. Experts on alienation usually suggest tailoring the remedy to the individual case, taking into account the severity and the persistence of the alienating conduct and its impact on the child. A recent study of sixteen alienation cases addressed the question of the efficacy of various interventions.

> In looking at interventions to deal with the alienation from a parent, a wide range of both legal and clinical processes were identified. In three of the cases, a change of custody away from the alienating parent or a strict limitation of that parent's contact with the child(ren) was implemented by the court system. In all three cases, this was successful in eradicating the alienation. There were no cases in which a change of custody occurred but the alienation continued. In the other thirteen cases, various interventions were tried, ranging from therapy for each of the parents individually, therapy for the parents together, therapy for the children with the alienated parent, therapy for the children with the alienating parent, and the assignment of a Guardian Ad Litem to the case. In two of these cases, the children were evaluated as having experienced "some" or "minimal" improvement in their relationship with the alienated parent. In the other eleven cases, there was no improvement and in two of these cases, the alienation was evaluated as "worse" after these interventions.
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> John Dunne & Marsha Hedrick, *The Parental Alienation Syndrome: An Analysis of Sixteen Selected Cases,* 21 J. of Divorce & Remarriage 21 (1994) http://www.fact.on.ca/Info/pas/dunne.htm

> Gardner's recent follow-up study of 99 children diagnosed with PAS found a strong association between environmental modification and reduction in PAS symptoms (78). In 22 instances, the alienated child's contact with the rejected parent was increased and contact with the alienating parent was decreased. In all 22 cases PAS symptoms were reduced or eliminated. By contrast, only 9% of the children (7 out of 77) whose contact with the rejected parent was not increased by the court, showed a reduction in PAS symptoms. This study also provides a beginning understanding of the factors that lead alienated children to initiate their own reconciliation with the rejected parent. Further study along these lines may assist decision-makers in determining which children might not require environmental modification in order to recover from PAS.
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> Richard A. Warshak, *Current Controversies Regarding Parental Alienation Syndrome* 19 American J. of Forensic Psychology (2001) (in press)

We cannot assume that initial interventions will be successful, although many will be. The trial judge must have the power to assess progress and make subsequent orders. Escalating interventions should remain in the tool boxes of family law trial judges.

> This study also suggests that traditional therapies and interventions are not successful in rehabilitating children affected by this syndrome. Although the courts have been reluctant to take drastic action, especially when this is contrary to a child's explicit wishes, in this study only a change in custody to the alienated parent was successful in remedying the alienation. It should be noted, however, that in two of the cases in this study in which the court was willing to take this step, and one case in which a change of custody occurred voluntarily, the children eventually had little contact with the alienating parent. This suggests that the PAS dynamic may be so toxic that a relationship with both parents may not be possible, or in the child's best interests, in cases of severe alienation. Each case must be evaluated on its own merits and the identification of a parental alienation syndrome is not sufficient, in and of itself, to justify changes in custody. Full evaluation of a child's situation and relative parental strengths and weaknesses may identify instances when it is in the best interest of the child to remain with the alienating parent and to have little or no contact with the alienated parent in order to reduce the effects of continued conflict on the child.
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> John Dunne & Marsha Hedrick, *The Parental Alienation Syndrome*, *supra*.

When restructuring the parenting plan, educational and therapeutic interventions fail, courts must be able to make an order for primary residence with the target parent. Sometimes the risk of such a remedy will motivate resolution of the problem. Rigid application of a changed circumstances doctrine deprives family courts of the opportunity to try escalating interventions.

> If the above-described interventions fail and the child remains virtually without relationship to the target parent despite the education, the post-divorce counseling, impasse resolution therapy, and the specific behavior management intervention, one can conclude as a matter of established fact that the alienating parent does not have the capacity to foster a relationship with the other parent which is inherently harmful to the child when the effect is to alienate the child from one parent.
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> J. Campbell Harvey & Peggie Ward, *Family Wars: The Alienation of Children* in Selected Papers from the Second World Congress on Family Law and the Rights of Children and Youth held in association with the Annual Conference of the Association of Family and Conciliation Courts 66, 81 (1997)

No definition of best interests can encompass a doctrine which ignores the child's plight because the most drastic intervention was not selected first. The notion that a child should continue to suffer because the behavior causing the suffering was present at the time of the last order cannot be reconciled with the statutory best interests mandate.

> Significant behavior problems may result from the parent's brainwashing and inability to effectively parent. Children suffer from a multitude of behavioral maladjustments including anger, loss of impulse control, loss of self-confidence and self-esteem, clinginess, separation anxiety, fears, and phobias, depression and suicidal feelings, sleep disorders, eating disorders, academic problems or radical fluctuations in academics, enuresis, confusion, daydreaming, drug abuse and other self-destructive behaviors, peer group problems, obsessive-compulsive behavior, motor tension, anxiety, psychosomatic disorders, damaged sexual identity, desire to live with neither parent, rescuer role, excessive guilt, and the desire to, or a retreat into fantasy. It is unfortunate that the most devastating effect of divorce and custody disputes are these as described, inflicted upon

> the innocent victims for whom the parents profess love. Courts in all states have struggled with ways to protect the right of access to each parent and child. They now recognize a variety of causes of action and remedies available to the parent whose custodial or visitation rights have been interfered with by the other parent. The traditional "solutions" range from the mild remedies of specifying exactly the time and place of visitation, awarding make-up visitation, and family therapy or mediation intervention to moderate remedies such as supervised visitation, having a third party responsible for overseeing visitation, loss of visitation, and an award of attorney's fees. More severe remedies include contempt proceedings, change of custody, and a variety of tort actions designed to redress the problem through coercive financial compensation, rather than modulating behavior through other means.
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> Joy M. Feinberg and Lori S. Loeb, *Custody and Visitation Interference: Alternative Remedies,* 12 AAML J. 271 (1994)

The very recent case of *Wilson v. Shea* G026722 (4th District, March 9, 2001), which is not yet final, bears many similarities to *Montenegro*. *Wilson* also involved never-married parents and a mother who actively sabotaged the child's relationship with her father during the child's first five years,

> Even though the trial judge granted the move-away order, the dominant theme of the hearing was the systematic poisoning of Michael's relationship with his daughter by Robin. Robin would not allow Michael to take Amanda to see his family, and had even gone so far as to tell Amanda when she was not yet five-years old that Michael's wife was a witch. He was not allowed to stay on Amanda's fifth birthday (Amanda pleaded, "Daddy, don't go. Don't go, please.") and after that, Robin told him, "Why don't you just leave. I don't want nothing to do with you. I don't want your money. I don't want you to have nothing to do with Amanda." In the wake of the episode Michael didn't see his daughter for three years. Finally, when the case was filed and initially referred to mediation, Amanda was "petrified" of seeing her father; after a few visits, however, the counselor noted that Michael was "great" with his daughter and recommended visitation.

Both the Trial Court and the Court of Appeal approached the family from a therapeutic perspective.[29] A strict "changed circumstances" approach could have precluded the therapeutic reunification of father and daughter after a three year no contact "status quo." Read another way, a *Montenegro* approach would treat the alienation as a change of circumstances, and not permit subsequent modifications should the behavior continue. Yet a change of custody could not realistically be considered until after father and daughter re-established their emotional connection and familiarity. If Robin fails to support the father-daughter relationship after the move, the family law court should have the power to place Amanda in her father's primary custody. No one can predict, with certainty, the efficacy of an intervention. Maintaining a meaningful daughter-father relationship on a cross-country basis with limited financial resources and in the face of maternal hostility is apt to prove daunting. The Court had sufficient facts to find that the move would be detrimental. Should it prove detrimental when this plan is implemented, the trial court must have the authority to modify the order.

*Wilson v. Shea* illustrates the importance of preserving a family law court's discretion to work with a family over time, consider lesser measures before more drastic ones, and weigh the child's best interests in the context of experience. No one can know whether Robin will facilitate Amanda's relationship with her dad after the move. It is possible that the litigation helped her recognize the importance of this relationship for her daughter. It is possible that the litigation left her even more entrenched in her desire to exclude Michael from meaningful participation in childrearing. When Amanda comes to stay with her father this summer, the Court should not be precluded from taking a second look.

Escalating or other variable interventions are an essential tool for specialized family law courts. A parent's scope of responsibility for childrearing may be increased or decreased based upon changes in

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[29] One cannot help wondering whether the Court was over-constricted by its reading of *Marriage of Burgess* (1996)13 Cal. 4th 25 into believing that it could not prevent the move. The facts create a strong inference that the purpose of the move was to interfere with the daughter's relationship with her father, given that the request followed the filing of his Order to Show Cause to re-establish his parenting time. In *Wilson* stability evidently means leaving a child in the almost sole care of a mother who teaches hatred, and noncompliance with court orders, without regard to the impact on the child's well-being. While *Burgess* does not require the result we see in *Wilson v. Shea*, it has had a strong chilling effect on trial judges. *Burgess* is more fully discussed below. One is also struck by the token nature of the visits which are supposed to provide a basis for a meaningful father-daughter relationship. Four weekend "day visit" trips per year, and a one week summer vacation cannot provide the basis for formation or maintenance of attachment and attunement. Alienation experts stress that the child must have substantial time with the "target" parent in order to form his or her own independent view of that parent. Clawar and Rivlin, Children Held Hostage, *supra.* Michael will be a virtual stranger, but rather than a hands-on parent. This cannot be what the legislature intended when it stressed the child's need for "frequent and continuing contact" with both parents.

parenting performance. Around the state, counties and individual judicial officers are developing new approaches and model programs which are threatened by the holding in *Montenegro*. For example, San Francisco has a Unified Family Court and Butte County has pioneered both a Unified Family Court (H.O.P.E.) and a Family Law Drug Court.

> The Superior Court of California, County of Butte instituted a unified family court in June 1998. In a unified family court such as Butte's, one judge handles all cases involving a family, regardless of case type. Butte's unified calendar, named H.O.P.E. (Helping Organize Parents Effectively), is outcome-based and relies on multidisciplinary team members as service providers. The court attempts to fashion orders that are consistent and provide for coordination in the delivery of services to assist the family in resolving their legal and personal issues. Another outcome is the reduction of currently pending cases involving the family.
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> Steven J. Howell, *One Judge – One Family Butte County's Unified Family Court*, 1 J. of the Center for Families, Children & the Courts 171 (2000) http://www.courtinfo.ca.gov/programs/childrenandthecourts/resource/jourvol1.htm

Poor and low income families are apt to be disproportionately represented in family law drug courts, and less likely to have insurance or other resources for high quality treatment programs. Thus a rigid changed circumstances doctrine again has a disparate impact on families with different economic means.

If this Court does not adopt a more progressive view of the changed circumstances doctrine than the Court of Appeal holding in *Montenegro*, innovative programs which rely upon incremental and ongoing interventions such as the ones in Butte County will be crippled.

> Because of the success of our therapeutic drug court, we decided that this integrated family court should emphasize a therapeutic approach as opposed to a punitive one. The judicial officer should emphasize persuasion rather than punishment and use the parent's desire to be with his or her children (a positive outcome of the visitation, custody, or other issue in dispute) as the primary motivation for compliance. We also agreed that the judicial officer would focus on short-term goals rather than long-term challenges for the families. The primary approach of the court would be outcome-based, and the judicial officer could impose appropriate sanctions, including jail time, if he or she felt them to be necessary.
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> *Id.* at 172

Family law drug courts keep close watch on the progress of parents in treatment programs, and frequently fine tune the parenting plan. The incentive for substance abusing parents to see transfer to a family law drug court is the prospect of future custody modifications increasing the parent's role in childrearing as progress in rehabilitation and sustaining recovery is achieved. Application of a strong changed circumstances rule would cripple the ability of such drug courts to function. See also Robert Victor Wolf, *Fixing Families: The Story of the Manhattan Family Treatment Court*, 2 J. of the Center for Families, Children & the Courts 5 (2000) for an example of a drug court dealing with dependency court custody cases. Drug courts apply principles of therapeutic jurisprudence. Deborah J. Chase and Peggy Fulton Hora, *The*

*Implications of Therapeutic Jurisprudence for Judicial Satisfaction*, 37 Court Rev. 12 (2000) http://aja.ncsc.dni.us/courtrv/review.html.

Like drug courts, family law domestic violence courts must work as problem-solving courts, employing principles of therapeutic jurisprudence. These courts are premised upon offering services, assessing the efficacy of interventions, and modifying parenting plans in an on-going rather than one-time intervention. California's Domestic Violence Courts regularly employ a therapeutic model in making child custody determinations. They, too, would be thwarted by a rigid changed circumstances test. Judicial Council of California Administrative Office of the Courts, *Domestic Violence Courts: a Descriptive Study* (2000) www.courtinfo.ca.gov/programs/childrenandthecourts/resource/dvreport.pdf, Julia Weber, *Domestic Violence Courts: Components and Considerations*, 2 J. of the Center for Families, Children & the Courts 23 (2000) http://www.courtinfo.ca.gov/programs/childrenandthecourts/resource/jourvol2.htm.

**FROM COMPETITION TO COMPLEMENTARITY:**

**WHY A MORE LIBERAL STANDARD FOR MODIFICATION**

**PROTECTS CHILDREN RATHER THAN PROMOTES CONFLICT**

Social changes and greatly increased research and experience have dramatically changed the role of family courts in child custody matters. Framing custody decisions as a forced choice between parents exaggerates competition rather than complementarity.

> Realizing the promise of the best interests standard requires a rethinking of other characteristics of custody law. (Footnote omitted.) A child-centered custody paradigm cannot assume that one custodial arrangement is best for all, or even most children. Children's needs are not best met by a model that posits a competition between parents and other caretakers for custody rather than emphasizing the potential for complementary child-rearing. The assumption that there is a large and important difference between custodial care and visitation does not reflect the reality of many children's lives. Treating custody determinations as final, absent a dramatic change of circumstances, ignores the ongoing changes in the child's developmental needs, the capacity and availability of parents to meet those needs, the family structure and other factors. A child-centered model would provide substantial resources to assist collaborative decision making, and would frame litigation as an exploration of alternate parenting plans rather than as a battle. Finally, a child-centered model includes collaboration between the legal and mental health professions in considering what is in a child's best interests.
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> Shear, *From Competition to Complementarity…*, *supra.* At 312.

The more permanent the order, and the brighter the line between custodial and noncustodial parents, the more adversarial custody disputes become. The changed circumstances rule escalates the stakes entailed in custody decisions and thus polarizes the parents. All economic and emotional resources must be marshaled for an early battle. Yet those experienced in ADR know that compromise and

settlement are cumulative and progressive. Studies of the divorce process show that emotional intensity and distrust are at their peak at separation, when custody decisions must be made. If parents can make short term, tentative, collaborative decisions they build confidence and experience in cooperation, and are likely to never need judicial intervention. If they are forced by legal doctrines into armed camps, the opportunity for such baby steps is foreclosed.

In considering the "permanence" of custody orders one must look at the circumstances under which they are made. Family courts are not funded in proportion to their caseloads, or to the complexity, importance, or longevity of the cases they decide. The family law case load has grown incrementally, not just in size but complexity. Unfortunately, few family lawyers are appointed to the bench and family law is unrepresented in the appellate courts so the trial judge is often learning on the job. Family law judicial officers must learn law, psychology, accounting, business valuation, and (in order to make realistic attorneys fees awards) the economic realities of family law practice. They must make quick assessments of credibility and parental functioning. Most decisions are made on the fly. A couples' assets, obligations, future support arrangements and parenting plan are all at issue in the "average" dissolution proceedings. Those making decisions about the allocation of resources in this state's family courts tend to be former D.A.'s and civil litigators without deep insight into the complexities of family law. Family law judicial officers carry far heavier and more complex caseloads than their colleagues. Family law cases have long lives. Not only do children's needs require periodic review and adaptation of parenting plans, but support and retirement plan issues may cause reopening of dissolution files decades after the original judgment was entered. Consequently, statistics compiled by number of filings alone fail to reflect the true workload of a family law courtroom. A typical California family law judicial officer greets a calendar of 30 to 75 cases each morning. Children wait months and months (while custody evaluations get stale) for a hearing to determine their parenting plans. Each of those cases presents complex issues of great importance to the family, and often to society. Deborah J. Chase, Sue Alexander & Barbara J. Miller, *Community Courts and Family Law*, 2 J. of the Center for Children, Families & the Courts 37 (2000) http://www.courtinfo.ca.gov/programs/childrenandthecourts/resource/jourvol2.htm.

California's children are shortchanged by a series of shortcuts designed to accommodate the overcrowding of family courts. Children's futures, particularly in modification proceedings, are decided based only on declarations in thousands of cases, as trial courts use *Reifler v. Superior Court* (1974) 39 Cal.App.3d 479 to support procedures which would not be tolerated in other litigation of far less complexity and social significance. See *Lammers v. Superior Court* (2000) 83 Cal.App.4th 1309. Expansion of the changed circumstances test is yet another shortcut, designed to accommodate the failure of the State and individual courts to adequately fund family law departments. If this Court decides that

children deserve the best, not the least, that the Court can offer, budgetary priorities will have to be reconsidered. The U.S. Commission on Child and Family Welfare (Parenting Our Children…, *supra.* at pp. 31-32) expressed dismay at the failure of the States to adequately fund family law courts, and staff them with judicial officers who have sufficient expertise.

If the State is serious about meeting the needs of children, its response to the increasing number and complexity of family law issues cannot be to slam the door of the courthouse in the face of parents. While some modifications proceedings are manifestions of parental discontent unrelated to the children's well-being, a substantial number signal real trouble with the plan which requires intervention. Experienced and cross-trained judges would not have a great deal of difficulty telling the difference. Waiting until difficulties cause more severe harm to the child in order to meet a "changed circumstances" threshold is poor public policy. Instead of beefing up the changed circumstances rule, the judicial system must turn to a reallocation of court resources, which recognizes the societal importance of what happens in family law courtrooms, and the true percentage of the case load which family law represents. Properly staffed and funded, parent education[30] and family court services programs would provide a far more effective and child-centered gatekeeper function than is offered by the changed circumstances doctrine. Expanded judicial education, recruitment of judicial officers with substantial family law experience, allowing the accumulation of wisdom and experience rather than rotating judges in and out of family law courtrooms, and increasing the availability of staff attorneys to assist judicial officers all would better serve the families of this state.

One proposed justification for the broadened changed circumstances test is the notion that children are best protected from the deleterious effects of parental conflicts by preventing relitigation. That notion is an oversimplification. It is *unresolved* parental conflict which threatens children's well-being. Joan B. Kelly, *Children's Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research*, 39 J. of the American Academy of Child & Adolescent Psychiatry 963 (2000). "Research indicates that the intensity and frequency of parent conflict, the style of conflict, its manner of resolution, and the presence of buffers to ameliorate the effects of high conflict are the most important predictors of child adjustment."

> The manner in which parents resolve their conflict has been determined to affect the impact of high conflict on children's adjustment. Chronic, unresolved conflict is associated with greater emotional insecurity in children. Fear, distress, and other symptoms in children are diminished when parents resolve their significant conflicts, as opposed to no

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[30] See the Special Issue of Family Conciliation Courts Rev. (Volume 34, No. 1, 1996) entitled *Parent Education In Divorce and Separation*.

> resolution, and when parents use more compromise and negotiation methods rather than verbal attacks (Cummings and Davies, 1994). The beneficial effects of these more resolution-oriented behaviors have been reported whether occurring behind closed doors or in front of the child.
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> *Id.*

Family courts are society's legitimate forum for peaceful, child-centered parental dispute resolution with professional assistance. Family courts have the opportunity both to resolve parental conflicts and to put buffers in place to ameliorate the adverse effects of high conflict on children. Children are best protected from unresolved conflict when society provides meaningful opportunities for child-centered dispute resolution.

Courts should be respectful of parents' concerns about their children. Failure to assist families with their disputes about their children's care perpetuates those disputes within the family, feeds resentment, and is likely to ensure that the children experience chronic unresolved conflict, rather than seeing their parents use society's processes to resolve the dispute. Children may absorb parental bitterness towards societal institutions, a sense of powerlessness, resentment and futility.[31] When we ignore the plight of these children, we place them at serious risk.[32] Hearing modifications does not mean that all modification requests should be granted. In those cases where the Court declines to otherwise modify the plan, therapeutic interventions should be considered. (Family Code § 3190 *et. seq.*)

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[31] Courts should also be mindful that perceived injustice is a common trigger of workplace violence. One of the primary functions of courts is the provision of fair forum. When that forum is withheld, violence within the family or violence directed at the court system are likely to result. Family courts are already under seige. Here the court system could take its cue from organizational psychologists who focus on the link between perceived injustice and workplace violence. R. Folger & R. A. Baron, *Violence and Hostility at Work: a Model of Reactions to Perceived Injustice* in G. R. VandenBos & E. Q. Bulatao (Eds.), Violence on the Job: Identifying Risks and Developing Solutions 51-85 (1996); D. P Skarlicki & R. Folger, *Retaliation for Perceived Unfair Treatment: Examining the Roles of Procedural and Interactional Justice.* 82 J. of Applied Psychology 434 (1997); Gerold Mikula, Klaus R. Scherer, & Ursula Athenstaedt, *the Role of Injustice in the Elicitation of Differential Emotional Reactions*, 24 Personality & Social Psychology Bulletin 769 (1998); Joel H. Neuman, *Workplace Violence and Workplace Aggression: Evidence Concerning Specific Forms, Potential Causes, and Preferred Targets*, J. of Management (1998) (call up the title at http://www.findarticles.com ). Neuman observes, "Fairness and respect for the individual is a cornerstone of well-designed prevention programs (e.g., Anfuso, 1994; Nicoletti & Spooner, 1996)." Parents concerned about their children's welfare perceive the changed circumstances test, particularly as it is increasingly applied to bar most modifications, as profoundly unjust. Some of them will pose a risk within the family; others will direct their anger at the Court.

[32] For example, divorce increases the risk of teen suicide. Madelyn S. Gould, *Separation/Divorce and Child and Adolescent Completed Suicide*, 79 J. of the American Academy of Child & Adolescent Psychiatry 490 (1998) http://www.findarticles.com.

> The data suggests that even families experiencing chronic and severe post-divorce problems can be assisted by therapeutic intervention. Styles of therapeutic intervention can be designed to meet the specific problems of the children and families. Within a therapeutic environment parents do have some capacity to develop more trust, empathy, and tolerance for existing differences. They also have the ability to develop the specific behavior and cognitive strategies necessary to assist their children in working through specific problems of divorce.
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> Anita K. Lampel, *Post-Divorce Therapy with Highly Conflicted Families*, 6 Independent Practitioner (1986)

When Courts ignore the post-judgment difficulties parents and children encounter they ignore the "overarching" statutory best interests mandate.

**UNDERSTANDING CHILDREN'S RELATIONSHIPS WITH PARENTS AND CAREGIVERS – MOVING BEYOND THE PSYCHOLOGICAL PARENT CONSTRUCT**

> Courts and legislatures, in attempting to balance the child's need for a consistent relationships with the primary caregiver, the child's need for significant relationships with both parents, and the rights and obligations of parents to raise and support their children, have sometimes sought refuge from the complexity inherent in these decisions by taking a formulaic approach. The formulas adopted have changed with the times.
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> Alicia F. Lieberman & Patricia Van Horn, *Attachment, Trauma, and Domestic Violence,* 7 Child & Adolescent Psychiatric Clinics in North America (Child Custody) 423, 438 (1998)

Family Code §3040 (Former Civil Code §4600) requires courts to base each custody determination on the child's best interests. The best interests doctrine replaced California's maternal preference rule in 1972, creating a new paradigm for child custody determinations. For the first time in history, the child's needs rather than the parents' rights would govern custodial arrangements.[33] Unlike prior doctrines, the best interests standard mandates individualized determinations of a particular child's needs and her parents' capacities to meet those needs. "Under [the best interests] standard, there is a case by case determination of the best ways to meet the unique needs of each child." Richard E. Behrman and Linda Sandham Quinn, *Children and Divorce: Overview and Analysis*, in 4 The Future of Children: Children & Divorce 4, 8 (1994) www.futureofchildren.org.

California's changed circumstances doctrine is a court-created doctrine, created in *Marriage of Carney* (1979) 25 Cal.3d 725. It was intended to promote and expand the best interests mandate. Justice

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[33] Elizabeth M. Ellis, *Divorce Wars: Interventions with Families in Conflict* 9-21 (2000); Barbara Bennett Woodhouse, *Child Custody in the Age of Children's Rights…supra.;* Leslie Ellen Shear, *From Competition to Complementarity: Legal Issues and their Clinical Implications in Custody*, 7 Child & Adolescent Psychiatric Clinics of North America 311 (1998); Mary Ann Mason, From Father's Property to Children's Rights: The History of Child Custody in the United States (1994); Joan B. Kelly, *The Determination of Child Custody*, 4 The Future of Children: Children & Divorce 121 (1994) http://www.futureofchildren.org/cad/index.htm

Stanley Mosk, writing for the majority, opened the opinion by defining the court's task as reconciling society's interest in the children's best interests and its moral and legal obligation to respect the rights of handicapped citizens. The heart of *Carney* was its definition of best interests as preservation of the children's psychological attachment to their sole caretaker. *Carney* was an unfortunate choice for exploration of the meaning of best interests because the children had no on-going relationship with their mother, who had not seen them in five years and lived on the opposite coast. Unlike the *Carney* children, most children whose futures are decided by California's family courts enjoy and benefit from multiple attachments.[34]

In their recent article for the Journal of the Center for Families, Children & the Courts, a physician and a California Superior Court Judge urge Courts and forensic professionals to replace their focus on attachment with the more complete perspective encompassed by the concept of "reciprocal connectedness." This concept had not yet emerged when *Carney* was decided.

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[34] See, *inter alia*, T. Berry Brazelton & Stanley I. Greenspan, The Irreducible Needs of Children: What Every Child Must Have to Grow, Learn and Flourish, Chapter 1 "The Need for Ongoing Nurturing Relationships" (2000); Daniel J. Siegel, The Developing Mind: Toward a Neurobiology of Interpersonal Experience, Chapter 3 "Attachment" (1999); Dorothy Huntington, *Divorce and the Developmental Needs of Children,* in California Chapter Association of Family and Conciliation Courts Institute for Training and Research, Mediation of Child Custody and Visitation Disputes: Transcripts from the Vallombrosa Retreat September 1981 33 (1982); National Research Council Institute of Medicine, From Neurons to Neighborhoods: The Science of Early Childhood Development, Chapter 9 "Nurturing Relationships" (2000) (can be read on the internet at www.nap.edu); Kyle D. Pruett, Fatherneed: Why Father Care Is as Essential as Mother Care for Your Child (2000); Kyle D. Pruett, Me, Myself and I: How Children Build Their Sense of Self :18 to 36 Months (1999); Jonathan W. Gould, Conducting Scientificallly Crafted Child Custody Evaluations; Michael D. Kaplan, M.D. & Kyle D. Pruett, M.D. *Divorce and Custody: Developmental Implications*, in Charles H. Zeanah, Jr. Ed., Handbook of Infant Mental Health (2d Ed.) 533 (2000); Thomas M. Horner & Melvin J. Guyer, *Infant Placement and Custody* in Charles H. Zeanah, Jr. Ed., Handbook of Infant Mental Health (1st Ed.) 462 (1993); Joan B. Kelly, Ph.D. & Michael E. Lamb, Ph.D. *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children* 38 Family & Conciliation Courts Rev. 297 (2000); Alicia F. Lieberman, The Emotional Life of the Toddler (1993); Linda C. Mayes & Adrian Moliter-Siegl,, *The Impact of Divorce on Infants and Very Young Children*, in Robert M. Galatzer-Levy & Louis Kraus, Ed., The Scientific Basis of Child Custody Decisions (1999); David Popenoe, Life Without Father (1996); Janet R. Johnston & Vivienne Roseby, Ph.D., In the Name of the Child: a Developmental Approach to Understanding and Helping Children of Conflicted and Violent Divorce (1997); Sara S. McLanahan, *Father Absence and Children's Welfare*, in E. Mavis Hetherington, Ed., Coping With Divorce, Single Parenting and Remarriage: A Risk and Resiliency Perspective (1999); Richard A. Warshak, Ph.D., *The Primary Parent Presumption: Primarily Meaningless* (1996) http://home.att.net/~rawars/PPP.htm [A version of this essay was published as Chapter 28 (pages 101-103) in 101+ Practical Solutions for the Family Lawyer, Gregg M. Herman, Editor, American Bar Association (1996).]; Arlene Skolnick, *Solomon's Children: The New Biologism, Psychological Parenthood, Attachment Theory, and the Best Interests Standard,* in Mary Ann Mason, Arlene Skolnick & Stephen D. Sugarman, *supra.* at p. 236.

> …[O]nce it is clearly understood that children can, do, and should have relationships with more than one caregiver or sets of caregivers, (Footnote omitted.), "[t]here is a need both to consider dyadic relationships in terms that go beyond attachment concepts, and to consider social systems that extend beyond dyads.
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> Modern attachment theory addresses the dyadic nature of relationships but excludes the wider system of relatedness in which most children participate. It draws on historical and experimental psychological theory as its basis. Forensic mental health professionals, however, have extended the concept of attachment beyond its scientific and theoretical basis. When testifying about attachment, experts may thus inadvertently give the false impressions that their subjective clinical impressions possess scientific validity. For example, the authors have heard experts declare that because a child was bonded to her foster mother, she could not be bonded to her psychological mother.
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> This position assumes that a child bonds exclusively with one adult, that such bonds admit no degrees, and that the existence and intensity of bonds do not change as the child develops. All of these assumptions are dangerously misguided.
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> David E. Arredondo & Leonard P. Edwards, *Attachment, Bonding, and Reciprocal Connectedness: Limitations of Attachment Theory in Juvenile and Family Court*, 2 J. of the Center for Families, Children & the Courts 109, 110 (2000) http://www.courtinfo.ca.gov/programs/childrenandthecourts/resource/jourvol2.htm

Arredondo and Edwards explain,

> In a forensic setting, attachment theory is critically limited because it describes attachment in terms of *categories* instead of more accurately conceptualizing interrelatedness as a *spectrum* of continuously distributed variables. (Footnote omitted.) The concept of reciprocal connectedness openly acknowledges the difficulty of categorizing human relationships. Instead, it points to a *spectrum* of relatedness.
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> *Supra.* at 111.

Thus the changed circumstances doctrine, as interpreted in recent years, is based upon the most oversimplified and constricted view of an obsolete psychological construct.

> "Reciprocal connectedness" paints a more comprehensive and subtle picture of relationships than do "bonding" and "attachment." In the context of decision making in the family court setting, we can define it as a mutual interrelatedness that is characterized by two-way interaction between a child and an adult caregiver and by the caregiver's sensitivity to the child's developmental needs. The concept is more useful than "attachment" to courts because it describes a child's requirements for healthy neurobiological, social and emotional development and distinguishes them from simple dependency (security-seeking). It more closely approximates the knowledge necessary for a judge to make decisions about the neurobiological best interest of the child.
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> *Supra.* at 112.

Shortly after the decision in *Carney*, Justice Stanley Mosk gave an address at Los Angeles' annual Child Custody Colloquium. He was asked whether the changed circumstances test was intended to

bar modifications based upon incremental changes such as age, stage of development or family dynamics. Justice Mosk said "no."[35]

It was natural in 1979 for this Court to turn to the new concept of the psychological parent[36] in a case where the children's attachment to their mother had atrophied over years of abandonment. However, subsequent research has not supported the notion that children have a single, psychological parent.

> The notion that children have only one psychological parent has been thoroughly discredited by a large body of evidence that has demonstrated that infants normally develop close attachments to both of their parents, that this occurs at about the same time (approximately 6 months of age), and that they do best when they have the opportunity to establish and maintain such attachments (Biller, 1993; Lamb, 1997; Parke, 1981; Warshak, 1992)
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> Richard A. Warshak, *Blanket Restrictions: Overnight Contact Between Parents and Young Children*, 38 Family & Conciliation Courts Rev. 422, 427 (2000)

> In the decades since *Beyond the Best Interests* there have been major developments in the study of parent-child relationships in infancy and later on. As noted earlier "psychological parent" is a legal term, not a psychological one. Similar to the way "insanity" is a legal term that maps into the psychiatric concept of psychosis, psychological parenthood corresponds to the psychological concept of attachment. In both instances, however, the fit between the terms is not exact.
>
> Arlene Skolnick, *supra.* at 245

The world of custody decisionmaking has changed dramatically since this Court decided *Carney*. Court orders no longer award custody, they create parenting plans. Courts now have family court services programs, mental health professionals in the community have attained greater sophistication at working with divorcing families, parent education programs are offered in the courthouse and the community, treatment programs for children are growing and research into the needs of children and the effectiveness of various interventions has given us a far more complex and effective understanding of separation, divorce and children's welfare. The professional community realizes that the original parenting plan must be adapted over the life of the child, even though the Fourth District does not. Most parents accomplish these adjustments without a return to Court. The courthouse must welcome parents who recognize that a plan created for their two-year-olds makes no sense when their child is seven or eight. If the changed circumstances rule is permitted to preclude most post-judgment modifications children, and, consequently, society, will suffer.

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[35] Plenary session, *Fifth Annual Family Law Colloquium: The Child, the Family and the Legal System,* sponsored by the Family Law Department of the Los Angeles Superior Court, the Family Law Section of the Los Angeles County Bar Association; The Association of Family Conciliation Courts – California Chapter, 1981 Los Angeles Biltmore Hotel (question posed by Leslie Ellen Shear)

[36] Joseph Goldstein, Anna Freud & Albert Solnit, *Beyond the Best Interests of the Child* (1973).

Understanding of the unique contributions that each parent makes to a child's development has exploded since *Carney.* The Legislature recognized this change through the principles of frequent and continuing contact (Family Code §3020 and Family Code §3040), and with the introduction of joint custody (Family Code §3080 *et. seq.*). These enactments were the next steps in the best interests revolution. The task of the family (and the court where the parents need assistance) shifted from choosing between the parents to developing, implementing and adapting a comprehensive parenting plan in which each parents' strengths and limitations balance out the other parents' strengths and limitations. The bright line between custody and visitation vanished. "Visitation" has come to be seen as a demeaning mark of second-class parenthood and a threat to parental identity.[37] [38]

*Marriage of Burgess*, *supra.,* is part of the line of cases that refined the definition of best interests under California law. (*Marriage of Carney*, *supra.*; *Burchard v. Garay* (1986) 42 Cal.3d 531, 229 Cal.Rptr. 800, 724 P.2d 486). Together *Carney, Burchard*, and *Burgess* are best read for the proposition that courts must protect the continuity of children's healthy psychological attachments and pattern of high quality care. The cases define best interests in the context of asking, "What constitutes a material change of circumstances?" The answer to that question is "A change which impacts on the child's best interests." This is a shift of focus from the nature of the circumstances to the nature of their effect on the child. To define the role of changed circumstances, these courts had to define the heart of best interests. The courts recognized that the reality – including the quality, of children's relationships and care – not the timeshare, matter most when courts decide children's futures. While such relationships and patterns of care may often track the custody schedule, they do not necessarily do so.

Many mental health and family law professionals were troubled by this Court's decision in *Burgess* and the series of appellate cases interpreting it.[39] *Burgess* upheld a trial judge's conclusion that

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[37] In this context, it is important to distinguish between those families who seek court assistance in developing parenting plans, and those who do not. While most research finds that primary maternal custody is the predominant parenting plan, families who come to court usually involve two motivated parents each of whom desperately fears the loss of the opportunity to raise the child.

[38] Anne Endress Skove, *Parenting Time* in Knowledge Management Office of the National Center for State Courts, Report on Trends in the State Courts http://www.ncsc.dni.us/KMO/Projects/Trends/99-00/articles/Parent-Time.htm#Parent

[39] See Richard A. Warshak, *Social Science and Children's Best Interest in Relocation Cases: Burgess Revisited*, 34 Family Law Quarterly 83 (2000); Leslie Ellen Shear, *Life Stories, Doctrines, and Decision Making: Three High Courts Confront the Move-Away Dilemma*, 34 Family & Conciliation Courts Rev., 439 (1996); Samuel Roll, *How a Child Views the Move: The Psychology of Attachment, Separation and Loss*, 20 ABA Family Advocate (1997); William G. Austin, Ph.D., *A Forensic*

relocation to a nearby town was not a change of circumstances sufficient to trigger reassessment of the children's best interests. The Court looked at the labels, rather than the plan. The mother had been termed the "primary caretaker, although the actual timeshare was close to equal. The rationale for *Burgess* was stability of the children's attachment to a single, primary caretaker, i.e. the psychological parent doctrine. *Amica curiae* Judith Wallerstein noted that this analysis should not apply to those families in which both parents played a substantial role in childrearing. The Court thus concluded, in Footnote 12, that moves by a joint custody parent may require a different analysis.

Relying upon and expanding *Burgess, In re Marriage of Edlund and Hales* (1998) 66 Cal. App. 4th 1454 held, erroneously, that residential relocation cannot be a change of circumstances. Since all aspects of the child's life, including the relationship with the "custodial" parent[40], are dramatically changed by a move, this expansion of the changed circumstances doctrine carried grave consequences for all modification proceedings, not just move-aways.

Unfortunately *Burgess* has been read as an extending the application of a legal-psychiatric construct – the psychological parent – from application to children who only had one meaningful parent-child attachment to most children who have two homes.[41] Subsequent appellate decisions ignored the theoretical underpinnings of *Carney* and *Burgess*, i.e. that best interests requires preservation of children's critical relationships, and started classifying families as sole or joint custody based upon the percentage of time share. *Brody v. Kroll* (1996) 45 Cal. App. 4th 1732; *In re Marriage of Whealon* (1997) 53 Cal. App. 4th 132; and *In re Marriage of Biallas* (1998) 65 Cal. App. 4th 75. This focus on timeshare ignored the issues of attachment and complementary parenting in a futile quest for a bright line standard. There is no factual or psychological basis finding a direct correlation between timeshare and attachment, the importance of each attachment, or the child's need for multiple attachments. Custody negotiations

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*Psychology Model of Risk Assessment for Child Custody Relocation Law*, 38 Family & Conciliation Courts Rev. 197 (2000); William G. Austin, *Relocation Law and the Threshold of Harm: Integrating Legal and Behavioral Perspectives*, 34 Family Law Quarterly 63 (2000); Herbert N. Weissman, *Psychotherapeutic and Psycholegal Considerations: When a Custodial Parent Seeks to Move Away*, American J. of Family Therapy 176 (1994); Jonathan W. Gould, Conducting Scientifically Crafted Child Custody Evaluations, 1998, Sage: Thousand Oaks, CA, 140-144.)

[40] Even in families which do not meet the Footnote 12 exception, parents function in a complementary fashion. The loss of the left-behind parent's contributions to childrearing is apt to leave the "custodial" parent stressed, overburdened, and without a safety net in times of need. Parental strengths and limitations no longer balance each other out.

[41] Arredondo and Edwards trace the history and limitations of this doctrine in *Attachment, Bonding, and Reciprocal Connectedness, supra.* at 118-119

have come to be shaped around the percentage of timeshare and the discussion has devolved into debate about how to count time children spend asleep, in school, with a nanny, in the custody of one parent who is traveling on business, in day care, etc. The red herring of timeshare distracts parents from the practical aspects of planning for their children's care. Statistics dominate the debate, which should be focused on the meaningful dimensions of children's lives, relationships and experiences. In applying *Burgess*, the state's appellate courts strayed far from the child-centered policies of *Carney*.

> Owing to the multiplicity of child needs and caregiving responsibilities, it is often difficult to distinguish after the earliest period which of two involved parents the child experiences as the primary caregiver at any given time. Both parents assume different but equally valuable responsibilities in the upbringing of their children. Traditional role differences between mothers and fathers have blurred in response to changing attitudes about how important it is to children and their parents that both parents be engaged in nurturing activities. Pleck (Endnote omitted.) argues that fathering more than mothering is shaped by contextual forces in the family and society and, as such, fluctuates its behavioral norms more with historical changes.[42]
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> Marsha Kline Pruett and Kyle D. Pruett, *Fathers, Divorce, and Their Children, supra.* 392

Most children whose cases come before family courts have a strong, important and unique relationship with each of their parents.

> We can say that both parents contribute distinctively to their child's welfare. And during different developmental stages a child may relate better to one parent than the other, or rely on one parent more than the other. But most children form strong attachments to both parents in the first year of life and maintain important ties to both parents throughout their lives. By rank ordering the importance of parents, we dismiss children's own experiences of their parents' value, reinforce gender stereotypes, and perhaps discourage fathers from assuming more parenting responsibilities.
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> Richard Warshak, *The Primary Parent Presumption, supra.*

Protection of one parent-child relationship at the cost of the other does not promote a child's best interests. Distinctions between primary and secondary parents may satisfy courts, but they deny the realities of the child's emotional world.

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[42] In considering what weight to give Wallerstein's conclusions about the primacy of maternal care, one should recall that the *Surviving the Breakup* families she has studied for 25 years represent the last group of fathers who were not present in the delivery room and taking an active involvement in childrearing and the last of the nonworking mothers. The experiences of these families (which were a clinical, not a randomly selected, sample) are not always consistent with the experiences of families in 21st Century courtrooms. Constance Ahrons is just completing analysis of the data from the 20-year followup of the children in her randomly selected binuclear family study. She presents a far different picture of the longitudinal experience of divorce and the roles of each parent. Constance Ahrons, *Young Adults Speak Out Twenty Years Later: Preliminary Findings From the Binuclear Family Study,* presented at Do Great Work – See Great Works, AFCC California Chapter Conference February 3, 2001, Pasadena, California.

…[I]t is not at all clear that distinctions can be made between primary and secondary caregiving roles in many families with children above age four because of the diversity of children's needs and the multidimensionality of parenting roles and responsibilities. (Footnote omitted.) Because both parents assume meaningful but different roles and relationships with offspring, each parent is a "primary caretaker" of older children in different ways, and custody decisions might better focus on maintaining relationships with each parent rather than just the "primary" one.

Moreover, it is not at all clear that, when both parents assume *some* responsibility for the child's bathing, feeding, health, and basic care – the relative extent of their responsibility for these tasks defines the most significant dimension on which to rest a custody decision. In a sense … criteria for defining 'primary caretaker' status are among the *least* meaningful indices because basic maintenance tasks like meal preparation, bathing and chauffeuring can be readily assumed by either parent regardless of the level of his or her predivorce responsibility for these concerns. Many of these responsibilities are activities done *for* the child rather than *with* the child. (Footnote omitted.) The focus of a custody inquiry should properly be the meaning and significance of each parent's *relationship with* the child, which is far more difficult to assess and which is not easily indexed by inquiring which parent regularly dressed and bathed the child. Substituting quick evaluations of parental responsibility for maintenance of care for a searching inquiry into parent-child relationships does not contribute to valid or meaningful child custody decisions.

Ross A. Thompson, *The Role of the Father After Divorce*, 4 The Future of Children: Children & Divorce 210, 217-218 (1994)
http://www.futureofchildren.org/cad/index.htm

Caretaking is not necessarily parenting; quality matters more than quantity. In divorce cases, when a "primary caretaker" standard is used by the court, caretaking is often evaluated by counting the number of hours spent in the home with the child, or the number of routine tasks undertaken by each parent – preparing meals, bathing, and dressing. The assumption is that these activities are likely to indicate which parent is closer to the child. A parent, particularly a mother, who works full time and uses a nanny or day care, may be judged an inadequate caretaker by these standards.

…[W]e know from the research literature that it is the emotional quality of the interaction that has significance for the child, not the quantity of time. It is the give and take reciprocity of interaction, attention to what the child is feeling or trying to communicate, and being in touch with the child's interests and concerns, that create a strong adult-child bond.

Arlene Skolnick, *Solomon's Children...*, supra. at pp. 250-251

The importance of each parent's participation in childrearing cannot be determined by timeshare alone. Kelly identifies the following dimensions of parental involvement as important considerations in the development of a parenting plan:

What Dimensions of Parental Involvement Were/Are Present?

- Manager of child's time, routines, and transportation
- Provide physical assistance – meals, bathing, dressing, maintain safety
- Play, motor skills development, recreational programs
- Emotional input – love, interest in child's life, support, self-esteem, nurturance

- Intellectual stimulation and encouragement – reading, puzzles, concepts, exploration
- Assisting with child's "work" – values, discipline, appropriate behavior
- Economic – provide child's financial security.

Joan B. Kelly, *Child Development Research and Concepts: Reaching Appropriate Parenting Plans* (Academy of Family Mediators Conference, July 11, 1998)

Parents, within and outside of marriage, usually have different, but complementary, skills and attributes which combine to meet the child's needs. This is not just true in families where the residential timeshare is approximately equal. Parents who assume regular responsibility for their children offer the other parent a respite, while offering the child a different parenting style and different strengths. The parent who has the greater timeshare's effectiveness is made possible by the complementary contributions of the other parent.

Since *Carney*, understanding of the importance of children's multiple relationships has burgeoned. The concept of a sole psychological parent has proved not to be a good fit in custody cases[43], as fathers in the last two decades assumed a greater interest and participation in child-rearing and mothers entered the workforce in large numbers. Like the *Burgess* children, the children in most families who litigate have more than one actual or potential psychological parent. Disengaged parents, who are not attached to their children, are often not prone to come to court or to oppose relocation by a true primary parent. Thus broad national samples of post-divorce parenting arrangements offer little insight into the families before the Court. Custody law premised on the notion that most children have a single permanent

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[43] "One specific proposal to reduce indeterminacy of the best interests standard was posited by Goldstein et al in *Beyond the Best Interests of the Child,* their book pertaining to child custody and placement issues. (Endnote omitted.) The authors propose that decisions be made swiftly with regard for a child's sense of time and with finality to preserve caretaking continuity and a child's sense of security. The goal of custody is to preserve and protect the child's relationship with his or her psychologic parent. The proposal has received broad clinical support, being challenged with regard to custody following divorce. The main controversy surrounding the authors' ideas is the establishment of a primary caretaker when parents cannot cooperate, leaving the survival and continuity of the relationship between the child and the noncustodial parent to the primary parent's discretion. While the proposal makes intuitive and clinical sense insofar as it introduces a clarity and a clean break from the divorce for the custodial parent, it seems less appropriate when the child has two psychologic parents. Supporting the child's continuity with one psychologic parent requires, with some high-conflict couples, supporting permanent discontinuity with the other psychologic parent. This component is applied more flexibly in the book's most recent revision, (Endnote omitted.) possibly because of useful accumulated experience and discussion in the intervening era."

Marsha Kline Pruett and Kyle D. Pruett, *Fathers, Divorce, and Their Children*, *supra.* 389, 391 (The Pruetts and Albert Solnit (co-author of *Beyond the Best Interests*...) are on the faculty of the Yale Child Study Center.)

primary psychological parent does not meet the needs of most families who seek judicial or court-connected assistance with their parenting plans. (See *amici curiae* brief of Mary A. Duryee *et. al.*)

## CONCLUSION:

## REFINING THE DEFINITION OF CHANGED CIRCUMSTANCES FOR 21ST CENTURY COURTS AND FAMILIES

> The "best interest of the child" implies attention to what is the best result for the child from the child's perspective. This necessarily involves attention to child development principles.
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> David E. Arredondo & Leonard P. Edwards, *Attachment, Bonding, and Reciprocal Connectedness: Limitations of Attachment Theory in Juvenile and Family Court, supra.* at 122

> Parents and other caregivers constitute the parenting environment, which is at the core of the young child's world. There is a web of interactions affecting the child, including levels of parental involvement with the child and the emotional quality and parenting styles characterizing the relationships. The relationships among the caregivers also affect the parenting environment, as does the psychological adjustment of each caregiver, and the caregivers' abilities to see beyond their own needs and put the child's needs first.
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> Mary Ann Whiteside, *An Integrative Review…* Executive Summary, http://www.courtinfo.ca.gov/courtadmin/aoc/familycourtservices/grants/custodyforchildren/custodyexecsumm.doc

In *Carney* this Court held that although the custodial father had become a quadriplegic, there was no change of circumstances supporting a new best interests determination because the heart of best interests was found to be continuity of intangible emotional attachments and guidance, not the physical caretaking. In *Burchard*, continuity of emotional attachments outweighed the greater physical caretaking availability of a full time, stay-at-home stepmother. Finally, in *Burgess*, the Supreme Court held that a move by a child's primary caretaker does not constitute a change of circumstances affecting the child's best interests. While the three cases are most often cited in the context of the changed circumstances rule, their deepest significance is the recognition that a best interests determination entails preservation of continuity of actual close bonds and active caretaking, not a particular percentage of physical caretaking. *In re Marriage of Birnbaum* (1989) 211 Cal.App.3d 1508 underscored the lack of importance of the details of the schedule, noting that no change of circumstances is required for a rearrangement of the residential schedule.

Childhood, and family life consist of constantly changing circumstances which both discretely and cumulatively impact custody issues as profoundly as does the occasional dramatic change. There are almost always changed circumstances, and many of the changes are important. Children develop and their

needs differ at different ages and stages. Relationships are dynamic. We must expect parenting plans to be adapted over time and not view every request for modification as evidence of pathology.

Even if one parent plays a larger role in childrearing at the time the family comes to court, that role may shift between the parents at different moments in time. Children need different things from their parents at different moments in their lives. The parent who may be best suited to nurture or breast feed an infant may be less well equipped to meet the child's needs as he starts school. The other parent may be more likely to help the child develop strong social skills, provide intellectual stimulation, or encourage the child's growing autonomy. Ongoing participation of the other parent in the child's life may be essential to balance out parental deficits or create a larger world view. If one parent's opportunity to care for the child is very limited or infrequent, then it is less likely that that parent's unique characteristics can play a complementary role. Moreover, without enough caretaking experiences at frequent enough intervals, it is impossible for the parent and child to establish and sustain attachment and attunement. Frequency becomes critically important for infants, toddlers and preschoolers who cannot maintain an attachment to a parent who doesn't care for them every few days. Visiting relationships are often strained by unfamiliarity and lack of attunement. Strong parenting requires lots of opportunity to parent. (See Kristine M. Rosenthal & Harry F. Keshet, Fathers Without Partners: A Study of Fathers and the Family After Marital Separation (1981) for the impact of different parenting plans on parenting effectiveness.)

In *Carney* stability meant continuity of the children's healthy attachments to their sole caretaker. In *Montenegro* stability was interpreted to mean not rescuing the child from the care of an angry and vindictive parent. In *Congdon* a judicial officer bent upon punishing a father for returns to Court used the change circumstances test to ignore the children's changing developmental needs and capacities. A global concept of stability ignores these profound individual differences. For many, if not most, 21st

Century children, stability[44] means continuity of their attachments with both parents, siblings and other family members.

Stability is but one of the many dimensions of a best interests determination. Legal doctrine should not break out one component of best interests and allow it to preclude consideration of all other factors. See Mary Ann Whiteside, *Executive Summary, supra.* for a discussion of the multiple factors which influence the outcome of custodial arrangements for children.

Experience and research have taught us what the best interests paradigm requires for its purposes to be served. However, the law retains artifacts of the prior paradigm, as evidenced by the Court of Appeal decisions in *Congdon, supra., Lester v. Lenanne, supra.* and *Montenegro*. Each of these cases focuses on the parents, not the children. While parents were the focus of the discarded parental preference standards, children must be the focus of best interests analyses. Application of the best interests doctrine requires a shift of focus from who wins custody to what plan meets the child's needs. It recognizes that children have multiple attachments, that families are dynamic, that children's needs change at each developmental stage, that educational and therapeutic interventions often should be attempted before more drastic measures, and that mothers and fathers make unique contributions to childrearing. (See also Elizabeth Scott, *Pluralism, Preference, and Child Custody*, 80 California Law Rev. 615 (1992) arguing that child custody determinations should preserve complementary roles for parents rather than choosing between them.)

The best interests standard requires individual, case by case determinations, rather than global formulas. The *Montenegro* trial court was operating within the 21st Century best interests paradigm.

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[44] In her report to the Judicial Council to assist family courts in understanding the needs of the young children whose futures they shape, *An Integrative Review of the Literature Pertinent to Custody for Children Five Years of Age and Younger*, 1996, Judicial Council of California Administrative Office of the Courts, pp.13-14 (available on-line at www.courtinfo.ca.gov), Dr. Mary Ann Whiteside describes the kind of stability needed by infants, toddlers and preschoolers whose parents live apart,

> [C]hildren in each of these age groups need stability. We may define stability with reference to several factors
>
> - continuity of relationships (children need to maintain ongoing, frequent contact with primary attachment figures);
> - the number and significance (to the child) of changes at any given time to which the child must accommodate (the more simultaneous significant changes, the more likely is the child to be overwhelmed); and
> - the degree of regularity and predictability within the child's daily and weekly schedule (children feel more secure when they are able to learn and predict their routines at mother's house, father's house, and their weekly schedule).

Unfortunately, the Court of Appeal reviewed that Court's actions using an antiquated frame of reference. Shear, *From Competition to Complementarity…*, *supra.* at p. 312. Table 1, compares the two paradigms:

| **Parental Rights/ Preference** | **Best Interest** |
|---|---|
| Global determination that custody should be awarded to a parent of a particular gender, absent special facts. | Case by case, individualized determinations of the needs of each particular child. |
| Award of custody to one person. | Development, implementation and adaptation of a detailed parenting plan. |
| Clear differentiation between custody and visitation. | Continuum of residence with varying allocations of "timeshare." |
| Permanent decision absent major change of circumstances. Static model of family relationships. | Adaption in response to developmental needs and family changes. Dynamic model of family relationships. |
| Adversary litigation model. | Multiple modes of dispute resolution. |
| Judges rely on moral imperative. | Expanded collaboration of legal system and social science. |

*Montenegro* provides an opportunity for the Supreme Court to begin the 21st Century with a modern best interests paradigm, reflecting the rapid expansion of expertise and interventions developed in the post-*Carney* decades. By reframing and refining the changed circumstances test to reflect children's multiple attachments and the dynamic nature of family life, this Court can further the evolution of the best interests doctrine.

> A sensitive policy analysis of law should seek to measure and weigh all of the various costs and benefits of legal rules. One important but previously neglected aspect of this policy calculus is the therapeutic impact of law. Therapeutic jurisprudence accordingly calls for a systematic study of law's therapeutic or antitherapeutic effects. These are not the only effects worth studying, but they should not be ignored. Therapeutic jurisprudence thus is largely a form of consequentialism. (Footnote omitted.) Although law is designed to serve various normative ends, scholars should study the extent to which these ends actually are furthered in practice. Once it is understood that rules of substantive law, legal procedures, and the roles of various actors in the legal system such as judges and lawyers have either positive or negative effects on the health and mental health of the people they affect, the need to assess these therapeutic consequences should not be neglected. Accomplishing positive therapeutic consequences or eliminating or minimizing antitherapeutic consequences thus emerges as an important objective in any sensible law reform effort.
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> Winick, *The Jurisprudence of Therapeutic Jurisprudence*, *supra.*

The changed circumstances test is a judge-made rule which must be subordinated to the statutory "best interests" mandate, which it purports to help define. Judges are well able to use their discretion to reject unnecessary modifications or those which are disguised appeals. The emotional and economic costs of litigation act as a sufficient deterrent in most cases. In those where they do not, there is often an underlying problem which requires intervention for the protection of the children.

Relitigation is often a symptom that something is awry. The problem may not be that which the moving party describes it to be. Nonetheless, where one parent is so discontented that he or she is coming back to court, this suggests that, at minimum, the family has need for support services, including parent education, counseling, mediation, appointment of a Parenting Plan Coordinator/Special Master, or minor's counsel. As a society, we have an obligation to protect children's best interests. We will have no way of knowing what those interests might be if we slam the courthouse door in their parents' faces. Nor is this "closed door" policy consistent across all post-divorce issues. While denying hearings on custody issues, we encourage regular relitigation of child support, even mandating regular modification proceedings in Child Support Agency enforcement cases. As noted herein, research into parental abduction demonstrates that the perceived unresponsiveness of the court system is cited by parents who engage in felonious self help. Courts close their doors at the peril of the children they are employed to protect and the society in which those children reside.

Every parenting plan is speculative by nature. Parents, lawyers, mental health professionals and judges make a prediction about what will work best, but our predictive abilities have limits. Sometimes we are wrong. Many families have little or no information about children's needs after divorce when they develop their parenting plans. Childhood is, by definition, a set of constantly changing circumstances. Children's needs, relationships, family configurations, understanding of the concept of time, activities, and capacities are always changing.

This Court should adopt a child-centered changed circumstances doctrine which is part of a best interests analysis, rather than a prelude to it. All parenting plan decisions must be guided by the child's best interests. Instead of looking to external events, family courts should look to the child's experience and needs. Such a standard can make it clear that returns to court will be judged based upon how the child is doing under the existing parenting plan and whether the proposed modification represents a significant improvement for the child. Modifications should also be permitted where logistics or other factors make continuing the existing plan infeasible or burdensome to child and family.

*Carney* stressed the intangible aspects of parenthood – love, moral guidance, and nurturance. The *Carney* message recognizing the heart of parent child relationship as the ethical, emotional and intellectual guidance that the parent gives the child throughout his formative years presents a marked contrast to

the Court of Appeal's description of Ms. Diaz' parenting in *Montenegro*. Given Ms. Diaz' reported hostility to Gregory's father, she clearly was not fulfilling these functions because she was teaching hate and disrespect for authority – warping her son's emotional development to satisfy her own needs to injure her "ex." Even if she kept a spotless house, cooked gourmet meals and her son was always perfectly dressed, those are not the essential functions of a parent. If she were a quadriplegic, she could employ a housekeeper to perform those tasks. What is essential to Gregory's best interests is how his parents teach him by word and, even more importantly, by example, to feel and think about his family and about others in general, and what they teach him about how to deal with problems and the importance of keeping commitments. The trial court's decision in *Montenegro* was consistent with the values of *Carney* and the Court of Appeal's decision ignored those values in favor of a mechanical application of doctrine without consideration of the real world effects.

The state has a duty to protect its children, for their own sakes, and so the society they people as adults will flourish. Damaged children are apt to become damaged adults, weakening rather than strengthening their communities. Many of the children whose best interests are ignored in Family Court will next be the subjects of Juvenile or Criminal Court proceedings. Doctrines implementing the best interest mandate must reflect society's best knowledge of children's needs and the real life circumstances of 21st Century children.

RESPECTFULLY SUBMITTED,

LESLIE ELLEN SHEAR
Attorney for Amici Curiae

## APPENDIX: BRIEF BIOGRAPHIES OF AMICI CURIAE

***Levitt and Quinn Family Law Center, Inc.***

*Jeffery Jacobsen, J.D., Executive Director*

Since 1981, Levitt & Quinn, a non-profit (501[c][3]) law firm, has provided family law services for the working poor and people of modest means in Los Angeles County. With a staff of six attorneys, five paralegals, support staff and volunteers, Levitt & Quinn works with several thousand clients each year on all aspects of their family law cases. Levitt & Quinn provides unbundled legal services to some family law clients and full representation to others.The vast majority of Levitt & Quinn's cases involve issues relating to children, including child custody, visitation and child support In the year 2000, Levitt & Quinn made more than six hundred court appearances on behalf of clients and expects this number to increase in 2001.

Twenty years ago, after dramatic budget cuts for Legal Aid and other government-funded family law service providers, three grandmothers, Ethel Levitt, Grace Quinn, and Ziva Naumann had a vision of how to address the enormous unmet family law needs of low-income residents in Los Angeles County. The majority of Levitt & Quinn's clientele would otherwise have no other place to go to for family law legal services. Unlike government-funded organizations, Levitt & Quinn predominantly serves the working poor in addition to clients on public assistance. The working poor, a huge demographic portion of Los Angeles, are in a "black hole" – employment makes them ineligible for most public legal services yet they cannot afford the retainers of private attorneys.

Levitt & Quinn seeks *amicus* status to offer analysis of the impact of a *Montenegro*-style changed circumstances test on poor and low income families and their children.

***Association of Certified Family Law Specialists***

*David Borges, J.D., CFLS, President*

*Lorraine Gollub, J.D., CFLS, Amicus Committee Chair*

ACFLS is a non-profit association of California's certified family law specialists. Approximately 500 certified family law specialists belong to ACFLS. The Association has an active *amicus* committee, which develops briefs which provide appellate courts with the perspective and experience of certified family law specialists whose advocacy is not constrained by advocacy for a particular client. Appellate courts have found ACFLS' *amicus* briefs so helpful, that they have requested ACFLS briefs. The ACFLS brief authored by Leslie Ellen Shear significantly influenced the Court of Appeal's analysis in *Marriage of Buzzanca* (1998) 61 Cal.App.4th 1410.

ACFLS members represent litigants of varying economic means and are often pioneers in the delivery of family law legal services. ACFLS has a great interest in the welfare of children in California's family courts, and its active minors' counsel committee has conducted programs and encouraged the development of legislation. ACFLS notes that neither the members of this Court, nor the staff attorneys have devoted their careers to family law and child custody. ACFLS has been gravely concerned with the recent trend to restrict consideration of children's best interests in custody modification proceedings, and requests an opportunity to present this brief on behalf of the minor child in *Montenegro.*

***Leslie Ellen Shear, J.D., CFLS***

Ms. Shear's practice emphasizes issues relating to children, including parenting plans (custody and visitation), parentage, and custody jurisdiction (interstate and international) matters. Her professional roles include consultation and coaching, mediation, litigation, appeals, parenting plan coordinator (special master) and representation of community mental health agencies and mental health professionals. She represented the minor child before the U.S. Supreme Court in *Michael H. v. Gerald D.,* submitted *amicus* briefs in *Marriage of Buzzanca* and *Marriage of Kelso* for ACFLS which influenced those decisions. She also was counsel in *Hocharian v. Superior Court* and *Marriage of Ohmer,* which resulted in published opinions, as well as other unpublished appeals and writs.

Ms. Shear has published a number of professional articles in national journals related to the issues before the Court in *Montenegro.* She serves on the governing boards or executive committees of the Association of Family and Conciliation Courts (California Chapter) and the Los Angeles County Bar Association Family Law Section. Ms. Shear was appointed to the State Bar of California, Board of Legal Specialization Family Law Advisory Commission in 2000. She has been an active member of the State Bar of California Family Law Section Subcommittee on Custody and Visitation (South) for two decades. She is a past Newsletter Editor and Secretary of the Association of Certified Family Law Specialists. She is a past board member of the San Fernando Valley Child Guidance Clinic.

Ms. Shear drafted California's statutory definition of legal custody and portions of AB 1526. She frequently provide lectures and trainings for mental health professionals, family court services, community mental health clinics, family lawyers and judicial officers, and to separated and divorced parents. Her work is cited in professional books and articles. She was on the faculty of the 1981 AFCC Valombrosa Retreat, which trained the state's custody mediators following the enactment of legislation mandating mediation of child custody disputes. She has a national reputation as an expert in child custody issues.

***Richard A. Warshak, Ph.D.***

Dr. Warshak is clinical, consulting, and research psychologist in private practice in Dallas, Texas, Clinical Full Professor of Psychology at the University of Texas Southwestern Medical Center, and past president of the Dallas Society for Psychoanalytic Psychology. Since 1977, as Director of the Texas Custody Research Project and Co-Principal Investigator of the National Institute of Mental Health Stepfamily Project, Dr. Warshak has studied the impact of divorce and remarriage. His studies are considered landmark work in child custody research. His work is cited often in the professional literature and in courtrooms and legislatures across the country, including the U.S. Congress, and earned him an invitation to the White House to discuss custody reform. By appointment of the State Bar of Texas, he serves on the Family Law Council's committee on expert witnesses. Dr. Warshak has written over thirty articles published in professional books and journals; most recently he has written about relocation, parental alienation syndrome, and overnight contact between parents and young children. Dr. Warshak's custody investigations culminated in the publication of his book *The Custody Revolution* (1992). His forthcoming book (Regan Books) offers specific advice to protect children from the effects of their parents' animosity and bad-mouthing. In addition to his custody work, Dr. Warshak developed the Inventory for Child and Adolescent Assessment (now in its second edition). It has become a valuable addition to social studies, custody evaluations, sex abuse evaluations, and consultations, and is used by attorneys and mediators to help understand children who are the subjects of litigation.

***Hugh McIsaac, M.A.***

Mr. McIsaac was Director of Family Court Services for the Los Angeles County Superior Court in Los Angeles from 1977-1993. Los Angeles County operates the world's largest family law court. Currently Mr. McIsaac is Director of the Oregon Family Institute and member of the Clatsop and Tillamook mediation panels on the Oregon Coast. Mr. McIsaac served as Director of Family Court Services in Portland, Oregon from1993-1998.

He edited Family and Conciliation Courts Review from 1986 to 1998. Mr. McIsaac also served as Fulbright lecturer New Zealand, 1986 (assisted in implementing New Zealand's family court reforms); President, Association of Family and Conciliation Courts, 1988; and conducted training in mediation of custody disputes for Barnardo's Home for Children in England, Family Mediation Scotland, and the Danish Amstadt in Fredicksburg, 1989. He participated in the development of the mandatory mediation and dependency mediation statutes in California; Consultant to the California State legislature, the Florida, Vermont, Ohio and New York Courts.

Other credits include: Member of the State Justice Institute's National Mediation Standards Committee 1989-91; Secretary to the Oregon Task Force on Family Law, 1994-1998. Member of the

State Family Law Advisory Committee from 1998 to present; Co-author, Futures Report Oregon State Family Law Advisory Committee.

***Philip M.Stahl, Ph.D.***

Dr. Stahl is a psychologist in private practice in Dublin California. He has been a frequent presenter at meetings of the Association of Family and Conciliation Courts, the American Psychological Association, California Psychological Association, American Orthopsychiatric Association, and local interdisciplinary meetings in Contra Costa County. Dr. Stahl has presented workshops at the statewide trainings for the California Judges (CJER) and the Utah Judges Association. He has trained custody evaluators for the state of Maryland, and for Sacramento, San Francisco, and Chico Counties in CA, Palm Beach County, FL, Las Vegas, NV, Baltimore, MD, Madison, WI, Topeka, KS, and Hartford, CN. He is on the faculty of National Judicial College and the National Council of Juvenile and Family Court Judges. He is an active member of the Association of Family & Conciliation Courts and is the Chair of AFCC's Child Custody Evaluation Committee. He is a member of the Board of the State Chapter of AFCC and the Editorial Review Board of AFCC's journal, Family Courts Review. He was a recent guest editor of the Review, as well (July, 2000).

Dr. Stahl has written extensively on various issues in high-conflict divorce and custody evaluation and is the author of *Complex Issues in Custody Evaluations* (Sage, 1999) and *Conducting Child Custody Evaluations: A Comprehensive Guide* (Sage, 1994). His publications include articles on ethics in AFCC's Resource Guide for Custody Evaluators (1995), on Second Opinion Reviews in Custody Evaluations (Family and Conciliation Courts Review, June 1996), and on Parental Alienation (California Psychologist, March, 1999). His newest book, *Parenting After Divorce*, was designed for parents and has just been published (Impact Publishers, 2000).

***Leonard Weiler, J.D., CFLS***

A member of the Alameda County and Contra Costa County Bar Associations as well as the California State Bar, the professional peer recognition of Mr. Weiler's family law expertise has been reflected in numerous leadership positions, including President of the Contra Costa County Bar Association Family Law Section (1997), President of the statewide Association of Certified Family Law Specialists (ACFLS) (1998), as well as founder and past chair of the Bay Area's Family Law Inter-County Council. He is a past member of the State Bar Standing Committee on Support North and the State Bar Conference of Delegates. He is a member of the California delegation to the Family Law Council of Community Property States. Mr. Weiler serves regularly as a Judge Pro Tem in the family law departments of the Alameda County and Contra Costa County Superior Courts. He has also been selected as an attorney fee arbitrator for both the Alameda County and Contra Costa County Bar Associations.

***Nancy Oleson, Ph.D.***

Dr. Olesen has worked in private practice for more than twenty years, with a particular emphasis on child abuse and neglect, custody and access disputes and the interface between clinical and forensic psychology. She has taught undergraduate and graduate level courses in clinical psychology and numerous professional workshops for professionals, both nationally and internationally. Dr. Olesen has been involved in research regarding psychological testing in custody evaluations. This research has been presented at national professional meetings and as research articles in the Journal for Psychological Assessment. Her article on the alienation of children in high conflict divorce and custody is in press for publication in July 2001 in the Family Court Review.

***Peter Walzer, J.D., CFLS***

Mr. Walzer is a family law specialist certified by the State Bar of California Board of Legal Specialization and a past president of the Association of Certified Family Law Specialists. He is a fellow of the American Academy of Matrimonial Lawyers and a fellow of the International Academy of Matrimonial Lawyers. Mr. Walzer has lectured previously on family law topics for various professional groups including CEB, NBI, and UCLA Extension. His articles have been published in California Lawyer, Los Angeles Lawyer and the Los Angeles Daily Journal.

***Douglas Darnell, Ph.D.***

Dr. Darnell is a clinical psychologist in private practice. He supervises the Psychology Department of the Trumbull County Family Court in Warren, Ohio, where he conducts child custody evaluations. He has taught at Youngstown State University and Kent State University. He hosts the radio show, "People Talk" on WALE-AM. Dr. Darnell is the author of *Divorce Casualties: Protecting your Children from Parental Alienation* (1998) and *Parental Alienation: What is not in the Child's Best Interest*, North Dakota Bar Review (1999).

***Robin Drapkin, Ph.D.***

Dr. Drapkin is a clinical psychologist whose practice specializes in family conflict resolution services including child custody mediation and evaluations, parenting plan coordinator (special master), psychological services to families related to divorce, remarriage, and custody issues, consultation to minor's counsel, consultation to family law attorneys re evaluation of psychological evidence. She has served as jointly stipulated evaluator, mediator, or special master in over 4,000 parenting or child custody disputes. Dr. Drapkin has served as Court-appointed Panel Psychologist, Los Angeles Superior Court Family Law Department; Senior Family Mediator, Los Angeles Superior Court Family Court Services; member, Advisory Committee to Supervising Judge, Los Angeles Superior Court Family Law Department; Hiring Panel Member for child custody evaluators and mediators, Los Angeles Superior Court

Family Court Services; Los Angeles Superior Court Advisory Committee on Child Visitation Monitors/Training Program; invited speaker to various groups concerning family dispute resolution issues, including Association of Family Conciliation Courts, Continuing Education of the Bar, Los Angeles County Bar/Superior Court Child Custody Colloquium, USC Family Law Institute, ABA/APA Conference on Children and Divorce.

Dr. Drapkin has authored professional articles on practical and philosophical issues related to child custody mediation and litigation. Her media projects include ABC/TV "20/20" program "Children of Divorce", Alan Landsburg Production "Children of Divorce: Kids in the Middle", Winner Best Documentary Pay-TV, FOX-TV "Nightline" program "Children of Divorce", feature interviews for Wall Street Journal and Los Angeles Times re: child custody mediation and joint custody Dr. Drapkin received the American Bar Association Family Law Section Special Recognition for Appreciation for Work in Family Law.

***Linda N. Wisotsky J.D., CFLS***

Ms. Wisotsky is the chair of the State Bar Family Law Section Custody Committee (South). She is a former member of the State Bar Family Law Executive Committee. Her practice has a heavy emphasis on child custody issues. She has lectured on child custody issues for the State Bar of California and the Los Angeles County Bar Association. She sits as a family law mediator and judge *pro tem* in Santa Monica, Van Nuys and the Central District of Los Angeles. She is the former chair of the State Bar Family Law Section Support Committee (South) and former member of the property section. She is a former member of the Beverly Hills Bar Association Family Law Executive Committee. She serves as a fee mediator for the Los Angeles County Bar Association and Beverly Hills Bar Association.

***Harold J.Cohn, J.D., CFLS***

Mr. Cohn was appointed by State Bar of California to grade first Family Law Specialization Examination; Appointed by State Bar of California to grade subsequent examinations to date; Appointed by State Bar of California Board of Governors to Family Law Section Executive Committee, 2000-2003; Appointed by State Bar of California Board of Governors to Family Law Advisory Commission, 1997-2000; Former Co-Chairman State Bar of California Standing Committee South on Child Custody and Visitation; Immediate past Chair, Executive Board, Los Angeles County Bar Association, Family Law Section, 1999-2000; Board of Directors Levitt & Quinn Family Law Center, Inc. a non-profit law firm; Executive Board Member, Beverly Hills Bar Association, Family Law Section, 1985-1999; Secretary, Executive Board Beverly Hills Bar Association, Family Law Section, 2000-2001.

***Lyn Greenberg, Ph.D.***

Dr. Greenberg practices clinical and forensic psychology in West Los Angeles. She has worked with court-involved children and families for over 10 years, and is Co-chair of the Forensic Committee of the L.A. County Psychological Association. She has written and presented extensively on court-related treatment and the needs of children in Family and Dependency Court. Her publications include: *Mental Health Professionals in Dependency Court*, *Merging Paradigms: The Marriage of Clinical Treatment and Forensic Thinking*, and *Is the Child's Therapist Part of the Problem? What Attorneys, Judges, and Mental Health Professionals Need to Know about Court-related Treatment for Children*.

***Lee Lawless, J.D., CFLS***

Ms. Lawless was appointed to the State Bar of California, Board of Legal Specialization Family Law Advisory Commission in 2001. She is the founding Member of the San Diego Task Force on Domestic Violence. Ms. Lawless is a past chair of the San Diego County Bar Association Family Law Section, Minors' Counsel Committee, and Fee Arbitration Committee, and a member of the San Diego Bar Association's Family Law Specialists, Client Relation Committee, Mexican American Bar Liaison Committee. She is a member of the Association of Certified Family Law Specialists, the National Association of Counsel for Children, the Association of Family and Conciliation Courts, the Foothills Bar Association and the Borrego Springs Domestic Violence Committee.

Ms. Lawless has served as adjunct in practicum/internships for Family Law Internships (1983-1986), guest lecturer on childrens' rights, and uest lecturer on domestic violence effects on children at California Western School of Law, and guest lecturer in a cross disciplinary class (sociology and law school) on the family and the law at the University of San Diego Law School. She has provided officer training in domestic violence to the San Diego Police Department. Ms. Lawless is regularly appointed to represent minor children in San Diego's family law courts. She has served as co-chair and/or committee member for various seminars on minors' counsel, and is helping to organize the upcoming conference of the National Association of Children's Counsel in San Diego. Ms. Lawless has provided in-service training for Family Court Services on various issues.

PROOF OF SERVICE
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STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 16830 Ventura Boulevard, Suite 351, Encino, CA 91436.

On April 16, 2001 I served the within documents described as

MOTION FOR RECONSIDERATION OF APPLICATION TO FILE AMICI CURIAE BRIEF
and
AMICI CURIAE BRIEF

on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

_x_ **BY MAIL:** I deposited such envelope, with postage thereon fully prepaid, in the mail at Los Angeles, California.

___ I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with the postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the parties served, service is presumed valid if postal cancellation date or postage meter date is more than one day after date of deposit or mailing affidavit.

___ **BY PERSONAL SERVICE:** I caused the above-described documents to be delivered by hand to the office of the addressees.

___ **BY FACSIMILE:** I caused the above-described documents to be transmitted by telephonic facsimile to: _____

*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 April 16, 2001 at Los Angeles, California.*

_____
Leslie Ellen Shear

**SERVICE LIST**

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