

# The *Burgess* Decision and the Wallerstein Brief

Richard A. Gardner, MD

Divorcing couples traditionally incorporate into their settlement contracts a stipulation regarding relative degree of freedom to relocate, especially if the relocating parent has primary custody of the children. Typically, the primary custodial parent might be restricted from moving outside of the state in which the divorcing couple has resided, or there may be a specific mile radius or travel time radius beyond which the primary custodial parent cannot relocate. In recent years, courts have become increasingly permissive with regard to allowing relocation by primary custodial parents, and the once stringent requirements that needed to be satisfied to justify relocation are being progressively relaxed. In 1996, the Supreme Court of California in *In Re the Marriage of Burgess*, 913 P.2d 473 (Cal. 1996), has set a precedent for even further relaxation of these once rigid restrictions. The *Burgess* decision has been frequently quoted in the State of California and is receiving widespread attention elsewhere. It is the author's opinion that this precedent is ill conceived and will most likely result in significant grief and suffering for the nonrelocating parent as well as the relocating children.

As a forensic psychiatrist who has been extensively involved in child custody litigation for over 35 years and as one who has testified in approximately 30 states, I have always viewed the State of California as being at the forefront of many of the major advances in the field. Recently, in the course of serving as an expert witness in a child custody/parental relocation case in southern California, the *amica curiae* brief of Judith S. Wallerstein, PhD, was brought to my attention. The brief was submitted to the Supreme Court

of the State of California *In Re the Marriage of Burgess*, 913 P.2d 473 (Cal. 1996). Although claiming neutrality, the brief clearly supports the mother's request of the court that she be permitted to relocate without losing her sole physical custodial status. It is my understanding that this brief was influential in the court's decision, that the case is being frequently cited, and that the principles laid down therein frequently utilized in parental relocation cases in California and elsewhere. I believe that the implementation of the Wallerstein recommendations is a regressive step that will only serve to compromise California's good name in one of the most important areas of the law, an area that most directly affects our next generation.

---

Richard A. Gardner, MD, is in private practice in Cresskill, NJ. He also serves as Clinical Professor of Child Psychiatry at Columbia University College of Physicians and Surgeons in New York City and is an attending psychiatrist at the Presbyterian Hospital in New York City. Address correspondence to: Richard A. Gardner, MD, 155 County Rd., P.O. Box 522, Cresskill, NJ 07626-0522.

Although I am in full agreement with many of Dr. Wallerstein's points, I do not believe that the brief is balanced, and in certain areas there are serious flaws. Throughout the brief, reference is made to "research." As is true in the law, it is very easy for mental health professionals to invoke research to support any position. For every article that "proves" a point, there can be found another that will "disprove" the same point. Social sciences are not "hard sciences" but "soft sciences," and much looser standards apply when research articles are assessed for publication.

### **The Bonding Consideration**

I am in full agreement with Dr. Wallerstein when she emphasizes that less important than the actual location of the two parents is the bonding that exists between each parent and the children. Accordingly, Dr. Wallerstein recommends that courts should focus on whether or not a strong bond has developed between the children and the parent from whom they will be separated. She cites "research" that suggests that in many cases the bond is weak or nonexistent, and that there is no significant loss to the children if the other parent relocates; the basic principle being that no love was lost because there was no love there in the first place. I am sure that there are situations in which this is indeed the case. I am sure, as well, that there are many situations in which there has been strong bonding with the parent who has been left behind and that the relocation has been significantly detrimental to the children. The implication of Dr. Wallerstein's brief is that the usual

situation is that there is really only one parent (*de facto*), the primary custodial parent, and the other parent, with whom the children have such a weak bond that for all intents and purposes it is nonexistent, is of secondary importance. She would lead the reader to believe that this is the most common situation. I believe that this is not the most common situation, although it certainly exists. The more common situation is the one in which the primary bonding may very well be with the primary custodial parent, but the bonding with the noncustodial parent is very deep nevertheless. Although one cannot measure this bond objectively, one can easily say that the bonding is very strong with the noncustodial parent, and that relocation would be very detrimental to the child because of the disruption of this bond.

I am also in agreement with Dr. Wallerstein when she warns that geographical chauvinism ("where we live must be the best place in the world") should not be a consideration when courts adjudicate relocation requests. However, Dr. Wallerstein does not mention the chauvinism that often plays a role in a parent's wish to relocate, with the notion that the site of potential relocation is "the best place in the world." Were her brief fully neutral and balanced, she would have extended the same caveat to both sides.

Dr. Wallerstein continues (p. 26): "Therefore, custody should not be revisited when relocation is proposed, except in extraordinary circumstances when necessary to protect the child."

If Dr. Wallerstein is correct and the child's bonding is most often minimal or nonexistent with the parent who has been

## The *Burgess* Decision

left behind, then this recommendation would probably cause little or no harm. If, however, I am correct, that the more common situation is the one in which there are varying degrees of deep bonding with the parent who has been left behind (although not necessarily as deep as the bonding with the relocating parent), then much harm will be done. If the courts were to follow this principle, it would be a rare parent whose requests for relocation would be refused. And that would be done only under “extraordinary circumstances.” Dr. Wallerstein continues (p. 27): In the majority of instances, the child’s best interest will favor the move and a continued interest in maintaining a significant relationship with the non-moving parent will be addressed by age-appropriate modifications in the visitation schedule (e.g., school holidays, vacations, etc.).

This has not been my experience. My experience has been that in the majority of instances relocation has resulted in progressive attenuation of the bonding between the children and the noncustodial parent, visitation “modifications” and adjustments notwithstanding. I have, of course, seen situations in which relocation has not caused harm: no love was lost, because there was no love in the first place. But such situations are not common when the parent left behind is litigating for custody.

### The Working Mother Consideration

Dr. Wallerstein continues (p. 30):

In addition, some courts have *presumed* [emphasis added] that a mother who has undertaken a demanding program of work or education to

create economic resources for herself and her family, e.g., by becoming a trial lawyer [like Marcia Clark] or a medical student [like Maria in her Case No. 1] cannot properly raise a child. These courts have not learned the lessons contained in the studies of children following divorce or in the decisions of this Court.

First, I have no specific information about Marcia Clark’s personal life, especially her relationship with her children. The implication here is that Dr. Wallerstein has some direct contact with Marcia Clark and her children and has concluded that the nine months of grueling work on the O.J. Simpson case has in no way interfered with her parenting capacities. I am dubious. I suspect that the enormous amount of time and energy that Ms. Clark had to devote to that trial—over a time span of nine months—must have had some negative impact on her children. I am also dubious about the success story about Maria (Case 1). Women devoted to becoming trial lawyers and women who are medical students are much better off having husbands or ex-husbands who live close by who can share with them the responsibilities of child-rearing. The implication here, once again, is that noncustodial parents are not really necessary in the vast majority of cases, or the input they can provide is not really meaningful or valuable. What Dr. Wallerstein is basically saying is that courts that have “presumed” that these double obligations compromise the child-rearing capacity have been wrong and that “research” proves them wrong. I believe that the courts’ presumption here has been valid, namely, that combining demanding work/educational programs with child-rearing

is highly likely to compromise child-rearing; and there is other "research" that supports this position. I believe, also, that the vast majority of mothers who have been involved in such double commitments would agree with me on this and agree, as well, that if there were a husband or ex-husband who was available and committed, the pressures on them would be lessened and the children would do better. We see here, once again, how Dr. Wallerstein has transformed the minority into the majority.

### **Implications of the Noncustodial Parent's Litigating the Relocation Issue**

This leads me to a very important point. Dr. Wallerstein's views here were promulgated in an *amica curiae* brief and submitted to a court of law adjudicating a child custody/relocation dispute. Accordingly, there is a father in the *Burgess v. Burgess* case who is asking the court to transfer sole custodial status to himself if the mother moved away. The very fact that the father went to the trouble and expense of going to court on this issue indicates to me that his bonding with his child could have been strong and not necessarily in the category of the weak or nonexistent bonding that Dr. Wallerstein would have us believe is so rare. Her brief would have been more balanced if she noted to the court that the parent who is willing to litigate the relocation issue is probably not in the category of having a weak or nonexistent bonding with the children.

### **Reasons for the Relocation Request**

It is to her credit that Dr. Wallerstein states (p. 31): "Reasons for a move that are frivolous or advanced out of anger or a desire for revenge that is calculated to prevent or substantially diminish a child's contact with the other parent do not justify the move."

Dr. Wallerstein does not give proper emphasis here to *other* inappropriate reasons for requesting relocation, such as lack of appreciation of the bonding between the child(ren) and the noncustodial parent; pathological dependency on family members in the locale to which the relocating parent wishes to move; and personality problems that interfere with the parent's ability to adjust to a particular environment, with the associated fantasy that change of location will somehow result in more gratifying personal relationships. There are women whose basic view of a man is that of a sperm donor who, once he has provided these services, can be dispensed with entirely. And this may have been the model of such a woman's own mother. Such a view of the husband is often a factor operative in the wish to relocate. These reasons, in addition to vengeance, should also be considered by courts when adjudicating relocation requests. Dr. Wallerstein's brief would have been much more balanced had she added these reasons to the list of inappropriate reasons for requesting permission to relocate.

### **The Shuttling Consideration**

I am in full agreement with Dr. Wallerstein in her emphasis on the traumatic

## The *Burgess* Decision

effects of frequent shuttling and the loss of valuable parenting time that is eaten up by such shuttling. Dr. Wallerstein recognizes that implementation of her proposals will expose children to shuttling trauma, a trauma that they did not previously have to bear. She then recommends that this untoward effect of relocation can be reduced by decreasing the frequency of visits and making them of longer duration. The basic premise, once again, is that there will be little loss to the children by the move, especially because it may be accompanied by longer visits to protect them against the detrimental effects of shuttling. She does not emphasize shuttling trauma as an argument against the court's permitting the relocation. Again, we see a lack of balance.

### The "Believe the Children" Consideration

Dr. Wallerstein states (Case 1, p. 10): "It is disrespectful of the child's humanity to view the child as a puppet and to attribute the child's responses to manipulation by adults as if a child had no mind or heart of her own. Unfortunately, the courts are all too willing to see the child's responses as reflecting adults' manipulation."

All individuals, regardless of age, are suggestible and can be manipulated, and the younger the person the more likely it is that this can take place. Children are extremely suggestible, highly manipulable, and can be programmed to say and believe anything that the adult manipulator wishes to inculcate into the child. It is extremely common in divorce cases for each parent to attempt to induce in the

child criticisms of the other parent in the hope of enhancing his or her own position in the course of a custody dispute. If courts were to follow Dr. Wallerstein's advice, they would automatically assume that a child's professions of affection/hate are entirely reality based and could not be the result of adult manipulations. I believe that most judges, lawyers, and mental health professionals involved in child custody disputes will readily attest to the fact that the incidence of manipulated children is widespread and that inappropriate professions of hatred are commonly induced against parents who were loving and tender prior to the onset of the child custody dispute. Courts who take seriously Dr. Wallerstein's advice here will be making erroneous decisions in many cases. Consistent with this position, Dr. Wallerstein states (p. 35): "Especially at the time of a contemplated move, the court should be responsive to the child's voice, amplifying it above the din of competing parents. Only in this way can it ascertain and respect the 'best interest of the child.'"

It is unfortunate that Dr. Wallerstein is still waving the old "believe the children" banner that has caused so much grief in so many families. I am not claiming that we should ignore entirely what children have to say in divorce disputes; I am only saying that one must give consideration to the fact that children are children, that they can easily be manipulated, and that when considering their comments about relocation, the manipulation/programming element must be given serious consideration. Children's voices should not be given more consideration than those of

the parents. It serves the best interests of children to do what is best for them, not what they profess is best for them. Every good parent knows this, and the younger the child, the more important is this dictum.

### **Child's Relationship with the Noncustodial Parent**

Dr. Wallerstein states (Case 1, p. 12): "The child's relationship with the remaining parent does not necessarily deteriorate with the geographical move."

I agree that the child's relationship with the parent who remains behind does not "necessarily deteriorate." The real question is what is the *more likely* outcome of the relocation? The answer, in a vast majority of cases, is that it *will* deteriorate; this is not necessarily so—just highly probable. I agree, also, that it is not *necessarily* the case that one will contract AIDS if one has sexual relations with a person who has AIDS. However. . . I need go no further.

### **Case Studies**

Wallerstein concludes with two case studies, both of which support a woman's request for relocation. Wallerstein does not provide an example of a case in which the courts were justified in not granting permission for relocation. This is yet another example of the bias in her brief.

Case 1 is a "tearjerker" in every sense of the word; in fact, I myself choked up when reading this story. It is the story of a Mexican-American woman, Maria, whose life aspiration was to be a doctor. Her daughter Susan was very strongly bonded to her, and her ex-husband

wanted primary custody if the mother went off to medical school. This "heart-rending" saga is dramatically detailed in such a manner that it would only be the most heartless or sadistic court that would turn down this mother's request for relocation. The story ends with the mother in medical school, as the primary custodial parent, with father left behind working in his grocery store. The tale presumably ends with everybody "living happily ever after": the child doing very well in all realms and the mother presumably fulfilling her academic obligations in medical school. It may very well be that this child's mother was able to handle well the rigors of one of the most demanding educations known to humanity in combination with child-rearing, which is also one of the most demanding vocations known to humanity. It may be that this mother, like Marcia Clark (as Dr. Wallerstein describes her), handled both of these situations without compromising anything in either realm. I do not believe, however, that the vast majority of women would be able to achieve this. Once again, Dr. Wallerstein is presenting the minority as if it were the majority. In the second case study, as well, there were compelling reasons for the court to grant the mother's request for relocation. As mentioned, the brief would have been more balanced if Dr. Wallerstein had provided a case study that demonstrated the detrimental effects to the child of the court's misguided decision to allow relocation.

### **Concluding Comments**

In her brief, Dr. Wallerstein quotes from the ruling of Associate Justice

## The *Burgess* Decision

Donald B. King of the California Court of Appeal, who is quoted by Mahan in the May 1994 issue of *California Lawyer*: "It may be that she [Dr. Judith Wallerstein] knows more about the effect of divorce on children than anyone in the world."

If this is indeed the case, this does not speak well for all the other people in the world, especially legal and mental health professionals, who know quite well that relocated parents often leave behind deeply committed former spouses who suffer enormous grief and loss as they watch the progressive attenuation of the parent-child bonding that is the direct result of the court's ill-advised decision to allow relocation.

As I mentioned at the outset, I consider the *Burgess* decision to be setting a dangerous precedent, a precedent that if followed will bring about significant pain and grief to many loving, dedicated fathers and their children. It is a regressive step, unbecoming to the State of California, a state generally recognized as being at the forefront of important advances in the field of custody-visitation litigation.

### References

1. *In re Burgess v. Burgess*, 913 P.2d 473 (Cal. 1996)
2. Wallerstein JS: *Amica curiae* brief re *Burgess v. Burgess*. Filed Dec. 12, 1995, Supreme Court, State of California