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In Re Marriage of Birnbaum: Modifying Child Custody Arrangements by Ignoring the Rules of the Game

Mara Quint Berke

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I. INTRODUCTION

Courts must often make difficult child custody decisions following the dissolution of marriages.[1] In these instances, courts act not only as mediators between the parents and themselves, but also as mediators between the parents and the child.[2] The courts' goal in child custody suits is to determine the living arrangements that will most benefit the child.[3] The issues involved are complex—mainly because courts must examine a variety of factors in making child custody decisions.[4]

Typically, once trial courts issue custody orders, it is very difficult for appellate courts to modify them. This difficulty arises in modifying original custody orders because courts are required to adhere to strict requirements established by statutes and case law.[5] These laws require

1. See *infra* notes 83-140 and accompanying text for a discussion of the initial custody award.

2. *See, e.g.*, Birnbaum v. Birnbaum (*In re* Marriage of Birnbaum), 211 Cal. App. 3d 1508, 1511 n.4, 260 Cal. Rptr. 209, 212 n.4 (1989) (parents love their children but neither can see past their particular egocentric needs to acknowledge full value of other parent to child); McLoren v. McLoren, (*In re* Marriage of McLoren), 202 Cal. App. 3d 108, 114, 247 Cal. Rptr. 897, 900 (1988) (court erroneously modified custody to joint custody where parents had ongoing inability to cooperate in their parenting responsibilities due to severe hostility toward each other, at times erupting into physical violence, and to virtual absence of any communication between them).

3. *See, e.g.*, Burchard v. Garay, 42 Cal. 3d 531, 540, 724 P.2d 486, 492-93, 229 Cal. Rptr. 800, 806-07 (1986) (custody determination must reflect how best to provide continuity of attention, nurturing and care); O'Connell v. O'Connell (*In re* Marriage of O'Connell), 80 Cal. App. 3d 849, 858, 146 Cal. Rptr. 26, 32 (1978) (right to custody and control of child is right to companionship of child and right to make decisions regarding his or her care, control, education, health, and religion); *see* CAL. CIV. CODE §§ 4600, 4608 (West Supp. 1990).

4. Factors that courts consider when making child custody decisions include the following: primary caretaker, time available for parenting, stability of environment, mental capacity, health, visitation, child's welfare, and child preferences. *Burchard*, 42 Cal. 3d at 540, 724 P.2d at 492-93, 229 Cal. Rptr. at 806-07 (custody determination must reflect how best to provide continuity of attention, nurturing and care); Kim v. Kim, 208 Cal. App. 3d 364, 370-71, 256 Cal. Rptr. 217, 220 (1989) (father denied custody because he shot wife and molested daughter); Detrich v. Dorothy H. (*In re* Jack H.), 106 Cal. App. 3d 257, 269, 165 Cal. Rptr. 646, 653 (1980) (court should consider child's wishes); Matthews v. Matthews (*In re* Marriage of Matthews), 101 Cal. App. 3d 811, 818, 161 Cal. Rptr. 879, 883 (1980) (child's welfare is paramount); Columbo v. Columbo, 71 Cal. App. 2d 577, 583-84, 162 P.2d 995, 998 (1945) (mother suffered from recurring insanity and lower court erred in awarding her custody); *see infra* notes 102-40 and accompanying text.

5. *See infra* notes 141-78 and accompanying text.

the party requesting modification to show that it is in the best interests of the child[6] to change the pre-existing custody arrangement, as well as to prove that there has been a change in circumstances.[7] This Note examines *Birnbaum v. Birnbaum (In re Marriage of Birnbaum)*,[8] in which a California Court of Appeal ignored these requirements. The *Birnbaum* court was able to evade these established rules because of the vague statutory definition of joint custody and the definition's effect on the standards for modification of such custody orders.[9] In *Birnbaum*, the appellate court upheld the trial court's modification of the custody agreement by avoiding the "modification" requirements, and instead labeling the order a "rearrangement of the children's residential timetable."[10] Legal analysis suggests, however, that this change in the parenting arrangement was, in fact, a modification, and that the court improperly avoided the strict laws governing modification of child custody agreements.[11]

This Note examines and criticizes the *Birnbaum* decision. By not following the applicable judicial precedent and statutes, the *Birnbaum* court failed to advance the policy concerns underlying child custody laws. These laws were designed to guard the child's best interest by fostering stable custody arrangements as well as judicial economy.[12] The author argues that courts, in child custody cases, should follow the statutorily and judicially defined modification requirements. These requirements, when correctly enforced, protect the important interests underlying child custody cases. To ensure that these policies are furthered, the author proposes that the California legislature adopt more precise definitions of joint custody and more specific limitations on child custody modification.

II. BACKGROUND

To understand the problems created by the *Birnbaum* court's refusal to apply traditional modification laws, this section provides an overview of several legal concepts. First, this section defines the types of custody awards available to parents and children. Second, it explains

6. *See infra* notes 144-52 and accompanying text.
7. *See infra* notes 153-61 and accompanying text.
8. 211 Cal. App. 3d 1508, 260 Cal. Rptr. 210 (1989).
9. *See supra* notes 271-83 and accompanying text.
10. *Birnbaum*, 211 Cal. App. 3d at 1513, 260 Cal. Rptr. at 213.
11. *See infra* notes 246-62 and accompanying text.
12. *See Burchard*, 42 Cal. 3d at 535, 724 P.2d at 488, 229 Cal. Rptr. at 802; Carney v. Carney (*In re* Marriage of Carney), 24 Cal. 3d 725, 730-31, 598 P.2d 36, 38, 157 Cal. Rptr. 383, 385 (1979); Connolly v. Connolly, 214 Cal. App. 2d 433, 436, 29 Cal. Rptr. 616, 617-18 (1963); CAL. CIV. CODE §§ 4600, 4608.

how California courts determine initial custody orders. Third, this background sets forth the traditional modification requirements for child custody arrangements.

A. Child Custody in General

Child custody refers to the relationships between parents and children[13] and encompasses all qualities of these relationships.[14] Frequently, custody has been considered coextensive with residency.[15] Custody includes the right to establish a child's domicile, as well as other rights and obligations associated with the parent-child relationship, such as child care, control, education, health and religion.[16]

When divorcing parents are unable to agree on custody arrangements, judges are faced with the difficult task of determining which custody arrangement is in the child's best interests.[17] In making this determination, judges should select an arrangement that will foster positive child development[18] and lessen the severe emotional and psychological trauma of parental divorce.[19] Section 4600 of the California Civil

13. Porter & Walsh, *The Evolution of California's Child Custody Laws: A Question of Statutory Interpretation*, 7 SW. U.L. REV. 1, 2-3 (1975) (citing H. CLARK, LAW OF DOMESTIC RELATIONS 573 (1968)).

14. *See* CAL. CIV. CODE §§ 4600(b), 4608 (West Supp. 1990); Comment, *Joint Custody: An Alternative for Divorced Parents*, 26 UCLA L. REV. 1084, 1086 (1979).

15. Porter & Walsh, *supra* note 13, at 3.

16. *See* Walker v. Superior Court, 47 Cal. 3d 112, 134, 763 P.2d 852, 866, 253 Cal. Rptr. 1, 15 (1988), *cert. denied*, 109 S. Ct. 3186 (1989); Burge v. City of San Francisco, 41 Cal. 2d 608, 617, 262 P.2d 6, 12 (1953); Lerner v. Superior Court, 38 Cal. 2d 676, 681, 242 P.2d 321, 323 (1952); O'Connell v. O'Connell (*In re* Marriage of O'Connell), 80 Cal. App. 3d 849, 858, 146 Cal. Rptr. 26, 32 (1978); Porter & Walsh, *supra* note 13, at 3; Comment, *supra* note 14, at 1086 n.16.

17. *See* CAL. CIV. CODE § 4600(b). In determining the best interests of the child, courts should consider the health, safety, and welfare of the child, any history of abuse against the child, and the nature and amount of contact the child will receive from both parents. *Id.* § 4608(a), (b), (c); *see* Dupaix, *Best Interests Revisited: In Search of Guidelines*, 3 UTAH L. REV. 651, 651 (1987).

18. *See* Sam E. v. Stahl (Guardianship of Claralyn S.), 148 Cal. App. 3d 81, 85-86, 195 Cal. Rptr. 646, 649 (1983); *see also* Dupaix, *supra* note 17, at 655 (determination of custody rights goes to very heart of child's identity and fundamental bond to its parents, and families establish lives based on these judgments).

19. *See, e.g.*, Kim v. Kim, 208 Cal. App. 3d 364, 371, 256 Cal. Rptr. 217, 220-21 (1989) (father denied custody because he shot wife and molested daughter); McLoren v. McLoren, (*In re* Marriage of McLoren), 202 Cal. App. 3d 108, 114, 247 Cal. Rptr. 897, 900 (1988) (court erroneously modified custody to joint custody where parents had ongoing inability to cooperate in their parenting responsibilities due to severe hostility toward each other, at times erupting into physical violence, and to virtual absence of any communication between them); *see* Comment, *supra* note 14, at 1085. *See generally* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1979) [hereinafter BEYOND THE BEST INTERESTS] (effects on children caused by disruption of parent-child relationship in divorce and

Code[20] states that the legislature's purpose in holding child custody proceedings is "to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, and to encourage parents to share the rights and responsibilities of child rearing . . . ."[21] Thus, the legislature intended to preserve the family unit[22] and encourage judges to select an arrangement in furtherance of this goal.

1. Custodial preferences

Section 4600 defines the order of preference in granting custody of a minor child to an adult.[23] Custody awards are granted according to the court's determination of what is in the child's best interests.[24] First, custody is awarded to both parents jointly or, alternately, to either parent.[25] Second, if custody is not awarded to either parent, it may be awarded to the person(s) "in whose home the child has been living in a wholesome

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change in their environment); J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP (1980) (studies on effects of divorce on children and parents).

20. CAL. CIV. CODE § 4600(a).

21. *Id.*

22. S. 477, 1979-80 Leg., Reg. Sess., 1979 Cal. Stat. 449. The California legislature stated that the purpose of the joint custody law was "to assure minor children of close and continuing contact with both parents after the parents have separated or dissolved their marriage." *Id.*; *accord*, CAL. CIV. CODE § 4600(a) (way to preserve family unit and the child-parent relationship is to maintain contact between parents and children).

23. *See* CAL. CIV. CODE § 4600(b).

24. *Id.* The custody award depends on what is best for the child, a standard broadly defined in section 4608 of the California Civil Code:

> In making a determination of the best interest of the child in any proceeding under this title, the court shall, among any other factors it finds relevant, consider all of the following:
>
> (a) The health, safety, and welfare of the child.
>
> (b) Any history of abuse against the child. As a prerequisite to the consideration of allegations of abuse, the court may require substantial independent corroboration including, but not limited to, written reports by law enforcement agencies, child protective services or other social welfare agencies, courts, medical facilities, or other public agencies or private nonprofit organizations providing services to victims of sexual assault or domestic violence. . . .
>
> (c) The nature and amount of contact with both parents.

Id. § 4608(a)-(c).

25. *Id.* § 4600(b); *see, e.g.*, Miller v. Hudmon (*In re* Miller), 244 Cal. App. 2d 454, 458-59, 53 Cal. Rptr. 211, 214 (1966); Marlow v. Wene, 240 Cal. App. 2d 670, 676, 49 Cal. Rptr. 881, 885 (1966). The parenting plan adopted by the court must also be gender neutral. CAL. CIV. CODE § 4600(b)(1). Thus, one parent cannot be preferred as custodian on the basis of that parent's sex. *Id.*; *see also* Speelman v. Superior Court, 152 Cal. App. 3d 124, 128-29, 199 Cal. Rptr. 784, 786 (1983) (both male and female parents have equal custody rights). For a discussion of maternal preference prior to enactment of section 4600, see *Speelman*, 152 Cal. App. 3d at 128, 199 Cal. Rptr. at 786. Now the sole concern in a custody determination is the best interests of the child. Burchard v. Garay, 42 Cal. 3d 531, 536, 724 P.2d 486, 489, 229 Cal. Rptr. 800, 803 (1986).

and stable environment."[26] Next, custody is awarded to any other person(s) "deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child."[27] Before the court grants custody to a person other than the parent, it must find that a custody award to a parent would be detrimental to the child and that an award to a nonparent is required to serve the child's best interests.[28]

2. Sole and joint custody

Section 4600.5 defines several types of custody awards, including sole custody, joint physical and joint legal custody.[29] There is neither a statutory preference nor a statutory presumption for or against any of these particular custody arrangements.[30] Therefore, trial courts have wide discretion in selecting a particular parenting plan.[31]

a. sole custody

Sole custody grants all custodial rights and responsibilities to one parent, subject to the other parent's visitation rights.[32] There are two types of sole custody: sole physical custody and sole legal custody. Sole physical custody means that a child must "reside with and under the supervision of one parent, subject to the power of the court to order visi-

26. CAL. CIV. CODE § 4600(b)(2); *accord* Urband v. Urband (*In re* Marriage of Urband), 68 Cal. App. 3d 796, 798, 137 Cal. Rptr. 433, 434 (1977) (trial court has wide discretion in custody determination); Coddington v. Coddington, 210 Cal. App. 2d 96, 100, 26 Cal. Rptr. 431, 433 (1962) (trial court is allowed wide latitude in exercising its discretion).

27. CAL. CIV. CODE § 4600(b)(3); *accord Urband*, 68 Cal. App. 3d at 798, 137 Cal. Rptr. at 434; *Coddington*, 210 Cal. App. 2d at 100, 26 Cal. Rptr. at 433.

28. CAL. CIV. CODE § 4600(c); *see, e.g.*, Roche v. Roche, 25 Cal. 2d 141, 142-44, 152 P.2d 999, 1000 (1944) (physical custody to grandparents was awarded to nonparent and could not be made unless parent who opposed award was found unfit); Stauffacher v. Stauffacher, 227 Cal. App. 2d 735, 737-38, 39 Cal. Rptr. 31, 33 (1964) (award to father for placement in foster home held award to nonparent); Loomis v. Loomis, 89 Cal. App. 2d 232, 238-39, 201 P.2d 33, 36 (1948) (custody award to father who intended to leave children with their aunts in California while he resided in Maryland held award to nonparent). *But see* Booth v. Booth, 69 Cal. App. 2d 496, 501-02, 159 P.2d 93, 96 (1945) (children resided with their grandparents, which was also father's residence, when father was stationed overseas in armed forces was not custody award to nonparent).

29. *See* CAL. CIV. CODE § 4600.5(d) (West Supp. 1990).

30. *See id.* § 4600(d); 2 C. MARKEY, CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE § 22.81, at 22-63 (1978).

31. *See* CAL. CIV. CODE § 4600(d); 2 C. MARKEY, *supra* note 30, § 22.81, at 22-63.

32. *See* CAL. CIV. CODE § 4600.5(d)(2), (4); Bruch, *And How Are the Children? The Effects of Ideology and Mediation on Child Custody Law and Children's Well-Being in the United States*, 2 INT'L J.L. & FAM. 106, 108 (1988). The *Birnbaum* case involves a joint custody arrangement, so the author does not focus on sole custody, other than to provide these general definitions.

tation."[33] In sole legal custody arrangements, the court grants one parent "the right and the responsibility to make the decisions relating to the health, education, and welfare of a child."[34]

The underlying policy furthered by these statutes is to assure a minor child frequent and continuing contact with both parents.[35] In evaluating a parent's general suitability as a sole custodian, courts consider "which parent is more likely to allow the child . . . frequent and continuing contact with the noncustodial parent."[36] Generally, the more cooperative parent is granted sole custody because this parent presumably will allow greater contact with the noncustodial parent, satisfying the statute's underlying policy.[37]

b. joint custody

As an alternative to sole custody, the California legislature has also provided for "joint custody."[38] Joint custody is defined as "joint physical custody and joint legal custody."[39] This definition, however, is inadequate because the statute neither defines the roles of each parent nor the nature of the living arrangements for the child. Consequently, courts must provide their own interpretations. One interpretation derived from a combination of legal sources is that: (1) joint custody allows both parents an equal voice in their child's upbringing, reaching decisions as they probably would have, had the marriage remained intact; (2) joint custody apparently does not give either parent a greater right than he or she had before the marriage ended; and (3) the parents share equal rights, respon-

33. CAL. CIV. CODE § 4600.5(d)(2).

34. *Id.* § 4600.5(d)(4).

35. *Id.* § 4600(a); *see* Kloster, *The New Joint Custody Statute: Chrysalis of Conflict or Conciliation?*, 21 SANTA CLARA L. REV. 471, 481 (1981).

36. *See* CAL. CIV. CODE § 4600(b). A major factor in reducing the immediate disturbing effects on children is the continuation of their relationships with both parents. *McLoren*, 202 Cal. App. 3d at 114, 247 Cal. Rptr. at 900 (court erroneously modified custody to joint custody where parents had ongoing inability to cooperate in their parenting responsibilities due to severe hostility toward each other, at times erupting into physical violence, and to virtual absence of any communication between them); *cf.* Murga v. Petersen (*In re* Marriage of Murga), 103 Cal. App. 3d 498, 503, 163 Cal. Rptr. 79, 80 (1980) (one parent's establishing residency in far away place to preclude other's visitation constitutes change in circumstances to modify visitation order); Richards, *Joint Custody Revisited*, 19 FAM. L. 83, 83 (1989).

37. CAL. CIV. CODE § 4600.5(b).

38. *Id.* § 4600.5(c).

39. *Id.* § 4600.5(d)(1). Joint custody has two components, joint legal custody and joint physical custody. 2 C. MARKEY, *supra* note 30, § 22.81, at 22-63; *see* Atkinson, *Criteria for Deciding Child Custody in the Trial and Appellate Courts*, 18 FAM. L.Q. 1, 36 (1984). In 1983 joint custody was defined as "an order awarding custody of the minor child or children to both parents." CAL. CIV. CODE § 4600.5(c) (West 1983) (current version at CAL. CIV. CODE § 4600.5(d)(1) (West Supp. 1990)).

sibilities and decision-making with respect to the child for the child's care, control, education, health and religion.[40] Under this interpretation, joint custody assumes significant involvement by both parents in the child's physical care and in making major decisions affecting the child.[41] Both parents have equal rights and responsibilities for their child and, therefore, an equal voice in decisions affecting their child's long-term welfare.[42] Joint custody, however, does not necessarily provide for equal division of time between the parents.[43]

(1) joint legal custody

Under joint legal custody, parents share both the right and the responsibility to make the decisions relating to the health, education and welfare of the child.[44] The child's living arrangements may seem exactly like sole custody with visitation rights.[45] A court, however, may award joint legal custody without joint physical custody.[46] If a court awards parents both joint physical custody and joint legal custody, the distinction between these two types of custody awards may not seem apparent.[47] One important difference, however, is that joint legal custody does not involve the child's residence.[48] Joint legal custody additionally requires consultation between the parents in making decisions.[49] Some examples of decisions that would require consultation between the parents with joint legal custody include whether the child should attend a private school, participate in religious activities or obtain costly dental care.[50] Decisions not requiring consultation include whether a child must com-

40. *Burge*, 41 Cal. 2d at 616, 262 P.2d at 11; *O'Connell*, 80 Cal. App. 3d at 858, 146 Cal. Rptr. at 32; Cox & Cease, *Joint Custody: What Does It Mean? How Does It Work?*, 1 FAM. L. REP. 2228, 2230 (1976); Comment, *California's Presumption Favoring Joint Child Custody: California Civil Code Sections 4600 and 4600.5*, 17 CAL. W.L. REV. 286, 296 n.76, 299 (1981).

41. Bruch, *supra* note 32, at 108-09.

42. Comment, *supra* note 40, at 298.

43. Birnbaum v. Birnbaum (*In re* Marriage of Birnbaum), 211 Cal. App. 3d 1508, 1515, 260 Cal. Rptr. 210, 215 (1989); *see, e.g.*, Lewin v. Lewin (*In re* Marriage of Lewin), 186 Cal. App. 3d 1482, 1491, 231 Cal. Rptr. 433, 437 (1986) (court upheld joint legal and physical custody with primary physical custody with father and visitation to mother).

44. CAL. CIV. CODE § 4600.5(d)(5).

45. WOMAN'S LEGAL DEFENSE FUND, THE CUSTODY HANDBOOK: A WOMAN'S GUIDE TO CHILD CUSTODY DISPUTES 4 (1988).

46. CAL. CIV. CODE § 4600.5(g); *see, e.g.*, *Coddington*, 210 Cal. App. 2d at 98-99, 26 Cal. Rptr. at 432-33 (legal custody awarded to father and mother jointly but physical custody awarded only to father).

47. *See* CAL. CIV. CODE § 4600.5(d)(3), (5) (only apparent difference is significant periods of physical custody required for joint physical custody).

48. *See id.*; Comment, *supra* note 40, at 299.

49. Comment, *supra* note 40, at 299.

50. *Id.* at 296 n.75, 299-300.

plete homework assignments or participate in after-school activities.[51]

(2) joint physical custody

Joint physical custody requires that each parent has physical custody of a child for a significant period of time.[52] The goal of joint physical custody is to arrange a scheme which provides a child well-balanced contact with both parents.[53] The parents alternate as physical custodian of the child and, thus, share in the child's residential care[54] and control.[55] There is no set pattern for joint physical custody; therefore, parents may help choose the schedule the court ultimately adopts.[56] A common schedule is for the child to spend three days each week with one parent and four days with the other.[57] A child may also alternate the schedules with his or her parents weekly or annually.[58] Under a joint physical custody arrangement, both parents make decisions affecting the child's well-being on a day-to-day basis.[59] Moreover, the physical custodian need not consult with the noncustodian in making these decisions.[60]

(3) types of joint custody arrangements

Joint custody may exist in varying forms, such as split, divided or shared custody.[61] "Split custody" arises when parents share in the physical custody of their child.[62] One example of "split custody" is where the child alternates between parents' homes based on a specific schedule.[63] Another example arises where there is more than one child from the

51. *Id.* at 299.

52. CAL. CIV. CODE § 4600.5(d)(3).

53. *See id.*

54. Comment, *supra* note 40, at 299; Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems; Punitive Decrees, Joint Custody and Excessive Modification*, 65 CALIF. L. REV. 978, 1009 (1977) (joint legal custody of child is shared at all times by both parents, but joint physical custody is alternated according to parents' agreement).

55. *Burge*, 41 Cal. 2d at 617, 262 P.2d at 12 ("Custody" means "complete custody or all rights involved in custody.").

56. *See* CAL. CIV. CODE § 4600.5(d); J. WALLERSTEIN & S. BLAKESLEE, SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE 257 (1989).

57. *See* J. WALLERSTEIN & S. BLAKESLEE, *supra* note 56, at 257.

58. *Id.*

59. *See Lerner*, 38 Cal. 2d at 681, 242 P.2d at 323 (essence of custody is companionship of child and right to make decisions regarding care and control, education, health and religion); *O'Connell*, 80 Cal. App. 3d at 858, 146 Cal. Rptr. at 32; Comment, *supra* note 40, at 299.

60. Comment, *supra* note 40, at 299.

61. *Id.* at 294-95; *see* P. WOOLLEY, THE CUSTODY HANDBOOK 195-201 (1979).

62. Comment, *supra* note 40, at 294.

63. Schillerman v. Schillerman, 61 Mich. App. 446, 447, 232 N.W.2d 737, 738 (1975); Comment, *supra* note 40, at 294.

marriage.[64] In this situation, the children are separated so that some live with their mother, while others reside with their father.[65]

"Divided custody"[66] refers to an arrangement where the child remains in the custody of one parent during part of the year and then lives with the other parent for the remainder of that year.[67] Visitation rights are allowed to the noncustodial parent.[68] Each parent has exclusive control over the child when the child is under the parent's custody.[69] Usually the custodial year is divided between the school year and summer vacation.[70] Parents and courts may choose this type of arrangement when the parents expect to live at great distances from each other and, consequently, split custody would be impracticable.[71]

"Shared custody" is an arrangement where the child grows up interacting with both parents in everyday situations.[72] Under this arrangement, the child is able to maintain "realistic and more normal relationships with each parent."[73] In formulating a joint custody arrangement, the court must specify each parent's right to physical control of the child in sufficient detail to prevent future conflicts and eliminate child snatching and kidnapping.[74]

(4) joint custody benefits and burdens

There are both advantages and disadvantages to joint custody ar-

64. Rocha v. Rocha, 123 Cal. App. 2d 28, 30, 266 P.2d 130, 131 (1954) (split custody of infant sons); Frazier v. Frazier, 115 Cal. App. 2d 551, 559, 252 P.2d 693, 698 (1953) (custody of daughter age two awarded to father and son age eight awarded to mother); McAuliffe v. McAuliffe, 53 Cal. App. 352, 355, 199 P. 1071, 1072-73 (1921) (custody of youngest children awarded to mother and custody of oldest two children awarded to father); *see* WOMEN'S LEGAL DEFENSE FUND, *supra* note 45, at 4; Comment, *supra* note 40, at 294.

65. Comment, *supra* note 40, at 294. Judges do not usually believe that it is good for the children to separate them from one another. WOMEN'S LEGAL DEFENSE FUND, *supra* note 45, at 4; *see supra* note 64.

66. Divided custody may also be referred to as alternating custody. J. FOLBERG, JOINT CUSTODY AND SHARED PARENTING 6 (1984).

67. *Id.*; *see* Merrill v. Merrill, 167 Cal. App. 2d 423, 424, 334 P.2d 583, 584 (1959) (father had custody on alternate weekends, certain holidays and six weeks in summer); Juri v. Juri, 61 Cal. App. 2d 815, 817, 143 P.2d 708, 709 (1943) (mother had custody four months, father had custody eight months).

68. As used herein, noncustodial parent is the parent that does not have physical custody of the child at the time in question.

69. J. FOLBERG, *supra* note 66, at 6.

70. Comment, *supra* note 40, at 294.

71. *See* P. WOOLLEY, *supra* note 61, at 103.

72. Comment, *supra* note 40, at 294. See P. WOOLLEY, *supra* note 61, at 98-108, for a discussion of the problems associated with shared custody arrangements.

73. Comment, *supra* note 40, at 294-95.

74. CAL. CIV. CODE § 4600.5(f).

rangements. The main advantage is that both parents may actively participate in their child's upbringing.[75] The parents can provide day-to-day care and make major decisions regarding their child's life.[76] As a result, the child feels secure in the love and involvement of both parents, and the parents are satisfied by maintaining close contact with their child.[77] There are, however, inherent problems with joint custody arrangements.

Joint custody may create instability in the child's life[78] and place the child in the middle of the parents' conflicts. A child may feel as if he or she is caught in a tug-of-war between the parents, a situation which is further aggravated by the "joint" rights of the parents.[79] In addition, joint custody may expose a child to a "psychological blow" if a parent pulls out of such an arrangement.[80] Children generally attribute the loss of one parent's care to a rejection of themselves, not to that parent's rejection of the marriage.[81] Thus, the success of a joint custody award depends upon the degree to which the parents are able to cooperate with each other.[82]

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75. Atkinson, *supra* note 39, at 37.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*; *see McLoren*, 202 Cal. App. 3d at 214, 247 Cal. Rptr. at 900 (intense loyalty conflict between parents experienced by both children throughout custody litigation).

80. J. WALLERSTEIN & J. BLAKESLEE, *supra* note 56, at 270.

81. *Id.*

82. *See Birnbaum*, 211 Cal. App. 3d at 1511 n.4, 260 Cal. Rptr. at 212 n.4 (parents love their children but neither can see past their particular egocentric needs to acknowledge full value of other parent to child); *McLoren*, 202 Cal. App. 3d at 114, 247 Cal. Rptr. at 900 (court erroneously modified custody to joint custody where parents had ongoing inability to cooperate in their parenting responsibilities due to severe hostility toward each other, at times erupting into physical violence, and to virtual absence of any communication between them); Atkinson, *supra* note 39, at 37-38. A recent report from the Center for the Family in Transition in Marin County has found no evidence that joint custody promoted the children's adjustment to their parents' divorce. *Joint Custody Findings Surprise Few*, 12 Cal. Fam. L. Rep. (Adams & Sevitch) No. 5, at 3630, 3630 (May 1988) [hereinafter *Joint Custody Findings*]. The center conducted two separate studies; the first considered families that chose their own custody arrangements; the second considered families with extensive post-dissolution conflict. *Id.* The findings were as follows:

> The first study found that there was no significant relationship between 'access arrangements' and the child's adjustment to the divorce; of greater importance were the child's age, the presence or absence of parental depression and anxiety, and the degree of physical and verbal aggression between the parents. The second study found that, where divorce disputes were severe, children who had greater access to both parents . . . were more emotionally troubled and behaviorally disturbed. Greater exposure to conflict between their parents made them more vulnerable to being caught up and used in the disputes. The researcher cautioned against encouraging or mandating joint custody when parents are involved in an ongoing struggle.

Id. Dr. Judith Wallerstein, Executive Director of the Center, said that in order to maintain continuous contact with both parents the child does not have to go back and forth between

B. Initial Determination of Child Custody

Courts focus their initial custody determination upon what custody arrangement would be best for the child.[83] Courts make this determination according to the "best interests" standard defined in section 4608 of the California Civil Code.[84] Section 4608 delineates broad considerations upon which courts must base their decisions.[85] Because this standard is extremely vague and difficult to apply, courts have developed a list of factors[86] that they consider important in making the initial custody determination.

1. The "best interests" standard

Many factors are involved in a court's initial determination of child custody arrangements.[87] The courts, however, have formulated most of these factors because the California Civil Code sections dealing with initial custody determinations are extremely vague.[88] Section 4600 of the California Civil Code states merely that "[c]ustody should be awarded . . . according to the *best interests of the child*."[89] It is not clear what "best interests" means.[90] Section 4608, however, requires courts specifically to consider: (1) the health, safety and welfare of the child; (2) any

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homes. *Id.* She also said that "[w]hile joint custody may still be warranted in some cases, these studies certainly don't show it to be the boon for kids that everyone hoped it would be." *Id.*

83. *See infra* notes 87-140 and accompanying text.

84. CAL. CIV. CODE § 4608 (West Supp. 1990).

85. *See infra* notes 91-94 and accompanying text.

86. *See infra* notes 102-40 and accompanying text.

87. *See infra* notes 102-40 and accompanying text. In *Foster v. Foster*, the court stated:

> In deciding a matter so vital to the parents and to the welfare of the child, it is important that the trial court in order to make as wise a decision as possible, should have as complete a picture of the whole background of the child as possible,—the financial condition of the parents, their interests, their morals, and their dispositions, as well as any other factor which might aid the court in determining the probabilities of either parent furnishing a happy, harmonious home for the child.

8 Cal. 2d 719, 732, 68 P.2d 719, 725 (1937), *quoted in* Hue v. Pickford, 96 Cal. App. 2d 766, 770-71, 216 P.2d 128, 131 (1950).

88. *See* Birnbaum v. Birnbaum (*In re* Marriage of Birnbaum), 211 Cal. App. 3d 1508, 1515, 260 Cal. Rptr. 210, 214 (1988); CAL. CIV. CODE §§ 4600, 4600.5, 4608 (West Supp. 1990); Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE L. & POL'Y REV. 267, 269 (1987).

89. CAL. CIV. CODE § 4600(b) (emphasis added).

90. This standard might be interpreted as either a happy childhood or one that leads to a child's becoming a well-adjusted adult, regardless of a happy childhood experience. For a discussion of children's best interests and the wide discretion available to judges in making their custody decisions, see P. WOOLLEY, *supra* note 61, at 261. For a detailed discussion of the problem of defining the best interests of the child, see Chambers, *Rethinking Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 487-99 (1984).

history of abuse by one or both parents against the child; and (3) the nature and amount of contact with each parent.[91] In addition to these specified factors, section 4608 instructs the courts to consider any "other factors [they] find[ ] relevant."[92] As a result of this vague statutory language, courts have applied a series of independent components in making the initial custody determination. These factors include: mental instability, alcohol and drug problems, frequent changes of residence, relationships with stepparents and stepsiblings, abuse and neglect, time with parent pending trial or during appeal, heterosexual or homosexual relationships, children's preferences, care and religion.[93] When applying the statutory and common-law considerations, however, the courts' overriding consideration must be what is best for the child.[94]

The best interests standard emerged because the adverse nature of

91. CAL. CIV. CODE § 4608.

92. *Id.* Although judges attempt to remain objective in their decisions, they are often affected by their own backgrounds and biases. Dupaix, *supra* note 17, at 652-53; Pearson & Ring, *Judicial Decision-Making in Contested Custody Cases*, 21 J. FAM. L. 703, 724 (1983); Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757, 762 (1985). The subjective nature of the best interests standard allows judges to use their discretion to consider the individual qualities of each parent and to make determinations based upon their own personality, temperament, background, interests and biases. Dupaix, *supra* note 17, at 652; Wexler, *supra*, at 762. The judges' own psychological observations of the parents may also permeate their decisions. J. GOLDSTEIN, A. FREUD & S. SOLNIT, IN THE BEST INTERESTS OF THE CHILD 27 (1985). As such, judges may adopt the roles of psychologists with expertise in child development. *Id.* Consequently, the process of determining child custody may be "less than a product of reasoned application of precedent" than of judges' personal beliefs. *Id.*

93. The nature of the elements the courts take into account depend upon the facts of a particular case. *See, e.g.*, Carney v. Carney (*In re* Marriage of Carney), 24 Cal. 3d 725, 598 P.2d 36, 157 Cal. Rptr. 383 (1979) (health or disabilities of parent); Lewin v. Lewin (*In re* Marriage of Lewin), 186 Cal. App. 3d 1482, 231 Cal. Rptr. 433 (1986) (fitness of parent); Levin v. Levin (*In re* Marriage of Levin), 102 Cal. App. 3d 981, 162 Cal. Rptr. 757 (1980) (health or disabilities of parent); Urband v. Urband (*In re* Marriage of Urband), 68 Cal. App. 3d 796, 137 Cal. Rptr. 433 (1977) (mother's Jehovah's Witness religion not basis for award to father because religion not detrimental for prohibiting blood transfusion when none needed); Nadler v. Superior Court, 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (1967) (homosexual parent); Immerman v. Immerman, 176 Cal. App. 2d 122, 1 Cal. Rptr. 298 (1959) (lesbian or gay parent); Colombo v. Colombo, 71 Cal. App. 2d 577, 582-84, 162 P.2d 995 (1945) (mother's mental condition was one determining factor in award of custody to father); *see* Atkinson, *supra* note 39, at 8-10. All or some of these factors may be relevant in the initial custody determination depending upon the facts of the case being considered. These are just some of the factors that courts consider when making a child custody determination. The above factors were irrelevant in the *Birnbaum* case, and, as a result, are not addressed in this Note.

94. Burchard v. Garay, 42 Cal. 3d 531, 536, 724 P.2d 486, 489, 229 Cal. Rptr. 800, 803 (1986); Kim v. Kim, 208 Cal. App. 3d 364, 370, 256 Cal. Rptr. 217, 220 (1989); Brockman v. Brockman (*In re* Marriage of Brockman), 194 Cal. App. 3d 1035, 1041, 240 Cal. Rptr. 96, 98 (1987); Sam E. v. Stahl (Guardianship of Claralyn S.), 148 Cal. App. 3d 81, 85, 195 Cal. Rptr. 646, 649 (1983).

divorce proceedings made it easy for courts and parents to ignore the rights and interests of the child.[95] Therefore, this standard dictates that judges ignore individual parental wishes and instead arrange a custody agreement that best furthers the child's welfare.[96] Moreover, the focus of custody proceedings is on the child's needs, not on parental rights, misgivings or desires.[97] Such proceedings are neither meant to discipline one parent for individual shortcomings, nor reward the unoffending parent.[98]

In some cases, children may be represented by counsel in custody proceedings.[99] Either a parent or the child, if sufficiently mature to voice a desire to be represented, may apply for counsel for the child.[100] In addition, the court upon its own motion may appoint the child an independent counsel.[101]

2. Factors courts use in applying the "best interests" standard

a. primary caretaker

Judges may have some preference in awarding custody to the primary caretaker.[102] One commentator states that judges may assume that the primary caretaker has a closer relationship with the child and is more experienced in meeting the child's needs, particularly when the child is

95. Dupaix, *supra* note 17, at 652.

96. *Id.*

97. Kern v. Kern (*In re* Marriage of Kern), 87 Cal. App. 3d 402, 410, 150 Cal. Rptr. 860, 865 (1979); Charlow, *supra* note 88, at 268.

98. *See* Stoker v. Kinney (*In re* Marriage of Stoker), 65 Cal. App. 3d 878, 881-82, 135 Cal. Rptr. 616, 618 (1977); Clarke v. Clarke, 4 Cal. App. 3d 583, 589, 84 Cal. Rptr. 393, 395-96 (1970); Stack v. Stack, 189 Cal. App. 2d 357, 371, 11 Cal. Rptr. 177, 187 (1961); Ashwell v. Ashwell, 135 Cal. App. 2d 211, 217, 286 P.2d 983, 987 (1955); Sorrels v. Sorrels, 105 Cal. App. 2d 465, 471, 234 P.2d 103, 106 (1951).

99. Section 4606(a) of the California Civil Code states, "In any initial or subsequent proceeding under this part where there is in issue the custody of or visitation with a minor child, the court may, if it determines it would be in the best interests of the minor child, appoint private counsel to represent the interests of the minor child." CAL. CIV. CODE § 4606(a) (West Supp. 1990); *accord In re* Marriage of Schwander, 79 Cal. App. 3d 1013, 1021, 145 Cal. Rptr. 325, 330 (1978). *See generally* Ardagh, *California Civil Code Section 4606: Separate Representation for Children in Dissolution Custody Proceedings*, 14 U.S.F. L. REV. 571 (1980) (discusses children's independent representation, circumstances that prompt courts to appoint independent counsel for children and role of appointed attorney).

100. *See In re* Patricia E., 174 Cal. App. 3d 1, 7, 219 Cal. Rptr. 783, 786 (1985); S. ADAMS & N. SEVITCH, CALIFORNIA FAMILY LAW PRACTICE §§ L.124-125.1, at L-32 to -33 (1988) (explanation of how to apply for representation).

101. *Patricia E.*, 174 Cal. App. 3d at 7, 219 Cal. Rptr. at 786; *see* S. ADAMS & N. SEVITCH, *supra* note 100, §§ L.124-125.1, at L-32 to -33.

102. *See, e.g., Burchard*, 42 Cal. 3d at 541, 724 P.2d at 492, 229 Cal. Rptr. at 807; *see* Atkinson, *supra* note 39, at 18-19. As used herein the primary caretaker is the parent who predominantly cares for the child.

young.[103] This parent has already demonstrated commitment to the child by caring for him or her and will most likely continue this care.[104]

Courts, however, may encounter problems in determining which parent is the primary caretaker, especially in cases where both parents have been almost equally involved in raising and caring for their child.[105] As a child grows older and becomes more independent, the role of the primary caretaker lessens and this factor may be less important to courts considering which parent should be awarded custody.[106]

b. time available to spend with the child

In addition to considering the role of the child's primary caretaker, courts must consider the amount of time each parent has available to spend with the child.[107] If one parent has more time to care for the child, one commentator suggests that courts may tend to consider this heavily.[108] It is certainly in the child's best interests to have a parent present to help him or her develop into an adult.[109] The California legislature also deemed the amount of contact with parents as an important factor in child custody determinations.[110]

c. stability of environment and educational opportunity

Another important factor courts weigh in determining the child's best interests is the stability in the child's established home environment.[111] Courts are concerned with whether the child is cared for and well adjusted to his or her existing environment.[112] Accordingly, courts may be reluctant to change the child's living arrangement.[113] If the child

103. *See* Atkinson, *supra* note 39, at 16-17.

104. *Id.* at 17.

105. *Id.* at 18.

106. *Id.*

107. *See* CAL. CIV. CODE § 4608(c).

108. *See* Atkinson, *supra* note 39, at 19.

109. *See* BEYOND THE BEST INTERESTS, *supra* note 19, at 4.

110. *See* CAL. CIV. CODE § 4608(c).

111. *Burchard*, 42 Cal. 3d at 535, 724 P.2d at 488, 229 Cal. Rptr. at 802 (court interested in preserving stable custody arrangements); *Carney*, 24 Cal. 3d at 730, 598 P.2d at 38, 157 Cal. Rptr. at 385 (policy of not upsetting child's established living situation); Mehlmauer v. Mehlmauer (*In re* Marriage of Mehlmauer), 60 Cal. App. 3d 104, 109, 131 Cal. Rptr. 325, 329 (1976) (child lived with mother for 8 years and court found that "[w]here all things appear essentially equal, it would seem beneficial to leave child in accustomed environment").

112. *See, e.g.*, *Burchard*, 42 Cal. 3d at 535, 724 P.2d at 488, 229 Cal. Rptr. at 802; *Carney*, 24 Cal. 3d at 730, 598 P.2d at 38, 157 Cal. Rptr. at 385.

113. *See, e.g.*, *Burchard*, 42 Cal. 3d at 535, 724 P.2d at 488, 229 Cal. Rptr. at 802 (underlying policy of stability); McLoren v. McLoren (*In re* Marriage of McLoren), 202 Cal. App. 3d 108, 113, 247 Cal. Rptr. 897, 900 (1988) (court should give full regard to maintenance of stable

has a stable and secure relationship with one parent, courts usually award custody to that parent.[114] Further, courts may give great weight to the child's educational opportunities.[115] Therefore, the parent who can better help the child with academic performance or special learning problems will often obtain custody.[116]

d. mental capacity, health or disability

Courts may also consider a parent's mental or physical condition in custody proceedings, but these factors usually do not justify an award to the healthier parent.[117] It is important to note that courts are "not required to find that one parent is unfit . . . as a prerequisite to awarding custody to the other parent."[118] The personal behavior and the characteristics of the parent, however, are relevant to the court's decision in determining whether a child should be left in that parent's custody.[119]

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homelife and disturbing effect which may result from change in child's established environment); *Levin*, 102 Cal. App. 3d at 988, 162 Cal. Rptr. at 761 (child's custody was not changed because stability and security in child's development were essential for child's happiness and proper development). *See generally* BEYOND THE BEST INTERESTS, *supra* note 19 (importance of stable environment for children).

114. *Levin*, 102 Cal. App. 3d at 988, 162 Cal. Rptr. at 761 (child's custody was not changed because stability and security in child's development were essential for child's happiness and proper development); *Mehlmauer*, 60 Cal. App. 3d at 109, 131 Cal. Rptr. at 329 (child lived with mother for eight years and court found that "[w]here all things appear essentially equal, it would seem beneficial to leave child in accustomed environment").

115. *See, e.g.*, *Birnbaum*, 211 Cal. App. 3d at 1514, 260 Cal. Rptr. at 213 (joint custody arrangement changed to make father "school parent" because school system in which former husband resided was superior to that in which wife resided); *In re* Marriage of Rosson, 178 Cal. App. 3d 1094, 1102, 224 Cal. Rptr. 250, 256 (1986) (children's primary physical residence was with mother, but modified when she moved based on need for stable environment and father's testimony about his involvement with children's academic, athletic, social and religious activities). See *infra* note 261 for examples where changing schools is not in the children's best interests.

116. Atkinson, *supra* note 39, at 22.

117. *See, e.g.*, *Burchard*, 42 Cal. 3d 531, 724 P.2d 486, 229 Cal. Rptr. 800 (mother's past emotional problems were insignificant); *Carney*, 24 Cal. 3d 725, 598 P.2d 36, 157 Cal. Rptr. 383 (father's physical handicap, which affected his ability to participate in physical activities with his child, did not constitute changed circumstance significant enough to justify taking child out of his custody); Frazier v. Frazier, 115 Cal. App. 2d 551, 559, 252 P.2d 693, 698 (1953) (custody of daughter age two awarded to father because daughter's birth brought mother's mental condition to focus and son age eight awarded to mother); *Columbo*, 71 Cal. App. 2d at 582, 162 P.2d at 997-98 (error to award mother custody because she suffered from recurring insanity).

118. Cunningham v. Cunningham, 217 Cal. App. 2d 65, 67, 31 Cal. Rptr. 448, 449 (1963); *accord Stack*, 189 Cal. App. 2d at 371, 11 Cal. Rptr. at 187.

119. *Stack*, 189 Cal. App. 2d at 371, 11 Cal. Rptr. at 188.

e. interference with visitation

Courts further regard access to visitation as a substantial component in custody decisions.[120] This is probably because courts feel that children need both parents to participate in their upbringing.[121] Although their parents are no longer married, children need reassurance that both parents still accept and want them.[122] Section 4600(b)(1) of the California Civil Code provides that courts should determine custody according to which parent will allow for frequent and continuing contact with the other parent.[123] Courts attempt to preserve visitation rights whenever possible.[124] Courts, however, will probably alter custody arrangements where the custodial parent interferes with visitation.[125] A commentator has stated that courts alter custody under these circumstances because: (1) a child has easier access to the security and love of both parents,[126] and (2) the parent who is granted access is usually more emotionally stable and a better role model for the child.[127]

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120. Section 4601 of the California Civil Code states that:

> In making an order pursuant to Section 4600.5, the court shall order reasonable visitation rights to a parent unless it is shown that the visitation would be detrimental to the best interests of the child. In the discretion of the court, reasonable visitation rights may be granted to any other person having an interest in the welfare of the child.

CAL. CIV. CODE § 4601 (West Supp. 1990). See O'Connell v. O'Connell (*In re* Marriage of O'Connell), 80 Cal. App. 3d 849, 146 Cal. Rptr. 26 (1978) for a general discussion of the differences between custody and visitation.

121. Richards, *supra* note 36, at 83. A major factor in reducing the immediate disturbing effects on children is the continuation of their relationships with both parents. *Id.*

122. Atkinson, *supra* note 39, at 26.

123. CAL. CIV. CODE § 4600(b)(1).

124. *See, e.g.*, Birdsall v. Birdsall (*In re* Marriage of Birdsall), 197 Cal. App. 3d 1024, 1030-31, 243 Cal. Rptr. 287, 290 (1988) (no restraining order on overnight visitation with homosexual parent); Murga v. Petersen (*In re* Marriage of Murga), 103 Cal. App. 3d 498, 503, 163 Cal. Rptr. 79, 80 (1980) (one parent's establishing residency in far away place to preclude other's visitation constitutes change in circumstances to modify visitation order). The paramount consideration in child custody and visitation is the welfare of the children. Sanchez v. Sanchez, 55 Cal. 2d 118, 121, 358 P.2d 533, 535, 10 Cal. Rptr. 261, 263 (1961); Matthews v. Matthews (*In re* Marriage of Matthews), 101 Cal. App. 3d 811, 818, 161 Cal. Rptr. 879, 883 (1980); Devine v. Devine, 213 Cal. App. 2d 549, 552, 29 Cal. Rptr. 132, 134 (1963).

125. *See* Speelman v. Superior Court, 152 Cal. App. 3d 124, 132, 199 Cal. Rptr. 784, 789 (1983) (one parent's frustrating other's efforts to see child could justify changed circumstances); *Murga*, 103 Cal. App. 3d at 503, 163 Cal. Rptr. at 80 (one parent's establishing residency in distant place to preclude other's visitation constitutes change in circumstances to modify visitation order); Atkinson, *supra* note 39, at 26.

126. CAL. CIV. CODE § 4600(a) (legislature states that public policy of state is to assure child frequent and continuing contact with both parents); Atkinson, *supra* note 39, at 26.

127. Atkinson, *supra* note 39, at 26.

f. the child's preferences

In addition to other factors, courts may consider the child's preferences in establishing any custody arrangement. Section 4600 provides that "[i]f a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court *shall consider and give due weight* to the wishes of the child in making an award of custody or modification."[128] The language of this statute is not mandatory, but discretionary.[129] In some cases, courts may consider it unwise to consider the child's preference because such a course of action "may destroy what little good will is left between the parents or between one of the parents and the child."[130] Nonetheless, there clearly is a legislative preference to interview minors to determine their best interests.[131]

Wallerstein and Kelly, well-known researchers who studied the impact of divorce on children, made numerous observations about the age when children's preferences should be followed.[132] They found that "children below adolescence [were] not reliable judges of their own best interests and that their attitudes at the time of the divorce crisis may be very much at odds with their usual feelings and inclinations."[133] Preadolescent children may not be able to make informed judgments about their own interests because of their long-lasting anger at the parent whom they held responsible for the divorce.[134] Children of this age are also subject to being "co-opted into the parental battling . . . tak[ing] sides, often against a parent to whom they had been tenderly attached during the intact marriage; and . . . attempt[ing] to rescue a distressed parent often to their own detriment."[135] These observations, along with findings that children with the "most passionate convictions at the time of the breakup later . . . regret[ted] their vehement statements at that

128. CAL. CIV. CODE § 4600(a) (emphasis added).

129. *Mehlmauer*, 60 Cal. App. 3d at 110, 131 Cal. Rptr. at 329; Messer v. Messer, 259 Cal. App. 2d 507, 509, 66 Cal. Rptr. 417, 418 (1968); *Stack*, 189 Cal. App. 2d at 364, 11 Cal. Rptr. at 183. Thus, it is not a ground for later reversal if the court refuses to consider the desires of the child. *Mehlmauer*, 60 Cal. App. 3d at 110-11, 131 Cal. Rptr. at 329; *Messer*, 259 Cal. App. 2d at 509, 66 Cal. Rptr. at 418; *Stack*, 189 Cal. App. 2d at 364, 11 Cal. Rptr. at 183 (child was ten and court did not consider her preference).

130. *Stack*, 189 Cal. App. 2d at 364, 11 Cal. Rptr. at 183.

131. *See* Detrich v. Dorothy H. (*In re* Jack H.), 106 Cal. App. 3d 257, 269, 165 Cal. Rptr. 646, 653-54 (1980) (court should use trial judge's inquiry of children's preferences at ages 8 and 11 instead of presuming what children preferred); CAL. CIV. CODE § 4600(a).

132. J. WALLERSTEIN & J. KELLY, *supra* note 19, at 314 (study of 60 families over time to assess impact of divorce on their development).

133. *Id.*

134. *Id.*

135. *Id.*

time, have increased [the] misgivings about relying on the expressed opinions and preferences of youngsters below adolescence in deciding the issues which arise in divorce-related litigation."[136]

Another recent study by researchers determined that judges of the Superior Court of California, when making their custody decisions, attached greater significance to children's preferences as the children's age increased.[137] The preferences of adolescent children had a much stronger influence on judges than the desires of latency age children, and the desires of the very young had even less of an influence.[138] Although courts generally consider the child's preference, the weight of this factor depends, in part, on the child's psychological makeup, level of maturity[139] and age.[140]

C. *Standards for Modification*

1. Statutory guidelines

After the court makes its initial custody determination, parents may still be able to change this arrangement through modification proceedings. Section 4600 of the California Civil Code[141] provides that "[i]n any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at *any time thereafter*, make such order for the custody of the child during minority as may seem necessary or proper."[142] The phrase "at any time thereafter" authorizes the court to modify its original custody award.[143]

In addition, section 4600.5 of the California Civil Code[144] specifi-

136. *Id.* at 314-15.

137. Reidy, Siver & Carlson, *Child Custody Decisions: A Survey of Judges*, 23 FAM. L.Q. 75, 78 (1989) (study done by questionnaire of 156 California Superior Court judges in 41 of 58 counties covering aspects of child custody dispute resolution process).

138. *Id.*

139. "Maturity is not measured by chronological age." Rosson v. Rosson (*In re* Marriage of Rosson), 178 Cal. App. 3d 1094, 1103, 224 Cal. Rptr. 250, 256 (1986) (maturity is factor used to determine at what age child's preference should be considered in custody case).

140. CAL. R. CT. 1285.10.

141. CAL. CIV. CODE § 4600 (West Supp. 1990).

142. *Id.* § 4600(a) (emphasis added).

143. 2 C. MARKEY, *supra* note 30, § 22.90, at 22-66.

144. CAL. CIV. CODE § 4600.5 (West Supp. 1990). Section 4600.5(i) provides that:

> Any order for joint custody may be modified or terminated upon the petition of one or both parents or on the court's own motion if it is shown that the best interests of the child require modification or termination of the order. The court shall state in its decision the reasons for modification or termination of the joint custody order if either parent opposes the modification or termination order.

Id. § 4600.5(i).

cally applies to the modification of joint custody agreements.[145] The statute states that any order for joint custody may be modified upon petition of one or both parents or upon the court's own motion if it is shown that the child's best interests require modification of the order.[146] The party seeking the modification has the burden of proving that such a modification is in the best interests of the child.[147] If the court decides to modify the initial custody agreement, the court must state its reasons if either parent opposes the modification.[148] In making its decision, the court "should give full regard to 'the maintenance of a stable homelife, and the disturbing effect which might result from a change of the child's established mode of living.' "[149] These concerns apply whether the court is contemplating a change in physical or legal custody.[150] Generally, the decision to modify custody is based on the circumstances at the time of the modification.[151] The court, however, may also consider prior conduct to determine whether to modify the custody arrangement.[152]

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145. *Id.*

146. *Id.*

147. Carney v. Carney (*In re* Marriage of Carney), 24 Cal. 3d 725, 731, 598 P.2d 36, 38, 157 Cal. Rptr. 383, 385 (1979); Kern v. Kern (*In re* Marriage of Kern), 87 Cal. App. 3d 402, 410-11, 150 Cal. Rptr. 860, 863 (1978); Mehlmauer v. Mehlmauer (*In re* Marriage of Mehlmauer), 60 Cal. App. 3d 104, 108-09, 131 Cal. Rptr. 325, 328 (1976).

148. CAL. CIV. CODE § 4600.5(i).

149. McLoren v. McLoren (*In re* Marriage of McLoren), 202 Cal. App. 3d 108, 113, 247 Cal. Rptr. 897, 900 (1988) (quoting Lawrence v. Lawrence, 165 Cal. App. 2d 789, 792-93, 332 P.2d 305, 308 (1958)).

150. *McLoren*, 202 Cal. App. 3d at 116, 247 Cal. Rptr. at 900; *see* 2 C. MARKEY, *supra* note 30, § 22.90, at 22-66.

151. *McLoren*, 202 Cal. App. 3d at 114, 247 Cal. Rptr. at 900; *see also Carney*, 24 Cal. 3d at 741, 598 P.2d at 45, 157 Cal. Rptr. at 392 (court recognized during pendency of appeal additional circumstances bearing on best interests of children may have developed and could be considered by trial court on remand); Rosson v. Rosson (*In re* Marriage of Rosson), 178 Cal. App. 3d 1094, 1102, 224 Cal. Rptr. 250, 256 (1986) (court does not require "harm" to child as prerequisite to modification of custody); Speelman v. Superior Court, 152 Cal. App. 3d 124, 132, 199 Cal. Rptr. 784, 788 & n.1 (1983) (court must articulate how circumstances have changed since initial decision). *But see* Russo v. Russo, 21 Cal. App. 3d 72, 94, 98 Cal. Rptr. 501, 517 (1971) (in determining to whom child custody should be entrusted according to child's best interests, courts must consider circumstances that gave rise to these proceedings and circumstances which developed in interim); Denham v. Matina, 214 Cal. App. 2d 312, 320-21, 29 Cal. Rptr. 377, 383 (1963) (order reversed because trial judge did not hear evidence of past conduct to determine fitness of parent).

152. Sanchez v. Sanchez, 55 Cal. 2d 118, 124, 358 P.2d 533, 537, 10 Cal. Rptr. 261, 265 (1961).

> Although "[t]he question as to whether a parent is a fit or proper person to have the custody of a minor child refers . . . to his or her fitness at the time of the hearing and is not necessarily controlled by conduct . . . prior thereto," such *prior conduct may, of course, be considered by the court in determining with which parent the best interests of the child will be found.*

Id. (emphasis added) (quoting Prouty v. Prouty, 16 Cal. 2d 190, 194, 105 P.2d 295, 297

2. Change in circumstances requirement

For courts to modify custody orders, the party seeking modification not only must prove that such a change in custody is in the best interests of the child, but must also show that there has been a change in circumstances.[153] The change in circumstances requirement applies equally to modifying physical or legal custody.[154] The burden of showing a sufficient change in circumstances lies with the party seeking the change in the custody order.[155] To justify a change in custody, there must be a persuasive showing of substantially changed circumstances affecting the child.[156] "[A] child will not be removed from the prior custody of one parent and given to the other 'unless the material facts and circumstances

(1940)); *accord* Merrill v. Merrill, 167 Cal. App. 2d 423, 428, 334 P.2d 583, 587 (1959) (evidence of acts prior to rendition of challenged decree inadmissible because such evidence could not possibly show change in conditions, except where evidence of acts unknown to court or complaining party at time challenge decree entered may be admissible).

153. *Carney*, 24 Cal. 3d at 730, 598 P.2d at 38, 157 Cal. Rptr. at 385; Goto v. Goto, 52 Cal. 2d 118, 122-23, 338 P.2d 450, 453 (1959); *Rosson*, 178 Cal. App. 3d at 1101, 224 Cal. Rptr. at 255; *Speelman*, 152 Cal. App. 3d at 129, 199 Cal. Rptr. at 786. Section 4600.5(d) implicitly adopts the change in circumstances requirement by requiring a court to state its reasons for modifying joint custody if the motion is opposed. *Speelman*, 152 Cal. App. 3d at 132, 199 Cal. Rptr. at 788; CAL. CIV. CODE § 4600.5(i). The provision requiring the trial court to provide reasons for a change in custody forces the court to articulate how circumstances have changed since the initial decision. *Speelman*, 152 Cal. App. 3d at 132, 199 Cal. Rptr. at 788.

154. *McLoren*, 202 Cal. App. 3d at 111, 116, 247 Cal. Rptr. at 898, 901-02; *see* 2 C. MARKEY, *supra* note 30, § 22.90, at 22-66. The change in circumstances requirement does not apply in cases where the custody arrangement was not established by a court order or is a temporary custody arrangement implemented under pendente lite stipulation, order to show cause, or pretrial order. 2 C. MARKEY, *supra* note 30, § 22.90, at 22-65. "The court recognized how custody was originally determined is immaterial [, that is, w]hether by stipulation or by explicit or implied agreement, if the parties intended it to be a *final* agreement, a change of circumstance showing is required." Lewin v. Lewin (*In re* Marriage of Lewin), 186 Cal. App. 3d 1482, 1486, 231 Cal. Rptr. 433, 434 (1986). The rule "requires that one identify a prior custody decision based upon circumstances then existing which rendered that decision in the best interest of the child. The court can then inquire whether alleged new circumstances represent a significant change from preexisting circumstances, requiring a reevaluation of the child's custody." Burchard v. Garay, 42 Cal. 3d 531, 534, 724 P.2d 486, 488, 229 Cal. Rptr. 800, 802 (1986); *see also Lewin*, 186 Cal. App. 3d at 1486-88, 231 Cal. Rptr. at 434-36 (explanation of change in circumstances requirement discussing precedent). The rule is not inflexible and is subject to exceptions where the welfare of the child requires it. Walker v. Bourland (*In re* Walker), 228 Cal. App. 2d 217, 222, 39 Cal. Rptr. 243, 246 (1964). Changed circumstances is " 'another form of evidence which the court may consider in the exercise of its discretion to hear and decide the question of modification of custody orders previously made.' " *Id.* at 223-24, 39 Cal. Rptr. at 246 (quoting Kelly v. Kelly, 75 Cal. App. 2d 408, 415, 171 P.2d 95, 99 (1946)). Usually a change of circumstances must be shown, but that requirement is not an absolute ironclad rule. Immerman v. Immerman, 176 Cal. App. 2d 122, 126, 1 Cal. Rptr. 298, 300 (1959).

155. *Kern*, 87 Cal. App. 3d at 410-11, 150 Cal. Rptr. at 865; *Mehlmauer*, 60 Cal. App. 3d at 108-09, 131 Cal. Rptr. at 328.

156. *Carney*, 24 Cal. 3d at 730, 598 P.2d at 38, 157 Cal. Rptr. at 385; *Goto*, 52 Cal. 2d at

occurring subsequently are of a kind to render it essential or expedient for the welfare of the child that there be a change.' "[157] For example, frustration of the other parent's visitation with the child may constitute a change in circumstances.[158]

The reason for this rule has been well established.[159] The courts are reluctant to order a change of custody and will not do so except for imperative reasons because it is desirable to end child custody litigation and avoid changing the child's "established mode of living."[160] Courts, however, should not be too reluctant to consider changes in circumstances because if the change in circumstances rule is applied too mechanically, it locks the child into a bad situation.[161] Consequently, the child may be forced to live with a parent who either does not meet the child's needs, or is unfit.

3. Factors courts consider in modifying custody orders

All of the factors for the initial custody determination are also relevant in the modification proceedings.[162] For example, when courts consider the child's preference as to custody, that preference is entitled to greater consideration in a modification proceeding than in the initial custody order.[163] The reason for this higher degree of consideration is that the child has already experienced one living arrangement and, therefore, has a more informed basis for his or her preference.[164] In the original

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122-23, 338 P.2d at 453; *Rosson*, 178 Cal. App. 3d at 1101, 224 Cal. Rptr. at 255; *Speelman*, 152 Cal. App. 3d at 129, 132, 199 Cal. Rptr. at 786, 789.

157. *Carney*, 24 Cal. 3d at 730, 598 P.2d at 38, 157 Cal. Rptr. at 385 (quoting Washburn v. Washburn, 49 Cal. App. 2d 581, 588, 122 P.2d 96, 100 (1942)).

158. *Speelman*, 152 Cal. App. 3d at 129, 132, 199 Cal. Rptr. at 786, 789.

159. *See Carney*, 24 Cal. 3d at 730, 598 P.2d at 38, 157 Cal. Rptr. at 385.

160. *Id.* at 730-31, 157 Cal. Rptr. at 385, 598 P.2d at 38.

161. *Burchard*, 42 Cal. 3d at 550, 724 P.2d at 499, 229 Cal. Rptr. at 813 (Mosk, J., concurring).

162. *Sanchez*, 55 Cal. 2d at 124, 10 Cal. Rptr. at 265, 358 P.2d at 537 (1961). The most important test is whether the modification should be in the best interest of the child. Essentially, however, the change in circumstances requirement produces the same result as the best interest test. *Burchard*, 42 Cal. 3d at 538-39, 724 P.2d at 490-91, 229 Cal. Rptr. at 804-05. See *supra* notes 153-61 and accompanying text for a discussion of the change in circumstances requirement.

163. *See Rosson*, 178 Cal. App. 3d at 1103, 224 Cal. Rptr. at 257.

> A child's preference must be given serious consideration by the court in acting upon a motion for modification of custody where: (1) the issue is whether children will be moved from the community where they have lived for most of their lives; (2) an excellent parent who remains in that community wishes to have the children reside with him or her, and (3) the children, for valid reasons, have expressed a preference to remain in the community.

Id. at 1102-03, 224 Cal. Rptr. at 256.

164. *Id.* at 1103, 224 Cal. Rptr. at 257.

decree, on the other hand, the child could not predict whether a future arrangement would work out.[165]

4. Standards of trial and appellate review

The high standards courts apply at the trial and appellate levels make modification of child custody orders more difficult.[166] Assume that there is an appeal from the trial court's modification of the initial custody order. Appellate courts ordinarily only decide questions of law, while the resolution of factual issues is in the sole province of the trial courts.[167] The trial judge, "having heard the evidence, observed the witnesses, their demeanor, attitude, candor or lack of candor, is best qualified to pass upon and determine the factual issues presented by their testimony."[168] This becomes especially true where the custody of a minor child is involved.[169] The trial court is given great discretion to make the initial custody order because the appellate court can only review the trial judge's findings of fact and inferences drawn from the evidence established at trial.[170] Even if there were conflicting evidence, the appellate court must "indulge all intendments and reasonable inferences which favor sustaining the trier of fact"[171] and must not disturb the finding where substantial evidence in the record supports it.[172]

The general rule is that appealed judgments and orders are presumed correct.[173] The trial court's decision in awarding custody is not disturbed on appeal unless there has been a clear abuse of the trial court's

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165. *Id.*

166. *See infra* notes 167-78 and accompanying text.

167. Tupman v. Haberkern, 208 Cal. 256, 262-63, 280 P. 970, 973 (1929). Matters not raised in trial courts or preserved in the record normally cannot be raised on appeal. Pulver v. Avco Fin. Servs., 182 Cal. App. 3d 622, 632, 227 Cal. Rptr. 491, 495 (1986).

168. Nelson v. Nelson, 261 Cal. App. 2d 800, 806, 68 Cal. Rptr. 427, 431 (1968) (quoting Currin v. Currin, 125 Cal. App. 2d 644, 651, 271 P.2d 61, 65 (1954)). Other courts also believe that the trial judge is in the best position to rule on factual issues. *See* Briscoe v. Briscoe, 221 Cal. App. 2d 668, 672, 34 Cal. Rptr. 663, 666 (1963); Coil v. Coil, 211 Cal. App. 2d 411, 415, 27 Cal. Rptr. 378, 381 (1962); Wood v. Wood, 207 Cal. App. 2d 33, 36, 24 Cal. Rptr. 260, 262 (1962).

169. *Nelson*, 261 Cal. App. 2d at 806, 68 Cal. Rptr. at 431; *Coil*, 211 Cal. App. 2d at 416, 27 Cal. Rptr. at 381; Currin v. Currin, 125 Cal. App. 2d 644, 651, 271 P.2d 61, 65 (1954).

170. *Pulver*, 182 Cal. App. 3d at 632, 227 Cal. Rptr. at 495.

171. *Sanchez*, 55 Cal. 2d at 126, 10 Cal. Rptr. at 266; Bookstein v. Bookstein, 7 Cal. App. 3d 219, 224, 86 Cal. Rptr. 495, 499 (1970).

172. *Bookstein*, 7 Cal. App. 3d at 224, 86 Cal. Rptr. at 499.

173. Denham v. Superior Court, 2 Cal. 3d 557, 564, 46 P.2d 193, 197, 86 Cal. Rptr. 65, 69 (1970) ("All intendments and presumptions are indulged to support it on matters as to which record is silent, and error must be affirmatively shown."); Jacques Interiors v. Petrak, 188 Cal. App. 3d 1363, 1369, 234 Cal. Rptr. 44, 47 (1987).

discretion.[174] The general test for abuse of the trial court's discretion is "whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered."[175] The burden is on the appellant to establish an abuse of discretion.[176]

Appellate courts are also very reluctant to reverse modifications of original custody orders because they are concerned with the policy considerations of continuity in the children's living environment and finality of custody litigation.[177] Although generally it is rare that an appellate court reverses a custody order, such reversals are common where they have violated this policy.[178]

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174. Connolly v. Connolly (*In re* Marriage of Connolly), 23 Cal. 3d 590, 597-98, 591 P.2d 911, 914-15, 153 Cal. Rptr. 423, 427 (1979); B.G. v. San Bernardino County Welfare Dep't (*In re* B.G.), 11 Cal. 3d 679, 698-99, 523 P.2d 244, 258, 114 Cal. Rptr. 444, 458 (1974); Holsinger v. Holsinger, 44 Cal. 2d 132, 135, 279 P.2d 961, 963 (1955); *Bookstein*, 7 Cal. App. 3d at 224, 86 Cal.' Rptr. at 499; Messer v. Messer, 259 Cal. App. 2d 507, 509, 66 Cal. Rptr. 417, 418 (1968). *See also* Schwartz v. Schwartz (*In re* Marriage of Schwartz), 104 Cal. App. 3d 92, 163 Cal. Rptr. 408 (1980) (abuse of discretion by trial court's making its ruling on basis of preexisting bias). See 2 C. MARKEY, *supra* note 30, § 12.51, at 22-45, for effect of trial court discretion and rarity of reversals.

175. *Connolly*, 23 Cal. 3d at 598, 591 P.2d at 915, 153 Cal. Rptr. at 427; *accord* Carter v. Carter (*In re* Marriage of Carter), 19 Cal. App. 3d 479, 494, 97 Cal. Rptr. 274, 282 (1971); Troxell v. Troxell, 237 Cal. App. 2d 147, 152, 46 Cal. Rptr. 723, 726 (1965).

176. Blank v. Kirwan, 39 Cal. 3d 311, 331, 703 P.2d 58, 71, 216 Cal. Rptr. 718, 731 (1985).

177. *See Carney*, 24 Cal. 3d at 731, 598 P.2d at 38, 157 Cal. Rptr. at 385; *Connolly*, 214 Cal. App. 2d at 436, 29 Cal. Rptr. at 618.

178. *Carney*, 24 Cal. 3d at 731, 598 P.2d at 38, 157 Cal. Rptr. at 385; *Connolly*, 214 Cal. App. 2d at 436, 29 Cal. Rptr. at 618; *see, e.g.*, *Kern*, 87 Cal. App. 3d at 410-11, 150 Cal. Rptr. at 865; *Russo*, 21 Cal. App. 3d at 86, 98 Cal. Rptr. at 511; *Martina*, 214 Cal. App. 2d at 320-21, 29 Cal. Rptr. at 383; Ashwell v. Ashwell, 135 Cal. App. 2d 211, 213, 286 P.2d 983, 984-85 (1955); Sorrels v. Sorrels, 105 Cal. App. 2d 465, 234 P.2d 103 (1951); Bemis v. Bemis, 89 Cal. App. 2d 80, 200 P.2d 84 (1948). Family law courts have been even " 'less reluctant to find an abuse of discretion when custody is changed than when . . . originally awarded.' " *Carney*, 24 Cal. 3d at 731, 598 P.2d at 38, 157 Cal. Rptr. at 385 (quoting Connolly v. Connolly (*In re* Marriage of Connolly), 214 Cal. App. 2d 433, 436, 29 Cal. Rptr. 616, 618 (1963)); *McLoren*, 202 Cal. App. 3d at 113-14, 247 Cal. Rptr. at 900; *Currin*, 125 Cal. App. 2d at 651, 271 P.2d at 66 ("An appellate tribunal is not authorized to retry the issue of custody, nor to substitute its judgment for that of the duly constituted arbiter of the facts.") The function of the appellate court is "fully performed when [it] find[s] in the records substantial evidence which supports the essential findings of the trial court." Hoffman v. Hoffman, 197 Cal. App. 2d 805, 812, 17 Cal. Rptr. 543, 547 (1961). Another court noted:

> It is the trial court's responsibility to pass on the credibility of witnesses, the weight to which their testimony is entitled, and the inferences to be drawn from the evidence. On appeal it is, of course, the duty of this court to view the evidence and the reasonable inferences to be drawn therefrom in the light most favorable to the successful party in the court below.

Wood, 207 Cal. App. 2d at 36, 24 Cal. Rptr. at 262. In other words, an appellate court may not be willing to find an abuse of discretion to overturn the trial court in modification proceedings. As a result, most initial orders stand, but those orders that are able to be subsequently modified have an even more difficult time being overturned at this stage than they did before. Courts are reluctant to change custody orders unless a substantial reason exists. The courts

III. *IN RE MARRIAGE OF BIRNBAUM*

Birnbaum v. Birnbaum (In re Marriage of Birnbaum) [179] involved a "split and joint custody" arrangement in which both physical and legal custody were held jointly.[180] The court in *Birnbaum* modified the initial custody order regarding the length of time the children would reside with each parent.[181] This change was substantial and was arguably a "modification" of the initial custody arrangement. The court, however, explained that changing the children's residential timetables was not a modification in custody,[182] as defined in section 4600.5(i) of the California Civil Code.[183] The problem at issue in *Birnbaum* revolves around whether changing the length of time in which children reside with each

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have modified custody decrees in the following cases: Catherine D. v. Dennis B., 220 Cal. App. 3d 922, 932-33, 269 Cal. Rptr. 547, 554 (1990) (affirmed change of custody to father after mother repeatedly frustrated his visitation rights); *Rosson*, 178 Cal. App. 3d at 1101-02, 224 Cal. Rptr. at 255-56 (custodial parent's job-related decision to move from community which children lived for significant period and in which noncustodial parent resides); *Speelman*, 152 Cal. App. 3d at 132-33, 199 Cal. Rptr. at 788-89 (custodial parent's frustration of noncustodial parent's visitation rights); Dahl v. Dahl, 237 Cal. App. 2d 407, 409-11, 46 Cal. Rptr. 881, 882-83 (1965) (father obtained place and persons to care for child while mother maintained open illicit relationship with another man); Fauble v. Fauble, 219 Cal. App. 2d 682, 685-86, 33 Cal. Rptr. 470, 471-72 (1963) (father's remarriage and possession of ranch on which to keep children, and mother's second divorce and failure to properly care for children); Loudermilk v. Loudermilk, 208 Cal. App. 2d 705, 707-08, 25 Cal. Rptr. 434, 435-36 (1962) (mother's improved health and remarriage which enabled her to care for child, and father's remarriage and change of residence which limited mother's opportunity to visit and changed child's caretaker); Stack v. Stack, 189 Cal. App. 2d 357, 370, 11 Cal. Rptr. 177, 182 (1961) (both parents' remarriage and custodial mother's plan to remove child from state which would frustrate father's visitation rights); Harris v. Harris, 186 Cal. App. 2d 788, 790-92, 9 Cal. Rptr. 300, 301-02 (1960) (evidence mother not properly caring for child).

There are also some cases where courts have found that there was no change in circumstances which would permit a custody modification. For example, the California Supreme Court has specifically held that a physical handicap that affects a parent's ability to participate with his or her children in purely physical activities is not a sufficient change of circumstances to justify a change in custody. *Carney*, 24 Cal. 3d at 740, 598 P.2d at 38, 157 Cal. Rptr. at 391. The court reasoned that basing a custody decision on a parent's physical handicap is improper because the handicap stereotype fails to reach the heart of the parent-child relationship. *Id.* "[I]ts essence lies in the ethical, emotional, and intellectual guidance the parent gives to the child[ren] throughout [their] formative years, and often beyond." *Id.* The United States Supreme Court has held that if the custodial parent marries a person of a different race than either of the parents, this alone cannot justify a change in child custody. Palmore v. Sidoti, 466 U.S. 429, 434 (1984).

179. 211 Cal. App. 3d 1508, 260 Cal. Rptr. 210 (1989).

180. *Birnbaum*, 211 Cal. App. 3d at 1510-11, 260 Cal. Rptr. at 211; see also *supra* notes 38-65 and accompanying text for an explanation of split and joint custody.

181. *Birnbaum*, 211 Cal. App. 3d at 1512, 260 Cal. Rptr. at 211.

182. *Id.* at 1513, 260 Cal. Rptr. at 213.

183. CAL. CIV. CODE § 4600.5(i) (West Supp. 1990). See *supra* notes 144-52 and accompanying text for a discussion of the requirements of section 4600.5(i) of the California Civil Code.

parent without changing the type of custody initially granted—that is, joint legal and physical custody—is in fact equivalent to modifying a custody arrangement.

A. Statement of the Case

In August 1983, Lorene and Ira Birnbaum ended their marriage through an interlocutory judgment of dissolution.[184] A custody agreement providing the parents with joint legal and physical custody of their three daughters, aged three, five and seven, was incorporated into this judgment from the parents' marital settlement agreement.[185] The marital agreement provided that the first child's "primary residence"[186] was with the mother, the second child's primary residence was with the father and the schedule of the third child's primary residence would alternate annually.[187] All three children were to live with Lorene on weekdays and spend weekends and Wednesday afternoons with Ira during the school year.[188]

In August 1986, three years after Lorene had moved from the city of San Mateo to "the Coast Side" of San Mateo County, she filed a motion to modify the existing joint custody order.[189] She sought sole custody of

184. Birnbaum v. Birnbaum (*In re* Marriage of Birnbaum), 211 Cal. App. 3d 1508, 1510, 260 Cal. Rptr. 210, 211 (1989).

185. *Id.*

186. The term "primary residence" was used only to enable the parent providing the primary residence to claim the child as a dependent for federal and state income tax purposes. *Id.* at 1510 n.1, 260 Cal. Rptr. at 211 n.1.

187. *Id.* at 1510, 260 Cal. Rptr. at 211.

188. *Id.* at 1510-11, 260 Cal. Rptr. at 211. The court did not discuss residential arrangements during summers or holidays because they were not at issue on appeal. The provisions pursuant to an agreement incorporated into their interlocutory judgment of dissolution of marriage provided that each parent was to have the children for half of these times each year. *Id.* at 1511 n.2, 260 Cal. Rptr. at 211 n.2. The interlocutory judgment provided that the parents were to alternate physical custody of the three children on the following cycle:

> 1. [Ira] to have the children from Friday after school until Monday morning and each Wednesday afternoon from after school until 7:30 p.m.;
> 2. [Lorene] to have the children from Monday after the school day of each of them until Friday morning at the beginning of school, with the exception of Wednesday afternoons;
> 3. During school vacations, the parties were to have the same custodial days with the children except that the exchange times on Mondays and Fridays were to be at noon;
> 4. During the summer, the parties were to alternate custodial periods with the children every two weeks, with [Ira] having the right to specify whether he wished to have the first two-week block with him; provided, however, that the parent who provided the primary residence for each of the minor children during a particular year shall have that child for one additional week during the summer.

Appellant's Opening Brief at 1-2, Birnbaum v. Birnbaum (*In re* Marriage of Birnbaum), 211 Cal. App. 3d 1508, 260 Cal. Rptr. 210 (1989) (No. A0-40438).

189. *Birnbaum,* 211 Cal. App. 3d at 1511, 260 Cal. Rptr. at 212.

all three children and the limitation of Ira's school year visitation to alternate weekends only.[190] Ira responded by moving for "sole physical custody with reasonable visitation rights for Lorene."[191] He objected to the current arrangement because, he claimed, Lorene's move caused the children to attend inferior schools.[192]

At the initial hearing on these motions, the parties agreed to undergo co-parenting counselling with a psychologist.[193] The psychologist made an evaluation and recommended a two-year plan providing for "very nearly equal time."[194] For each four-week period, the children would live with Lorene on weekdays and with Ira on weekends for the first two weeks.[195] Then they would live one week with Lorene and the following week with Ira.[196] They would have Wednesday night dinners with the parent with whom they were not then residing.[197] Lorene favored this proposal, but Ira wanted the court to reverse the scheduled time with each parent in order to re-enroll the children in the San Mateo City school system.[198]

Having considered the psychologist's proposal as a general guideline, the trial court nevertheless adopted the reverse of the psychologist's original plan.[199] Thus, for three weeks the children would reside with Ira

190. *Id.*
191. *Id.* See *supra* notes 32-33 and accompanying text for a definition of sole custody.
192. *Birnbaum*, 211 Cal. App. 3d at 1511, 260 Cal. Rptr. at 212.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* at 1512, 260 Cal. Rptr. at 212. Some of the factors involved in the trial court's custody determination were the parents' time with the children, the children's preferences and visitation. *Id.* at 1511-12, 260 Cal. Rptr. at 212. The first factor is the amount of time parents are available to spend with their children. *Id.*; *see supra* notes 107-10 and accompanying text. Lorene complained that she had the children with her during the week, but not on the weekends, so she was unable to enjoy quality time with her children. Appellant's Opening Brief at 6, *Birnbaum* (No. A0-40438). She brought the original suit for this reason. *Id.* at 2. Ira complained that Lorene had two foster children living with her and their daughters were left alone to care for these children. *Id.* at 3. He, however, worked from his home so he would have more time to co-parent their children. *Id.*

Second, the trial court also considered the children's preferences. *Birnbaum*, 211 Cal. App. 3d at 1511-12, 260 Cal. Rptr. at 212; *see supra* notes 128-40 and accompanying text. Emily told her father that she agreed with his plan to change her school. *Id.* at 9. Ariella said she both agreed and disagreed but was concerned about leaving her friends. *Id.* Abigail told her teacher on numerous occasions that she did not want to live with her father. *Id.* at 13. She said that she was afraid to tell him anything. *Id.* at 14. However, there may be some testimony from the children that they would have been willing to attend the San Mateo schools. Respondent's Reply Brief at 12-13, Birnbaum v. Birnbaum (*In re* Marriage of Birnbaum), 211 Cal. App. 3d 1508, 260 Cal. Rptr. 210 (1989) (No. A0-40438). The trial court spoke with the

during the week, spending weekends and Wednesday evenings with Lorene.[200] They then would live with Lorene for the fourth week and spend the weekend and one evening with Ira.[201] The schedule would be reversed during summer vacations.[202]

Lorene filed a motion for reconsideration.[203] The trial court, after a conference with the children, denied the motion to reconsider the custody order and refused to stay its order pending appeal.[204] Lorene then appealed from the trial court's order modifying her daughters' living arrangements.[205] The court of appeal affirmed the trial court's decision.[206]

B. Reasoning of the Court of Appeal

Although the parties' appellate briefs treated the trial court's decision as a modification of child custody,[207] the appellate court found that there was no such change in custody.[208] The trial court had ordered the parents to continue sharing joint legal and physical custody.[209] On appeal, the court found that the only change was in the "co-parenting residential arrangement."[210] In other words, the trial court had merely rearranged the "children's residential timetable."[211] Instead of living with their mother during the week, the children would live with their father.[212] The court held that "when parents have joint physical custody

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children in chambers, but it is unclear if the court's order followed their wishes. *Birnbaum*, 211 Cal. App. 3d at 1512, 260 Cal. Rptr. at 212-13.

The third factor is the willingness of parents to allow for visitation. *Id.* at 1511-12, 260 Cal. Rptr. at 212; *see supra* notes 120-27 and accompanying text. The trial court found that Ira had "failed to completely embrace the concept of co-parenting and has taken a rigid counter-productive approach to sharing time with these children." Respondent's Reply Brief at 17, *Birnbaum* (No. A0-40438). Ira never allowed his former wife even to enjoy one Mother's Day in four and one-half years with her children. *See Birnbaum*, 211 Cal. App. 3d at 1511 n.4, 260 Cal. Rptr. at 212 n.4. He had the children on most weekends and chose to deprive Lorene of the company of her children on this occasion. Respondent's Reply Brief at 17, *Birnbaum* (No. A0-40438). Visitation periods are not bargaining chips. *Id.* The trial court then ordered Ira to pay Lorene's attorney's fees and the costs incurred by the psychologist's appearance because of his inflexibility and uncooperativeness. *Id.*

200. *Birnbaum*, 211 Cal. App. 3d at 1512, 260 Cal. Rptr. at 212.
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.* 260 Cal. Rptr. at 212-13.
205. *Id.* at 1510, 260 Cal. Rptr. at 211.
206. *Id.*
207. *Id.* at 1512, 260 Cal. Rptr. at 212.
208. *Id.* at 1513, 260 Cal. Rptr. at 213.
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.* at 1512, 260 Cal. Rptr. at 212.

of their children, an order modifying the co-parenting residential arrangement does not constitute a change in custody."[213]

After determining that there was no custody change, the court explained the standard of appellate review in such cases.[214] The court of appeal's " 'function [is] fully performed when [it] find[s] in the record substantial evidence which supports the essential findings of the trial court.' "[215] The court explained that the function of the court of appeal is not to " 'reweigh conflicting evidence and redetermine' "[216] the trial court's findings. The court acknowledged that there were conflicts as to the facts and the proper inferences to be drawn from them.[217] The appellate court, however, noted that it "cannot second-guess a conscientious and competent trial court," especially because the court "had the opportunity to observe the parents and the children personally."[218] Thus, the court reasoned that a change in the joint custody residential arrangement could not be reversed on appeal.[219]

The court of appeal at the same time, however, recognized a rule that would provide for the reversal of the trial court's order to modify child custody.[220] The trial court's discretion is not disturbed on appeal, " 'unless the record presents a clear case of abuse of that discretion.' "[221] The test for such abuse of discretion is whether the trial court " 'has exceeded the bounds of reason.' "[222] The appellate court in *Birnbaum* held that there was no abuse of the trial court's broad discretion and affirmed its decision.[223]

A significant portion of the appellate court's opinion discussed the testimony offered in support of the San Mateo school system's excellence.[224] The court found that there was sufficient evidence to support the trial court's findings that the San Mateo school was superior because

213. *Id.* at 1510, 260 Cal. Rptr. at 211.

214. *Id.* at 1513, 260 Cal. Rptr. at 213. See *supra* notes 165-77 and accompanying text for discussion of appellate standard of review.

215. *Birnbaum*, 211 Cal. App. 3d at 1513, 260 Cal. Rptr. at 213 (quoting Sanchez v. Sanchez, 55 Cal. 2d 118, 126, 358 P.2d 533, 538, 10 Cal. Rptr. 261, 266 (1961)).

216. *Id.* (quoting Sanchez v. Sanchez, 55 Cal. 2d at 126, 358 P.2d at 538, 10 Cal. Rptr. at 266).

217. *Id.*

218. *Id.* at 1518, 260 Cal. Rptr. at 216.

219. *Id.*

220. *Id.* at 1512, 260 Cal. Rptr. at 213.

221. *Id.* (quoting Messer v. Messer, 259 Cal. App. 2d 507, 509, 66 Cal. Rptr. 417, 418 (1968)).

222. *Id.* (quoting Connolly v. Connolly (*In re* Marriage of Connolly), 23 Cal. 3d 590, 598, 591 P.2d 911, 914, 153 Cal. Rptr. 423, 427 (1979)).

223. *Id.* at 1510, 260 Cal. Rptr. at 211.

224. *Id.* at 1513-14, 260 Cal. Rptr. at 213-14.

of its extensive extracurricular activities and honor courses.[225] The court recognized the conflicting testimony as to which parent lived in the better school district and would be the better "school parent."[226] The court, however, affirmed the trial court's finding that the San Mateo school was superior.[227] The trial and appellate courts relied solely on Ira's testimony as to the relative merits of the school systems.[228] The court stated that the " 'testimony of a single witness, even the testimony of a party himself, [is] sufficient' " evidence.[229] Thus, the court held that the evidence as to the superiority of the San Mateo school system supported the trial court's finding to alter the residential timetables.[230]

The *Birnbaum* court emphasized that the reason the Birnbaum's child custody case ended up in the judicial system, and the underlying reasoning for the court's holding, was the parents' failure to communicate.[231] The appellate court noted that the parents were inflexible and unable to agree to even slight adjustments in the times that the children would spend with each of them.[232] They were incapable of cooperating for their children's best interests because of their inability to communicate with each other.[233] Therefore, the trial and appellate judges had been forced to act as "super-parent[s] and make parenting decisions the parents themselves [could not] agree[] upon."[234] The trial court was empowered to decide that the "educational advantages offered by a particular school district justif[ied] residing in that district, just as parents themselves often utilize[d] this factor in choosing a residence."[235] The appellate court recognized that trial courts possess broad discretion to adjust co-parenting residential arrangements.[236] Parents who force courts to make such decisions have no basis for complaint.[237] Thus, the appellate court affirmed the trial court's decision.[238]

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225. *Id.* at 1514, 260 Cal. Rptr. at 214.
226. *Id.* at 1513-14, 260 Cal. Rptr. at 213-14.
227. *Id.* at 1514, 260 Cal. Rptr. at 214.
228. *Id.* at 1513, 260 Cal. Rptr. at 213.
229. *Id.* (quoting Chodos v. Insurance Co. of N. Am., 126 Cal. App. 3d 86, 97, 178 Cal. Rptr. 831, 837 (1981)).
230. *Id.* at 1514, 260 Cal. Rptr. at 214.
231. *Id.* at 1517-18, 260 Cal. Rptr. at 216.
232. *Id.* at 1517, 260 Cal. Rptr. at 216.
233. *Id.* at 1517-18, 260 Cal. Rptr. at 216.
234. *Id.* at 1518, 260 Cal. Rptr. at 216.
235. *Id.* at 1518 n.7, 260 Cal. Rptr. at 216 n.7.
236. *Id.* at 1518, 260 Cal. Rptr. at 216.
237. *Id.*
238. *Id.*

IV. STATEMENT OF THE PROBLEM

Established precedent and the California Civil Code provide that in order to modify custody arrangements courts must follow certain guidelines.[239] The *Birnbaum* court chose not to follow these strict requirements when it altered the children's periods of residency with each parent. The court should not have played a semantic game in redefining "modification."[240] The change in the initial custody order was clearly a "modification" under section 4600.5(i) of the California Civil Code[241] and established case law because it completely altered the custody arrangement.

The *Birnbaum* court's handling of this case is flawed for several reasons. First, if the court had followed the strict requirements for child custody modification as set forth in section 4600.5(i) of the California Civil Code and *Carney v. Carney (In re Marriage of Carney)*,[242] the case would have been reversed for a lack of a substantial change in circumstances.[243] Second, the court's reasons for its decision are ill-founded because of the nature of the evidence upon which it relied,[244] as well as its failure to address important policy considerations, such as stability of the children's environment. Finally, in addition to the inadequate basis for the trial court's decision, the appellate court's new rule permitting the change in residential timetables causes detrimental effects on children.[245] As a result, the *Birnbaum* decision eliminates the strict requirements that previously controlled child custody modification. This breakdown renders child custody modification law meaningless and permits any parent who is unsatisfied with a joint custody arrangement to alter the custody order.

V. ANALYSIS

A. *Dangerous Departure from Precedent and Statutes*

For a court lawfully to modify a child custody order before *Birnbaum v. Birnbaum (In re Marriage of Birnbaum)*,[246] the court was re-

239. *See supra* notes 141-65 and accompanying text.

240. *See infra* notes 333-38 and accompanying text.

241. CAL. CIV. CODE § 4600.5(i) (West Supp. 1990).

242. 24 Cal. 3d 725, 730, 598 P.2d 36, 38, 157 Cal. Rptr. 383, 385 (1979). "It is settled that to justify ordering a change in custody there must generally be a persuasive showing of changed circumstances affecting the child." *Id.*

243. *See infra* notes 246-62 and accompanying text.

244. See *infra* notes 315-24 and accompanying text for a discussion of Ira Birnbaum's testimony.

245. *See infra* notes 339-51 and accompanying text.

246. 211 Cal. App. 3d 1508, 1512, 260 Cal. Rptr. 210, 212 (1989).

quired to adhere to established case law, as well as section 4600.5(i) of the California Civil Code,[247] governing such a modification.[248] These laws[249] require: (1) that the modification be in the best interests of the children,[250] and (2) that a substantial change in circumstances has arisen thereby requiring a change in the initial order.[251] The *Birnbaum* court evaded these strict laws on child custody modification.[252]

If the court had applied the law correctly, the court probably would not have been able to change the initial custody order. Lorene, the party seeking the modification, had the burden of proving that the modification was both in the best interests of the children and that it was required because of a change in circumstances.[253] To meet the best interest standard, she should have shown that the children would be better off spending more time with her on weekends so that she could provide them with the emotional support they required.[254] If she had the children only during the school week, she may not have been able to spend as much quality time with her children as she would have had during some weekends.[255] Even if Lorene could have proven that the best interests of the children were to extend the amount of time they spent with her, she would still need to show a change in circumstances.[256] Lorene had given

247. CAL. CIV. CODE § 4600.5(i) (West Supp. 1990).

248. *See, e.g.*, Carney v. Carney (*In re* Marriage of Carney), 24 Cal. 3d 730, 730-31, 598 P.2d 36, 38, 157 Cal. Rptr. 383, 385-86 (1979). See *supra* notes 141-59 and accompanying text for a discussion of the modification requirements.

249. *See supra* notes 141-61 and accompanying text.

250. *Carney*, 24 Cal. 3d at 730, 598 P.2d at 38, 157 Cal. Rptr. at 385; *see supra* notes 148-52.

251. CAL. CIV. CODE § 4600.5(i). Section 4600.5(i) sets forth that modification must be in the best interests of the child, whereas case law establishes that a change in circumstances is required. *See supra* notes 153-61 and accompanying text.

252. Perhaps the court realized that there was not a substantial change in circumstances, but desired to change the custody arrangement anyway. By inventing the terminology, "co-parenting residential arrangement," the court avoided the established rules for modifying custody orders.

253. *See supra* notes 141-61 and accompanying text.

254. *See supra* notes 148-52 and accompanying text. The trial court noted that the mother provided the girls with emotional responses, sensitivity, and social development. Respondent's Reply Brief at 5-6, *Birnbaum* (No. A0-40438).

255. Lorene worked during the week and may have preferred to spend her days off with her children on the weekend. During the week her children were in school and probably participated in extracurricular activities after school. When they returned home, it is likely that the children did their homework. This would not leave too much quality time for the children to spend with their mother.

256. It is highly improbable that Lorene could show a change in circumstances merely because of her desire to spend quality time with her children. See Carney v. Carney (*In re* Marriage of Carney), 24 Cal. 3d 725, 731-33, 598 P.2d 36, 39-40, 157 Cal. Rptr. 383, 386 (1979), for a discussion of mother's attempt to carry burden of showing changed circumstances.

no evidence that there was such a change in circumstances.

Ira, on the other hand, may have refuted Lorene's claims by demonstrating that it was in the best interests for the children to live with him during the school week.[257] The fact that Ira resided in the San Mateo school district was a factor in his favor.[258] This fact allowed Ira to contend that it was better for the children to live with him on weekdays so that they could obtain a better education.[259] His claim could have been approached as one for modification. A valid argument may have been that a modification was necessary to provide the children with a better education. This reason, however, would not have amounted to a substantial change in circumstances.[260] This educational reason alone should not be enough to alter children's living arrangements. Although education is an important factor in child custody modification, it is not the only consideration.[261] No cases have stated that the location of a school district alone is a sufficient basis to modify custody.[262] Neither Ira nor Lorene would have met the standards for modification. Thus, the

257. *See supra* notes 148-52 and accompanying text.

258. *See Birnbaum*, 211 Cal. App. 3d at 1514, 260 Cal. Rptr. at 213 (joint custody arrangement changed to make father "school parent" because district system in which former husband resided was superior to that in which wife resided).

259. *Id.*

260. There are many factors involved in child custody modification and it seems that one factor alone, such as education in high school, may not be considered a change in circumstances. *See, e.g.*, Rosson v. Rosson (*In re* Marriage of Rosson), 178 Cal. App. 3d 1094, 1102, 224 Cal. Rptr. 250, 256 (1986) (children's primary physical residence was with mother, but was modified when she moved based on need for stable environment and father's testimony about his involvement with children's academic, athletic, social, and religious activities).

261. *See Rosson*, 178 Cal. App. 3d at 1102, 224 Cal. Rptr. at 256 (children's primary physical residence was with mother, but modified when she moved based on need for stability of environment and father's testimony about his involvement with children's academic, athletic, social, and religious activities); Curry v. Curry, 218 Cal. App. 2d 651, 655-56, 32 Cal. Rptr. 600, 602-03 (1963) (no modification of custody award allowed where child would be removed from school in Nebraska to school in California with strangers and strange surroundings); Cunningham v. Cunningham, 217 Cal. App. 2d 65, 67-68, 31 Cal. Rptr. 448, 449 (1963) (court believed not in best interest of boy of 15 to change custody and remove him from high school that he attended for one year); Coddington v. Coddington, 210 Cal. App. 2d 96, 99-101, 26 Cal. Rptr. 431, 433-34 (1962) (trial court changed sole custody from mother of 11 year-old girl to joint custody with physical custody to father during school year because she was below average in reading and step-mother helped to improve her reading during summer and would continue to help); Disney v. Disney, 121 Cal. App. 2d 602, 607-08, 263 P.2d 865, 868-69 (1953) (court modified custody because of mother's ineffective supervision and guidance of one of her two sons who skipped classes, did not study, went out on school nights and received lower grades and because court determined that male supervision of teenaged years would be more effective).

262. *See, e.g, Curry*, 218 Cal. App. 2d at 655-56, 32 Cal. Rptr. at 602-03; *Cunningham*, 217 Cal. App. 2d at 67-68, 31 Cal. Rptr. at 449; *Disney*, 121 Cal. App. 2d at 607-08, 283 P.2d at 263.

effect of the *Birnbaum* case was to establish a new rule allowing for changes in the residential timetable merely because one parent preferred a different custody arrangement.

B. Residence and Custody

Sections 4600 and 4600.5 of the California Civil Code[263] do not clearly define child custody.[264] The statutes briefly define a variety of custody arrangements, but do not specify precisely the types of arrangements that may be embodied in a joint physical and legal custody award.[265] The *Birnbaum* court initially awarded the parents joint physical and joint legal custody.[266] The parents shared in the physical custody by alternating the children's residence.[267] It follows that any change in residence from the initial custody agreement is a change in physical custody. Therefore, physical custody is, in essence, equivalent to residence and any alteration in the children's physical custody from the initial order changes the entire nature of the custody order.

The trial court in *Birnbaum* initially defined specific periods in which the children would reside with each of their parents.[268] The trial court later reversed these time periods from the initial order.[269] By changing the timetable of actual physical custody, or what the court termed the "co-parenting residential arrangement,"[270] the court effectively modified the custody arrangement. The court modified the arrangement because it was significantly different from the original custody agreement for the children to live with their father during the week, their mother on weekends for three weeks of the month and the reverse for every fourth week. If the appellate court had simply looked at the face of the initial custody agreement and compared it with the one that resulted after this decision, it should have been perfectly clear that there had been a modification in the custody order.

C. The Real Crux of the Problem

The court's reasoning in *Birnbaum*[271] demonstrates the problems

263. CAL. CIV. CODE §§ 4600, 4600.5 (West Supp. 1990).

264. *See supra* notes 20-37 and accompanying text.

265. *See* CAL. CIV. CODE §§ 4600, 4600.5(d); *see also supra* notes 20-60 and accompanying text.

266. *Birnbaum*, 211 Cal. App. 3d at 1512, 260 Cal. Rptr. at 212.

267. Appellant's Opening Brief at 1-2, *Birnbaum* (No. A0-40438).

268. *Birnbaum*, 211 Cal. App. 3d at 1510-11, 260 Cal. Rptr. at 211.

269. *Id.* at 1512, 260 Cal. Rptr. at 212.

270. *Id.* at 1513, 260 Cal. Rptr. at 213.

271. 211 Cal. App. 3d 1508, 260 Cal. Rptr. 210 (1989).

involved in modifying custody orders and the detrimental effect of constant changes in a child's environment. Though these problems are significant,[272] *Birnbaum* will have an even more dramatic affect on future cases because all lower courts are bound to follow this decision.[273] The hidden analysis that the court followed to reach this decision will affect all future decisions in this area. The *Birnbaum* court did not specifically address the problems arising from the vague definitions of joint custody[274] as defined by section 4600.5 of the California Civil Code.[275] The court was, however, able to use this definition of joint custody as a loophole to provide for the change in the "co-parenting residential arrangement."[276] Section 4600.5 does not state the type of parenting plans that may be established in joint custody arrangements.[277] It follows that

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272. *See infra* notes 284-312 and accompanying text.

273. Auto Equity Sales v. Superior Court, 57 Cal. 2d 450, 455-56, 36 P.2d 937, 940, 20 Cal. Rptr. 321, 324 (1962).

> [D]ecisions of . . . [the California Supreme Court] are binding upon and must be followed by all the state courts of California. Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all superior courts of this state, and this is so whether or not the superior court is acting as a trial or appellate court. Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction.
>
> . . . .
>
> Of course, the rule under discussion has no application where there is more than one appellate court decision, and such appellate decisions are in conflict. In such a situation, the court exercising inferior jurisdiction can and must make a choice between the conflicting decisions.

Id.

The courts are slowly chipping away at the meaning of *Birnbaum v. Birnbaum*. *See* Fingert v. Fingert (*In re* Marriage of Fingert), 221 Cal. App. 3d 1575, 1579, 271 Cal. Rptr. 389, 391 (1990) (abuse of discretion found where trial court's order would force mother to move or else give up custody). The court, disagreeing with the language in *Birnbaum*, stated:

> [The *Birnbaum* court has stated that] "if parents with joint physical custody are unable to modify residential arrangements for their children and call upon the court to do so, they have no basis to complain about the decision that is made." It must be acknowledged [, however,] that all litigation is brought about by those who are unable to settle their disputes. We do not choose to chastise parents who fail to make mutually agreeable coparenting residential arrangements by suggesting that, by such failure, they will have to accept whatever decision a trial court decides. We shall adhere to the standard of review announced by the Supreme Court.

Id. (quoting Birnbaum v. Birnbaum (*In re* Marriage of Birnbaum), 211 Cal. App. 3d 1508, 1518, 260 Cal. Rptr. 210, 216 (1989)).

274. *See Birnbaum*, 211 Cal. App. 3d at 1515, 260 Cal. Rptr. at 214. The court stated that "[i]t is doubtful that any two words mean as many different things to as many different people as the words 'joint custody.' The statutory definition, having to cover the wide variety of arrangements parents make when they have joint custody, is necessarily broad and does not provide much guidance." *Id.*

275. CAL. CIV. CODE § 4600.5 (West Supp. 1990).

276. *Birnbaum*, 211 Cal. App. 3d at 1513, 260 Cal. Rptr. at 213.

277. *See* CAL. CIV. CODE § 4600.5(d). Joint custody means joint legal and physical custody. *Id.* § 4600(d)(1). " 'Joint physical custody' means that each of the parents shall have significant periods of physical custody. Joint physical custody shall be shared by the parents in

switching the residential timetables of a child is not covered under section 4600.5(d). If this concept of altering timetables is not defined in custody, then it logically follows that there could not possibly be a modification in joint custody where the time spent at the parents' homes are merely rearranged. Thus, the court was able to grant a change in the residential timetables simply by taking advantage of the section's very general definition of joint custody.[278]

The current definition of joint custody is so general that it has no real meaning at all.[279] This problem of freely changing residential arrangements would not need to be addressed if the California legislature clearly defined joint custody.[280] A clear definition of joint custody would prevent courts from circumventing modification requirements by calling a change in custody merely a "rearrangement of the children's residential timetables."[281] If the legislature re-defined joint custody[282] to include

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such a way as to assure a child of frequent and continuing contact with both parents." *Id.* § 4600(d)(3). " 'Joint legal custody' means that both parents shall share the right and the responsibility to make the decisions relating to the health, education, and welfare of a child." *Id.* § 4600(d)(5).

278. *Id.* § 4600.5.

279. *See supra* notes 38-51 and accompanying text.

280. *See infra* note 282.

281. *Birnbaum*, 211 Cal. App. 3d at 1513, 260 Cal. Rptr. at 213.

282. *See, e.g.*, ILL. ANN. STAT. ch. 40, para. 602.1 (Smith-Hurd Supp. 1990).

> Joint custody means custody determined pursuant to a Joint Parenting Agreement or a Joint Parenting Order. In such cases, the court shall initially request the parents to produce a Joint Parenting Agreement. Such Agreement shall specify each parent's powers, rights and responsibilities for the personal care of the child and for major decisions such as education, health care, and religious training. The Agreement shall further specify a procedure by which proposed changes, disputes and alleged breaches may be mediated or otherwise resolved and shall provide for periodic review of its terms by the parents.

Id. para. 602.1(b). The parents must be flexible in arriving at resolutions which further the state's policies. *Id.* The court may also order mediation to assist the court in making a determination of whether a joint custody order is appropriate. *Id.* If the parents fail to produce an agreement, the court can enter a joint parenting order following the same specifications as a joint parenting agreement. *Id.*; *see also* COLO. REV. STAT. § 14-10-123.5 (1987) (statute requires parents to implement plan for joint custody for court's approval).

> In order to implement joint custody, both parties may submit a plan or plans for the court's approval. If no plan is submitted or if the court does not approve a submitted plan, the court, on its own motion, shall formulate a plan which shall address and resolve, where applicable, the parties' arrangements for the following:
>
> (a) The location of both parties, the periods of time during which each party will have physical custody of the child, and the legal residence of the child;
>
> (b) The child's education;
>
> (c) The child's religious training, if any;
>
> (d) The child's health care;
>
> (e) Finances to provide for the child's needs;
>
> (f) Holidays and vacations; and
>
> (g) Any other factors affecting the physical or emotional health and well-being of the child.

residential timetables, a court could not so easily modify a joint custody order simply by calling its action a change in the "co-parenting residential arrangement."[283] The party trying to alter the arrangement, thus, would have to prove a substantial change in circumstances had occurred in order to modify the custody arrangement.

D. Stability and Children's Best Interests

The lack of finality in child custody decisions conflicts with the need

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COLO. REV. STAT. § 14-10-123.5(3). The court may order mediation to assist the parties in formulating, modifying, or implementing the plan which must be jointly agreed to by the parties. *Id.* § 14-10-123.5 (4), (5). In determining whether joint custody is in the best interests of the child, the court must consider the following factors:

> (1) whether the child has established a close relationship with each parent;
> (2) whether each parent is capable of providing adequate care for the child throughout each period of responsibility, including arranging for the child's care by others as needed;
> (3) whether each parent is willing to accept all responsibilities of parenting, including willingness to accept care of the child at specified times and relinquish care to the other parent at specified times;
> (4) whether the child can best maintain and strengthen a relationship with both parents through predictable, frequent contact and whether the child's development will profit from such involvement and influence from both parents;
> (5) whether each parent is able to allow the other to provide care without intrusion, that is, respect the other's parental rights and responsibilities and his or her right to privacy;
> (6) the suitability of a parenting plan for the implementation of joint custody, preferably, although not necessarily, one arrived at through parental agreement;
> (7) geographic distance between the parent's residences; and
> (8) willingness or ability of the parent to communicate, cooperate or agree on issues regarding the child's needs.

N.M. STAT. ANN. § 40-4-9.1B (1978). Once the court awards joint custody, the court must approve a parenting plan for the implementation of the prospective custody arrangement before joint custody is awarded. *Id.* § 40-4-9.1F. The parenting plan must include a *division of the child's time and care* into periods of responsibility for each parent. *Id.* (emphasis added). The plan may also include:

> (1) statements regarding the child's religion, education, child care, recreational activities and medical and dental care;
> (2) designation of specific decision-making responsibilities;
> (3) methods of communicating information about the child, transporting the child, exchanging care for the child and maintaining telephone and mail contact between parent and child;
> (4) procedures for future decision-making, including procedures for dispute resolution; and
> (5) other statements regarding the welfare of the child or designed to clarify and facilitate parenting under joint custody arrangements.

Id. § 40-4-9.1F; *see also* MICH. STAT. ANN. § 25.312(6a) (Callaghan 1984) (joint custody means either court order where child resides alternatively for specific time periods with each parent or arrangement where parents share decision-making authority as to important decisions affecting child's welfare). See *infra* notes 352-59 and accompanying text for possible remedies.

283. *Birnbaum*, 211 Cal. App. 3d at 1513, 260 Cal. Rptr. at 213.

for continuity of relationships between parents and the child.[284] Psychoanalytic theory casts doubts on divorce proceedings which leave relationships uncertain throughout childhood.[285] Uncertainty is always present when custody proceedings are subject to modification.[286] This uncertainty violates a policy to maintain stability in the child's life.[287] Children require stable external arrangements for healthy development.[288] They need to maintain continuous, unconditional and permanent relationships with at least one adult parent.[289] Child placement arrangements should safeguard this need for continuity of relationships, surroundings and environmental influences.[290] The *Birnbaum* court ignored the children's needs for stability of relationships and environment.

By manipulating the child's external environment—such as with which parent the child resides—the *Birnbaum* court has dramatically affected the Birnbaum children's upbringing.[291] By changing the schedules to which the Birnbaum children were accustomed, the trial court seemed to disregard the importance of the children's living with their mother under the original custody agreement for three years.[292] Moreover, the children had attended schools in the El Granada school system for four

284. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 92, at 37. "[A] major factor in reducing the immediate disturbing effects on children is the continuation of their relationship with both parents." Richards, *supra* note 36, at 83.

285. BEYOND THE BEST INTERESTS, *supra* note 19, at 6.

286. *Id.*

287. Burchard v. Garay, 42 Cal. 3d 531, 535, 724 P.2d 486, 488, 229 Cal. Rptr. 800, 802 (1986); Carney v. Carney (*In re* Marriage of Carney), 24 Cal. 3d 725, 730-31, 598 P.2d 36, 38, 157 Cal. Rptr. 383, 385 (1979).

288. BEYOND THE BEST INTERESTS, *supra* note 19, at 31-32.

289. *See id.* at 99. A child's positive adjustment to the situations resulting from her parents' divorce may be conditioned on the child's not feeling rejected by her parents. J. WALLERSTEIN & J. KELLY, *supra* note 19, at 48. In addition, "children's behaviors [are] strongly affected by the quality of their relationships with their parents." M. LITTLE, FAMILY BREAKUP 166 (1982). There is a high correlation between the parent-child relationship and the adjustment of the child. *Id.* at 167. A child will suffer fewer negative consequences if he or she is able to retain a warm relationship with at least one parent. *Id.* at 161. "[T]he most crucial correlates of the child's later well-being appear to reside in the ways he experiences the quality of both the pre and postseparation relationships to each of the parents and his capacity to make peace within himself with their meaning." L. TESSMAN, CHILDREN OF PARTING PARENTS 525 (1978). *See* Richards, *supra* note 36, at 83.

290. McLoren v. McLoren (*In re* Marriage of McLoren), 202 Cal. App. 3d 108, 113, 247 Cal. Rptr. 897, 900 (1988); *see* Sam E. v. Stahl (Guardianship of Claralyn S.), 148 Cal App. 3d 81, 85-87, 195 Cal. Rptr. 646, 649 (1983); Stoker v. Kinney (*In re* Marriage of Stoker), 65 Cal. App. 3d 878, 881, 135 Cal. Rptr. 616, 618 (1977); Mehlmauer v. Mehlmauer (*In re* Marriage of Mehlmauer), 60 Cal. App. 3d 104, 109, 131 Cal. Rptr. 325, 328-29 (1976); Lawrence v. Lawrence, 165 Cal. App. 2d 789, 792-93, 332 P.2d 305, 308 (1958).

291. *See infra* notes 292-312 and accompanying text.

292. Birnbaum v. Birnbaum (*In re* Marriage of Birnbaum), 211 Cal. App. 3d 1508, 1510-11, 260 Cal. Rptr. 210, 211 (1989).

and one-half years.[293] The court failed to recognize the children's need for continuity of both their affectionate and stimulating relationships with their parents and their educational development.[294] The children would have been best served by remaining in a stable environment.[295] Studies have shown that disruptions of established patterns of care and emotional bonds have a variety of detrimental consequences on children.[296]

The court in *Birnbaum* ignored these concerns by establishing a malleable standard for changing custody arrangements. The court's interpretation of the inapplicability of the modification standards allows custody decisions to extend over a period of years. Parents can go to court at any time and alter the timetables of their joint custody orders without being subject to the safeguards inherent in California's definition of "modification."[297] By prolonging the grant of a final decision on custody determinations in this way, the court creates great uncertainty in children's lives.[298] If courts are permitted to reconsider the residential

293. *Id.*

294. BEYOND THE BEST INTERESTS, *supra* note 19, at 6-7. See *Burchard*, 42 Cal. 3d at 535, 538-41, 724 P.2d at 488-93, 229 Cal. Rptr. at 802-07, for an explanation of the importance of stability in children's lives.

295. *See* Rosson v. Rosson (*In re* Marriage of Rosson), 178 Cal. App. 3d 1094, 1101, 224 Cal. Rptr. 250, 255 (1986) (court considered positively that children had lived in same environment virtually all their lives).

296. BEYOND THE BEST INTERESTS, *supra* note 19, at 11; *cf. Burchard*, 42 Cal. 3d at 541, 724 P.2d at 492-93, 229 Cal. Rptr. at 806-07 (court stresses importance of stability in children's lives and harm that may result from discrepancies of "established patterns of care and emotional bonds"). Infants and toddlers become attached to their caretakers at an early age. BEYOND THE BEST INTERESTS, *supra* note 19, at 32-33. Such attachment is effectively promoted by the constant, uninterrupted presence and attention of a familiar adult. *Id.* However, this attachment can be easily upset by separating infants from their caretaker. *Id.* at 33. When infants are abandoned by their parents, they may suffer separation distress, anxiety and setbacks in the quality of their subsequent attachments. *Id.* This situation results in their being less trustful and causes a lack of warmth in their contacts with others. *Id.*

With young children under five years, disruption of the parent-child relationship can affect the children's achievements which are rooted and developed in an intimate interchange with a stable parent figure. *Id.* For example, a disruption of the parent-child relationship may affect their toilet training and their ability to communicate verbally. *Id.*

School-age children are also affected by disruption of the parent-child relationship. *Id.* Their achievements are "based on identification with their parents' demands, prohibitions and social ideals." *Id.* This identification develops where attachments are stable, but children may abandon such achievements if the children themselves feel abandoned by their parents. *Id.* The result may be that the children resent the adults who disappoint them, and may lead the children into making the new parent a scapegoat for the shortcomings of the former parent. *Id.* at 34.

297. For a discussion of the modification requirements defined in section 4600.5(i) of the California Civil Code and California case law, see *supra* notes 141-61 and accompanying text.

298. Santa Clara County Dep't of Soc. Serv. v. Gloria S. (*In re* Micah S.), 198 Cal. App. 3d 557, 566-68, 243 Cal. Rptr. 756, 761-63 (1988) (court places children's welfare at top of hierar-

timetables at the whim of either parent, there is no stability in a custody award.

Aside from this concern of uncertainty, it is also difficult for children to relate positively to, profit from, and maintain contact with two parents who have constant hostility toward each other.[299] This predicament that the children experience is especially true when the parents themselves are unable to communicate with each other.[300] Loyalty conflicts commonly result in custody battles and may destroy the children's positive relationships with both parents.[301] A better rule would be to prevent the court's decisions from shifting back and forth between competing complainants[302] and to limit the situations in which modification is permitted.[303] Any alteration of custody orders should be granted only under strict standards when a substantial change in circumstances affecting the children's best interests has arisen.

If the *Birnbaum* court had addressed these concerns, the court may have left custody with Lorene during the school year. Lorene played an active role in their children's school life and extracurricular activities.[304] Lorene requested to have some additional time with her children on the weekends rather than only during the school week.[305] Since the Birnbaums were unable to agree upon a reasonable amount of weekend time for the children to spend with Lorene, she brought her case to the courts to be resolved.[306] She had requested on a number of occasions a

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chy of values and recognizes dangers of procrastination (citing J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 38-39 (1979))).

299. BEYOND THE BEST INTERESTS, *supra* note 19, at 38.

300. "[C]hildren do least well [in dealing with a divorce] when there is a lot of conflict between parents during and after the divorce. This seems to be because inter-parental conflict is very corrosive of parent-child relationships." Richards, *supra* note 36, at 84.

301. *McLoren*, 202 Cal. App. 3d at 214, 247 Cal. Rptr. at 900 (intense loyalty conflict between parents experienced by both children throughout custody litigation); Richards, *supra* note 36, at 84. When loyalty conflicts arise, the children may feel that they cannot be loyal to one parent without jeopardizing their relationships with the other parent. *See* J. WALLERSTEIN & J. KELLY, *supra* note 19, at 49, 70-71, 88. As a result of these circumstances, the children's attempts to gain approval of their parents may become even more difficult. *See id.*

302. BEYOND THE BEST INTERESTS, *supra* note 19, at 39. Goldstein, Freud and Solnit suggest that the best solution short of having the courts relinquish their involvement in custody disputes, would be for the courts to make a final decision, allowing appeals or modifications only during a period immediately following the court's decision. *Id.* at 38-39. The authors suggest that the statutes should not provide for modification at any other time. *Id.* at 49.

303. *See infra* notes 352-59 and accompanying text.

304. Appellant's Opening Brief at 10, 13, Birnbaum v. Birnbaum (*In re* Marriage of Birnbaum), 211 Cal. App. 3d 1508, 260 Cal. Rptr. 210 (1989) (No. A0-40438).

305. *Id.* at 6.

306. *Id.* at 9.

change in her visitation schedule with the children, but had been turned down by Ira.[307] Ira responded to Lorene's lawsuit by asking for a change in custody so that the children could live with him during the majority of the year and attend a new school.[308]

In granting Ira's request, the court uprooted the children from a comfortable environment and placed them in a new living situation and a different school with an entirely new group of children.[309] One commentator has suggested that children in such situations may have some difficulty adjusting,[310] especially after living with their mothers for several years and attending school with the same group of children.[311] Thus, the *Birnbaum* court overlooked these factors and failed to consider the children's best interests in remaining with their mother under the original custody arrangement.[312]

E. Superior Schools—an Invalid Basis for the Court's Decision

In *Birnbaum*, the court erroneously based its custody decision on the quality of education at the schools.[313] There was "no evidence in the record to support the court's finding in it's [sic] Statement of Decision that enrollment" in the San Mateo schools "would provide the children with a greater variety of educational and enrichment options than they presently enjoy[ed]."[314] The only testimony about the relative merits of

307. *Id.* Lorene had asked for years if she could have one weekend a month with the children, but Ira refused. *Id.* He also would not change either days or times for visits unless Lorene switched other days or times in return. *Id.* On one occasion Lorene had cousins visiting and requested the girls be allowed to stay and visit their relatives, but Ira refused since it was on a weekend. *Id.* Lorene also was not able to have a Mother's Day with the children until 1987. *Id.* at 9-10.

308. *Birnbaum*, 211 Cal. App. 3d at 1511, 260 Cal. Rptr. at 212.

309. The Birnbaum children previously attended the El Granada schools in the Cabrillo District. Appellant's Opening Brief at 10, *Birnbaum* (No. A0-40438). This school was a one-mile bus ride from their home. *Id.* The children preferred to take the bus, rather than drive with their mother, so that they could socialize with their friends. *Id.* Now under the revised custody arrangement, they must attend school in the San Mateo School District. *Id.* at 11.

310. BEYOND THE BEST INTERESTS, *supra* note 19, at 34.

311. Appellant's Opening Brief at 19, *Birnbaum* (No. A0-40438) (children had been in same school system for last four years).

312. *See Burchard*, 42 Cal. 3d at 538, 724 P.2d at 492-93, 229 Cal. Rptr. at 806-07 (court stressed "importance of stability and continuity in the life of a child and the harm that may result from disruption of established patterns of care and emotional bonds").

313. Birnbaum v. Birnbaum (*In re* Marriage of Birnbaum), 211 Cal. App. 3d 1508, 1513-14, 260 Cal. Rptr. 210, 213-14 (1989).

314. Appellant's Opening Brief at 21, *Birnbaum* (No. A0-40438). The only evidence before the court as to the superiority of the San Mateo school system was Ira's opinion. *Birnbaum*, 211 Cal. App. 3d at 1513, 260 Cal. Rptr. at 213.

the school systems was given by Ira.[315] He explained that recent newspaper articles cited the elementary school, which the children would attend, as "one of two schools out of six thousand in the state to be named as an outstanding school."[316] He also contacted the schools about extracurricular activities and comparative test scores and found that the Cabrillo school district, where the mother resides, did not provide educational diversity or the enrichment available at the San Mateo school.[317] Ira testified that Cabrillo administrators told him that the school offered no electives or honors courses.[318] Lorene did not object to this testimony, thus, the court admitted this evidence even though it was hearsay.[319]

Ira further stated his opinion that the San Mateo school provides a better education for the children.[320] The court also admitted Ira's opinion which could have been excluded as "inadmissible lay opinion."[321] The trial court should have required more than merely Ira's testimony that the San Mateo school was superior.[322] At the trial level, experts or

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315. *Birnbaum*, 211 Cal. App. 3d at 1513, 260 Cal. Rptr. at 213.

316. *Id.*

317. *Id.* at 1514, 260 Cal. Rptr. at 213.

318. *Id.*

319. Had Lorene objected to Ira's testimony, the court should not admit his testimony because it was hearsay. *Id.* at 1513 & n.5, 260 Cal. Rptr. at 213 & n.5. Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." CAL. EVID. CODE § 1200(a) (West 1966 & Supp. 1990). Hearsay evidence is inadmissible. *Id.* § 1200(b). Thus, Ira's testimony as to what another person has said violates the hearsay rule, and this testimony is inadmissible. The court noted that Lorene did not object to this testimony as either hearsay or inadmissible lay opinion. *Birnbaum*, 211 Cal. App. 3d at 1513 n.5, 260 Cal. Rptr. at 213 n.5. Her counsel, therefore, failed or chose not to make the proper objection to this testimony.

320. *Birnbaum*, 211 Cal. App. 3d at 1513-14, 260 Cal. Rptr. at 213-14.

321. Section 800 of the California Evidence Code limits opinion of lay testimony as follows: "Testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: (a) Rationally based on the perception of the witness; and (b) Helpful to a clear understanding of his testimony." CAL. EVID. CODE § 800 (West 1966 & Supp. 1990). In addition, section 803 of the California Evidence Code explains:

> The court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on [a] matter that is not a proper basis for such an opinion. In such [a] case, the witness may, if there remains a proper basis for his opinion, then state his opinion after excluding from consideration the matter determined to be improper.

Id. § 803.

322. *See* Forsund v. Forsund, 225 Cal. App. 2d 476, 499-500, 37 Cal. Rptr. 489, 504-05 (1964) (trial court award can be reversed for abuse of discretion despite fact that some evidence in support was substantial evidence). Substantial evidence is evidence which is reasonable in nature, credible and of solid weight. *Id.* at 499, 37 Cal. Rptr. at 504. *But see* Chodos v. Insurance Co. of N. Am., 126 Cal. App. 3d 86, 97, 178 Cal. Rptr. 831, 837 (1981). The court in *Chodos* explained that:

> [A] judgment must be upheld on appeal in the face of a challenge to the sufficiency of evidence if it can be said that the judgment is supported by substantial evidence. The

school administrators from these school districts and others should have testified.[323] The court of appeal should not have so easily relied on the sole testimony of Ira, especially because he was biased and an interested party.[324]

Even assuming the San Mateo school was superior, the court neglected to consider Lorene's active role in her children's education. Lorene was very involved in both school and after-school programs.[325] She attended all school field trips and activities.[326] She also worked as a volunteer in the Cabrillo school system one day a week in each of her children's classes until she became a full-time paid teacher's aide in March 1987.[327] Thus, regardless of the differences in the schools' extracurricular programs, Lorene's involvement in her children's schools was significant and contributed to their education.[328]

The court's belief that Ira would be the better school parent seems to have no support. Ira did not attend any school functions,[329] nor did he take an active interest in the children's education.[330] The first time

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test, however, is not whether there is substantial conflict, but whether there is "substantial evidence" in favor of the respondent. If this "substantial evidence" is present, no matter how slight it may appear in comparison with the contradictory evidence, the judgment will be affirmed. In brief, the appellate court ordinarily *looks only at the evidence supporting the successful party, and disregards the contrary showing*.

Id. (citations omitted).

323. Since Lorene's motion for reconsideration included declarations from El Granada school personnel about the quality of the school system, the trial court should have allowed declarants to testify, rather than to summarily state that " 'the testimony of a single witness, even the party himself may be sufficient.' " *Birnbaum*, 211 Cal. App. 3d at 1512-13, 260 Cal. Rptr. at 212-13 (quoting Chodos v. Insurance Co. of N. Am., 126 Cal. App. 3d 86, 97, 178 Cal. Rptr. 831, 837 (1981)).

324. Because Ira has a stake in the outcome of the case, he has an interest in the court's decision. As a result, his views would be biased in his favor. Lorene did not object to Ira's testimony either as hearsay or as inadmissible opinion. *Id.* at 1513 n.5, 260 Cal. Rptr. at 213 n.5. Her attorney should have made these objections. The court's decision does not indicate what evidence was given by Lorene to refute this testimony. *Id.* at 1513, 260 Cal. Rptr. at 213. Lorene contended that the trial court findings of the superiority of the San Mateo school system was unsupported and that there was contrary evidence. *Id.*

325. Appellant's Opening Brief at 10, 13, *Birnbaum* (No. A0-40438).

326. *Id.* at 13.

327. *Id.* at 10, 12. Lorene worked Monday through Friday from 8:30 a.m. until 2:30 p.m. *Id.* at 10.

328. *Id.* at 11. Cliff Ellyn, a teacher at El Granada, "stated that the El Granada school was a good school with tremendous professional staff and after school options." *Id.* at 12. The school has swimming, soccer, music and dance programs after school. *Id.* at 12-13. The principal of El Granada elementary school indicated that the El Granada School offered students both academic and enrichment activities, including fine arts activities, music training, field trips and a gifted and talented student program. *Id.* at 14.

329. *Id.* at 14.

330. *Id.* at 11.

Ira even raised the question about the superiority of the San Mateo school was after Lorene had filed her motion requesting that she be allowed a weekend visit.[331] Despite the nature of the testimony and Lorene's academic and emotional involvement with her children, the court still found that the father was best suited to foster the children's academic careers.[332]

F. A Question of Semantics

By allowing the children to be moved from one parent to the other without requiring proof of changed circumstances, the court of appeal in *Birnbaum* merely engaged in a semantic game. The court re-labelled a modification of the custody arrangement as a mere change in "co-parenting residential arrangements"[333] and, thus, avoided the modification requirements altogether. As a result, the concept of custody and the strict requirements for modifying custody orders may have become diluted.[334] The court permitted the parents to refrain from proving a change in circumstances and simply allowed them to restructure the living arrangements. Commentators have noted that "most family law attorneys would have bet . . . that moving the kids from one parent to the other required a custody change."[335] The holding in *Birnbaum* suggests that "as long as the label stays the same, the 'restructure' can be as drastic as a total reversal of the former plan."[336] The result is achieved with a lesser burden of proof than is required by a change in custody.[337] The outcome of this decision is that in a case where parents initially have joint physical and joint legal custody and will continue to have this type of custody arrangement, the courts can play with the living arrangements without finding a change in circumstances.[338]

G. Changing Role of the Court

As a result of the decision in *Birnbaum v. Birnbaum* (*In re Marriage*

331. *Id.* at 10. It is possible that Ira desired this change so that he could antagonize Lorene because they were unable to communicate otherwise. He also may have responded in this way because Lorene initiated the proceedings to change the visitation.

332. *Birnbaum*, 211 Cal. App. 3d at 1514, 260 Cal. Rptr. at 214.

333. *Id.* at 1510, 260 Cal. Rptr. at 211.

334. *Trial Court Order Modifying Joint Custody "Co-parenting Residential Arrangement" Does Not Constitute Change of Custody*, 13 Cal. Fam. L. Rep. (Adams & Sevitch) No. 9, at 4093, 4095 (Sept. 1989) [hereinafter *Trial Court Order*].

335. *Id.*

336. *Id.* The label here that stays the same is the initial grant of custody which, in the *Birnbaum* case, was both joint legal and joint physical custody. *Id.*

337. *Id.*

338. *Id.*

of Birnbaum),[339] the role of the courts in custody disputes has now been extended. This case has provided a new way for parents to come before the court and change their custody orders. By avoiding the strict requirements to modify custody orders, those cases that could not meet the substantial change in circumstances requirement before this decision will now be resolved under the change in "co-parenting residential arrangement"[340] theory instead. Thus, courts will be more involved in custody disputes and minor changes in initial custody arrangements[341] because the *Birnbaum* court has granted the California judiciary broad power to alter the time allocated to each parent under joint custody orders. Courts apparently now have the authority to make decisions that affect the daily lives of children,[342] and in this way they take on the role of a "super-parent."[343] Courts should not make the types of parental decisions that should be left up to parents themselves to make. When parents disagree, as did the Birnbaums, they should seek help through mediation.[344] Instead of improving the resolution of custody disputes, these types of cases burden the courts with an unnecessary influx of complex litigation. This litigation is complex especially because of the many psychological and emotional aspects of child development.[345]

There are also negative effects on the families themselves because of the court's expanded role in this area. Switching timetables alone is not the core of the problem; rather, the crux of the problem lies in the threat of the possibility of a lawsuit continuing to disrupt family relationships. The *Birnbaum* court itself explained that allocating equal amounts of time with each parent is not the issue.[346] The court noted that "[p]arents' demands for equal amounts of a child's time constitute a disservice to the child, usually creating stress and preventing the child from fully achieving his or her potential."[347] The court instead emphasized,

339. 211 Cal. App. 3d 1508, 260 Cal. Rptr. 210 (1989).

340. *Id.* at 1513, 260 Cal. Rptr. at 213.

341. The role of the court mediator will also become more important. *Trial Court Order*, *supra* note 334, at 4095. Section 4607(e) of the California Civil Code provides that each county may decide whether a mediator may make custody and visitation recommendations to the court. CAL. CIV. CODE § 4607(e) (West Supp. 1990). The mediator, who does provides a recommendation, may not be cross-examined regarding the basis for the opinion because that information is treated as confidential and inadmissible. *Id.* § 4607(c).

342. *See Birnbaum*, 211 Cal. App. 3d at 1517-18, 260 Cal. Rptr. at 216; Rosson v. Rosson (*In re* Marriage of Rosson), 178 Cal. App. 3d 1094, 1106, 224 Cal. Rptr. 250, 259 (1986).

343. *Birnbaum*, 211 Cal. App. 3d at 1517-18, 260 Cal. Rptr. at 216.

344. *See infra* note 351 for an explanation of mediation.

345. *See supra* note 296. *See generally* J. WALLERSTEIN & S. BLAKESLEE, *supra* note 56 (studies on effects of divorce on parents and children).

346. *Birnbaum*, 211 Cal. App. 3d at 1515-16, 260 Cal. Rptr. at 214-15.

347. *Id.*

"Although time is important to the parents, the determining factor as to whether joint physical custody is in the best interests of the child is the nature of the parenting relationship between the parents."[348] No matter how well judges handle contested custody hearings or how wisely they decide, "at least one parent is sorely disappointed and the children are inevitably traumatized by having to go through adversary court processes. Worst of all the children are often in a position where pressure exists to choose between parents, each of whom they love."[349] The post-dissolution family is fragile and, when adversary custody proceedings occur, "this fragile structure falls apart like Humpty Dumpty and it becomes impossible to put Humpty Dumpty together again."[350] Child custody cases should be decided by parents with the aid of family counselors or psychologists and not the courts.[351]

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348. *Id.* at 1517, 260 Cal Rptr. at 215. A recent report from the Center for the Family in Transition in Marin County has found no evidence that joint custody promoted the children's adjustment to their parents' divorce. *Joint Custody Findings*, *supra* note 82, at 3630. The center conducted two separate studies; the first considered families that chose their own custody arrangements; and the second considered families with extensive postdissolution conflict. *Id.* The findings were as follows:

> The first study found that there was no significant relationship between "access arrangements" and the child's adjustment to the divorce; of greater importance were the child's age, the presence or absence of parental depression and anxiety, and the degree of physical and verbal aggression between the parents. The second study found that, where divorce disputes were severe, children who had greater access to both parents . . . were more emotionally troubled and behaviorally disturbed. Greater exposure to conflict between their parents made them more vulnerable to being caught up and used in the disputes. The researcher cautioned against encouraging or mandating joint custody when parents are involved in an ongoing struggle.

Id. Dr. Judith Wallerstein, Executive Director of the Center, said that in order to maintain continuous contact with both parents the child does not have to go back and forth between homes. *Id.* She also said that "[w]hile joint custody may still be warranted in some cases, these studies certainly don't show it to be the boon for kids that everyone hoped it would be." *Id.*

349. *Rosson*, 178 Cal. App. 3d at 1106, 224 Cal. Rptr. at 259.

350. *Id.*

351. See Section 4607 of the California Civil Code which provides for mandatory mediation proceedings. CAL. CIV. CODE § 4607(a) (West Supp. 1990). The section states in pertinent part:

> In any proceeding where there is at issue the custody of or visitation with a minor child, and where it appears on the face of the petition or other application for an order or modification of an order for the custody or visitation of a child or children that either or both such issues are contested, as provided in Section[s] 4600, 4600.1, or 4601, the matter shall be set for mediation of the contested issues prior to or concurrent with the setting of the matter for hearing. . . . [A] petition also may be filed pursuant to this section for the mediation of a dispute relating to any existing order for custody or visitation. . . . The purpose of the mediation proceeding shall be to reduce acrimony which may exist between the parties and to develop an agreement assuring the child or children's close and continuing contact with both parents. The mediator shall use his or her best efforts to effect a settlement of the custody or visitation dispute that is in the best interests of the child or children, pursuant to Section 4608.

VI. POSSIBLE REMEDIES

There are at least four alternatives to the *Birnbaum* approach which would foster stable custody arrangements and protect the child's best interests. First, the *Birnbaum* court could have determined the child's best interests and based its decision on the existence of changed circumstances alone. The court could have recognized an exception which would be triggered only "when the noncustodial parent shows that custody has remained unchanged but inadequate since its inception" and must prove "only that a change is essential or at least expedient for the welfare of the child in order to obtain custody."[352] Such a limited exception would be consistent with the primary purpose of the change in circumstances rule and should be adopted.[353]

Second, in the absence of such a judicially created exception, the California legislature could adopt a detailed modification requirement that would limit changes in custody. Under this alternative, the legislature would amend section 4600(i) to include:

> Unless stipulated by the parties, no motion to modify a custody judgment may be made earlier than two years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral or emotional health.[354]

In addition to adopting this limited exception, the legislature should

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Id. Trial judges find that a mediator's testimony about the child's best interests is significant and invaluable in assistance to parents. *See, e.g., Rosson*, 178 Cal. App. 3d at 1103-05, 224 Cal. Rptr. at 257-58. For a discussion of the mediation process, goals and benefits for parents and children, see generally FLORENCE BIENENFIELD, CHILD CUSTODY MEDIATION (1983).

352. Burchard v. Garay, 42 Cal. 3d 531, 550, 724 P.2d 486, 499, 229 Cal. Rptr. 800, 813 (1986) (Mosk, J., concurring). The courts should be flexible in certain circumstances and not apply so stringently the change in circumstances requirement. Although there are many problems which arise because of the *Birnbaum* court's flexibility in deciding children's custody, there is some merit to this flexibility. Courts need to be flexible in custody arrangements because the child-parent relationship and surrounding circumstances are constantly in flux. Judges should use their discretion when making their decisions, and should consider that for some children a change in the residential timetable or joint custody may be appropriate. This flexibility must be weighed against the need for stability in the parenting environment for children. If the court loosens these requirements to allow for changes in residential timetables, initial custody orders would have no meaning since they could be changed immediately with ease. To allow for this flexibility there needs to be a change in the entire way custody is determined and this new trend should involve a final determination by both mediators and psychologists.

353. *Rosson*, 178 Cal. App. 3d at 1106, 224 Cal. Rptr. at 259.

354. ILL. ANN. STAT. ch. 40, para. 601(a) (Smith-Hurd Supp. 1990); *accord* KY. REV. STAT. ANN. § 403.330(1) (Baldwin 1984 & Supp. 1990).

specifically define all types of custody so that courts cannot use *Birnbaum* to avoid the modification requirements, or invent another way to get around these requirements. The definitions of joint custody should explain the specific types of custody arrangements available, such as a change in the co-parenting residential arrangements.[355]

Third, as a flexible remedy, the legislature could adopt paragraph 602.1 of the Illinois Revised Statute which defines joint custody as any parenting arrangement that either parents agree upon or the courts order.[356] The parents must specify in writing all of their powers, rights and responsibilities for the child as well as the procedures for any proposed changes.[357] In the event that the parents are unable to agree upon a joint parenting plan, then the court under the statute will provide for specific custody arrangements.[358] This statute would be beneficial because parents would have flexibility in their joint custody arrangements, and children would be assured stability in their home environment so that courts could not modify the custody agreement at the whim of one parent merely to change the residential timetables.

A fourth alternative would be for the legislature to modify sections 4600.5(d) and 4600(a) of the California Civil Code[359] by adding the following language:

> It is the public policy of this State in allowing modification of custody orders to assure that minor children remain in a stable environment, and that their custody arrangements or residential timetables are only altered when there is a substantial change in circumstances. The purpose of this public policy is to avoid vexatious litigation and the constant disruption of the children's established mode of living.

VII. CONCLUSION

Birnbaum v. Birnbaum (In re Marriage of Birnbaum) [360] was decided incorrectly and should not have been litigated. The court should have followed the strict judicial rules governing modification and not

355. *See supra* note 282.

356. *See, e.g.*, ILL. ANN. STAT. ch. 40, para. 602.1 (Smith-Hurd Supp. 1990); *see infra* note 282.

357. *Id.* This definition seems to encompass a variety of joint custody plans so that if the Illinois statute were adopted, courts would not be able to modify joint custody so easily.

358. *Id.* See *supra* note 282 for a list of the types of arrangements courts or the parties themselves may include in their parenting plan.

359. CAL. CIV. CODE §§ 4600.5(d), 4600(a) (West Supp. 1990).

360. 211 Cal. App. 3d 1508, 260 Cal. Rptr. 210 (1989).

been so easily persuaded by the attorneys' briefs.[361] This case did not meet the test for modification and the court should not have invented new ways to alter initial custody orders not provided for by statute. Modification of child custody laws is a task properly left to the California legislature. By circumventing the established case law and statutes in this area, and ignoring the policies underlying child custody arrangements,[362] the *Birnbaum* court overstepped its bounds and laid the groundwork for future ill-advised decisions in this area.

Most importantly, children should not be subject to their parents' never-ending conflicts leading to these custody battles.[363] It is in the best interests of the child to remain in a stable environment[364] so that the effects of divorce are minimized. The *Birnbaum* decision allows parents to shift the child back and forth between them. It does so by allowing courts to resolve cases involving a change in residential timetables which do not meet the modification requirements. This decision, therefore, allows the continuation of vexatious litigation which only harms the child. Rather than perpetuating the incessant instability suffered by the child under *Birnbaum*, the courts should seek to minimize the detrimental effects of divorce, as they may linger on for years or even a lifetime after the dissolution of a marriage.

*Mara Quint Berke**

361. Respondent's Reply Brief at 16, Birnbaum v. Birnbaum (*In re* Marriage of Birnbaum), 211 Cal. App. 3d 1508, 260 Cal. Rptr. 210 (1989) (No. A0-40438).

362. *See* Burchard v. Garay, 42 Cal. 3d 531, 535, 724 P.2d 486, 488, 229 Cal. Rptr. 800, 802 (1986); Carney v. Carney (*In re* Marriage of Carney), 24 Cal. 3d 725, 730-31, 598 P.2d 36, 38, 157 Cal. Rptr. 383, 385 (1979); Connolly v. Connolly (*In re* Marriage of Connolly), 214 Cal. App. 2d 433, 436, 29 Cal. Rptr. 616, 617-18 (1963).

363. "[C]hildren involved in a custody proceeding should not be made the pawns of the personal desires, either on the part of the contestants or the court, no matter how sincere such desires may be." Juri v. Juri, 61 Cal. App. 2d 815, 819, 143 P.2d 708, 711 (1943).

364. *See supra* notes 284-312 and accompanying text.

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