CALIFORNIA JUDGES BENCHGUIDES

Benchguide 200

CUSTODY AND VISITATION

[REVISED 2017]

JUDICIAL COUNCIL
OF CALIFORNIA

OPERATIONS AND PROGRAMS DIVISION
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This benchguide addresses child custody and visitation proceedings under the Family Code, specifically the disposition of parent and nonparent claims in nullity, dissolution, legal separation, and parentage actions. It also discusses modification of custody, domestic violence issues, and move-away disputes. Discussion of custody and visitation (parenting time) disputes within the context of dependency, guardianship, and adoption proceedings is beyond the scope of this benchguide.

Visitation (Parenting Time): Where appropriate, the term "visitation" may be supplemented or replaced with the term "parenting time" in this benchguide. This usage adopted by the Judicial Council is not intended to change substantive law "but rather to use nomenclature that more respectfully describes the time parents are responsible for, or spend time with, their children." Elkins Family Law Task Force, Final Report and Recommendations, §II.A.7 (April 2010). See, *e.g.*, Judicial Council Form FL-311, Child Custody and Visitation (Parenting Time) Application Attachment; and California Rules of Court, Chapter 8 (Child Custody and Visitation (Parenting Time) Proceedings).

II. PROCEDURAL CHECKLISTS

A. Jurisdiction Checklists

1. [§200.2] Initial Custody Determinations

A California court may exercise jurisdiction to make an initial custody determination if (Fam C §3421(a))*:*

- California is the child's "home state" when the initial custody proceeding is commenced; *or*
- It was the child's home state within 6 months before the proceeding commenced and the child is absent from California, but a parent or person acting as a parent continues to live in California;

OR

- No other state has "home state" jurisdiction, or a court of the home state has declined jurisdiction; *and*

- The child and at least one parent or person acting as parent have a significant connection with California other than mere physical presence; *and*
- Substantial evidence is available in California concerning the child's care, protection, training, and personal relationships.

OR

- All courts having jurisdiction have declined to exercise jurisdiction on the ground that California is the more appropriate forum.

OR

- No court of any other state would have jurisdiction under the above criteria.

Definition: A "home state" generally means the state in which a child lived with a parent, or a person acting as a parent, for at least 6 consecutive months immediately before the custody proceeding or, if the child is less than 6 months old, from birth. Fam C §3402(g). However, Fam C §3421(a)(1) also extends "home state" jurisdiction to cases in which the child is absent from the state immediately before the proceeding was commenced. For example, California can have jurisdiction to make child custody orders if:

- The child continuously lived in California for 6 months;

OR

- The child is absent from the state for less than 6 months before the custody proceeding is commenced; *and*
- A parent or person acting as a parent continues to reside in California.

For discussion, see §§200.33–200.41.

Indian Law Caution: Tribes are to be treated as "states" for the purposes of child custody determinations. Wherever "state" is mentioned, the court must keep in mind that this includes a tribe. Fam C §3404(b). For further discussion of concurrent state and tribal jurisdiction, see Chapter 1, Section IV of BENCH HANDBOOK: THE INDIAN CHILD WELFARE ACT (Cal CJER 2013).

A "person acting as a parent" is a nonparent who (1) has physical custody of the child, or has had physical custody for a period of 6 consecutive months, within 1 year immediately before the child custody proceeding; and (2) has been awarded custody by a court or claims a right to custody. Fam C §3402(m).

2. [§200.3] Emergency Jurisdiction

A California court may exercise temporary emergency custody jurisdiction if the child is present in this state and (Fam C §3424(a))*:*

- The child has been "abandoned";

OR

- The exercise of such jurisdiction is necessary in an emergency to protect the child because the child, child's sibling, or child's parent is subjected to or threatened with mistreatment or abuse.

For discussion, see §200.41.

Definition: "Abandoned" means that the child has been left without provision for reasonable and necessary care or supervision. Fam C §3402(a).

Indian Law Caution: The federal Indian Child Welfare Act (25 USC §§1901 et seq) will apply to proceedings involving an Indian child. In addition, Fam C §7822(e) contains specific provisions regarding Indian children and abandonment proceedings.

3. [§200.4] Modification of Out-of-State Order

A California court may not modify a child custody determination made by another state unless (Fam C §3423)*:*

- The California court has jurisdiction to make an initial custody determination (see §200.2 above);

Indian Law Caution: The federal Indian Child Welfare Act (25 USC §1911(a)) provides that where an Indian child is a ward of a tribal court, the Indian tribe must retain exclusive jurisdiction, notwithstanding the residence or domicile of the child. The state court is required to afford such a custody order full faith and credit. 25 USC §1911(d).

AND

- The court of the other state determines:
  - It no longer has exclusive, continuing jurisdiction or that California would be a more convenient forum; *or*
  - The child, the child's parents, and any person acting as a parent do not presently reside in the other state. The California court may also make this determination.

For discussion, see §200.43.

B. [§200.5] Hearing on Request for Order (Order To Show Cause): Custody and Visitation

(1) *The parties must be notified that a court-appointed temporary judge will be hearing matters before swearing in the first witness or commencement of the proceeding.* To proceed, the parties must either sign a written stipulation or fail to object before the temporary judge begins the proceeding. CCP §259; Cal Rules of Ct 2.816.

(2) *Determine whether a mandatory Request for Order form has been filed.* Orders to show cause must be filed on a Request for Order form. See Judicial Council Form FL-300, adopted for mandatory use. The request must provide facts sufficient to notify the other party of the declarant's contentions in support of the relief requested. Cal Rules of Ct 5.92. *Note*: Because the California Rules of Court and the Family Code continue to use the term order to show cause, this benchguide will do so as well.

(3) *Determine whether minor children are in the courtroom.* If so, address the issue under your court's policies.

☛ JUDICIAL TIP: If the parties brought the children with the intent that the court will hear testimony from them, the court has an obligation to control the questioning of the minor witness and has many ways to obtain information from the minor. For discussion, see §§200.66–200.67.

(4) *Determine whether a domestic violence protective order or any other type of protective order has been issued in any of the cases or whether either party has alleged domestic violence in writing, under penalty of perjury*. Note that special procedures may be required in such cases. For discussion, see §200.70.

(5) *Unless the child is faced with immediate harm or there is an immediate risk that the child will be removed from the state, the court may not issue custody orders ex parte*. The court, however, may shorten the time for the hearing and service of notice of the hearing.

(6) *Call the calendar to determine if the parties and counsel are present, and get time estimates for each hearing from parties and counsel who are present or appear electronically.*

Note: Family Code §3012 permits a party to move to appear electronically at a child custody proceeding when subject to deportation or detention proceedings which may limit the ability to appear in person. Some courts allow litigants or attorneys to participate by telephone in other circumstances with the approval of the judge.

If a party will appear electronically, follow your county's local procedures about initiating contact on the date and time of the hearing.

Some local rules require the court to contact the party when the matter is called on the calendar.

(7) *If only one party is present, determine whether the other party has been served, or whether, if served, service was timely.*

(8) *If absent party was not served or service was untimely:*

- As appropriate, continue the request for order or order to show cause to a new hearing date and extend any temporary orders previously granted to the end of the new hearing, or as otherwise ordered. See Fam C §245; Cal Rules of Ct 5.94(e), (f).
- Follow your county's procedure for mediation. In some counties, the court will set a new date for mediation at this time, before the hearing date.

☛ JUDICIAL TIP: Mediation procedures vary greatly from county to county. Before beginning any family law assignment, the judge should meet with the local Family Court Services staff and become thoroughly familiar with the local court rules and procedures regarding confidentiality of mediation.

- Instruct petitioner to serve all original documents as well as the notice of the new date or dates.

(9) *If the absent party was served in a timely manner, the hearing will proceed as a default*.

(10) *If it is the practice to do so, administer an oath to all witnesses at this time*. Otherwise, administer the oath to the parties and their witnesses as each case is called forward.

(11) *Determine if the parties have been to mediation.*

(12) *If the parties have not been to mediation:*

- Assign a new date for mediation and a continued hearing date subsequent to the mediation date. Instruct both parties to appear at mediation and at the new hearing date. The court may not make custody or visitation (parenting time) orders without an attempt at mediation. However, in an emergency, the court can make custody and visitation orders pending mediation.
- If one party has had exclusive control and care of the child and the other party has not had contact with the child, the court should determine whether the parties can agree to some contact or visitation (parenting time), or whether it should order some minimal contact until the parties can go to mediation. The parties may stipulate to visitation before mediation.

(13) *If the parties have been to mediation*:

- Determine whether the parties have received copies of the mediation report from the mediator. If one or more of the parties have not received the report, ask court staff to make copies of the report for them to review immediately. Pass the case and move it to the bottom of the calendar. That often provides sufficient time for the parties to review and take action on the report without having to continue the matter. Fam C §3186(a); Cal Rules of Ct 5.210(e)(8)(A).
- Determine whether the parties reached an agreement at mediation.
  - — If an agreement has been reached, call the parties and ask if they have read and understand the mediator's report, and whether it accurately reflects their agreement. Verify that they assent to the agreement and absent any concerns the court may have based on review of the declarations, mediation report, or statements made by the parties, confirm the agreement and incorporate it in the order for custody and visitation rights. See §200.105.
  - — If the parties did not reach an agreement or reached only a partial agreement, subsequent actions will be determined by the type of mediation program used in the court's county.
  - — If nonrecommending (confidential) mediation program: After being informed in writing by mediator that agreement was not reached on specified issues, consider resubmitting the matter to mediation, ordering a custody evaluation, conducting a hearing, or setting another date for hearing. See §§200.94, 200.106.
  - — If recommending (nonconfidential) mediation program: Review mediator's report and any recommendations from the mediator as to custody and visitation. The parties are entitled to a hearing to examine the mediator about his or her recommendations. *Marriage of Rosson* (1986) 178 CA3d 1094, 1105, 224 CR 250, disapproved on other grounds in 13 C4th 25, 38 n10; *McLaughlin v Superior Court* (1983) 140 CA3d 473, 482–483, 189 CR 479. Consider and review all other evidence, including testimony from the parties, declarations, parties' comments, and response to the mediator's recommendations. Consider resubmitting the matter to mediation, or ordering a custody evaluation. For discussion of "Recommending" and "Nonrecommending" mediation, see §§200.93–200.94.

(14) *Consider the applicable standards for custody and visitation.* The broad general standard is the best interest of the child. Fam C §3011.

In determining this standard, the court must use the health, safety, and welfare of the child as a primary consideration, as well as any history of abuse, the nature and amount of contact with both parents, and the habitual or continual illegal use of controlled substances, or the habitual or continual abuse of alcohol or prescribed controlled substances by either parent. Fam C §3011(a)–(d). See §§200.50–200.65.

Indian Law Caution: Generally states and state courts have very limited jurisdiction over the conduct of Indians in "Indian Country." California has significantly more authority than many states due to Public Law 280. However, the court's jurisdiction to adjudicate civil matters arising between Indians in Indian Country is governed by 28 USC §1360, which states that as long as tribal ordinances or customs are consistent with state civil law, they must be given full force and effect when state courts decide civil causes of action.

(15) *Consider the ramifications of the types of custody in making a custody determination*—legal custody, which may be granted solely or jointly, or physical custody, which may be granted solely or jointly (see §§200.24–200.26).

(16) *If joint custody is awarded:*

- *Legal Custody*. Parents are not required to make every decision relating to the child together. Each parent may act alone, as long as the action does not conflict with any orders about physical custody of the children. The court must state in the order which decisions the parents must make jointly. The court must also specify the consequences for failing to obtain mutual consent before acting. Fam C §3083.
- *Physical Custody*. Specify the rights of each parent to physical control of the child in sufficient detail to enable a parent deprived of that control to implement laws for relief of child snatching and kidnapping. Fam C §3084.
- On a party's request, state the reasons for awarding joint custody. Fam C §3082.
- If appropriate, specify one parent as the primary caretaker of the child or children and one home as the primary home of the child or children, for purposes of determining eligibility for public assistance. Fam C §3086.

(17) *If sole custody is awarded*:

- *Legal Custody*. Only one parent has the right and responsibility to make the decisions relating to the health, education, and welfare of the child. Fam C §3006. However, the noncustodial parent cannot be denied access to records and information regarding the child,

including medical, dental, and school records. Fam C §3025. See §200.25.

- *Physical Custody*. The child will reside with and be under the supervision of one parent. Fam C §3007.
  - — Specify visitation (parenting time) schedule with the other parent.
  - — If appropriate, specify conditions of supervised visitation. See §§200.86–200.88.

☛ JUDICIAL TIP: If supervised visitation is ordered, it is good practice in most cases to schedule a review hearing within 60 to 90 days. This allows you time to review any reports on the supervised visitation and, if circumstances warrant, to modify the visitation arrangement. In many cases, supervised visitation does not have to be an indefinite order, and it should be reviewed periodically to determine whether continued supervision is needed for the best interests of the child or children.

- On a party's request, state the reasons for denying award of joint custody. Fam C §3082.

(18) *Ensure that the custody or visitation order includes the following* (Fam C §3048):

- The basis for the court's exercise of jurisdiction.
- The manner in which notice and opportunity to be heard were given.
- A clear description of the custody and visitation rights of each party.
- A provision stating that a violation of the order may subject the party in violation to civil or criminal penalties, or both.
- Identification of the child's or children's country of habitual residence.

☛ JUDICIAL TIP: Most orders contain the following language: California is the minor child's home state. The United States is the country of habitual residence. Both parties have been served/appeared as provided by law. Violation of the custody and visitation (parenting time) orders may subject a party to civil or criminal penalties or both.

See Judicial Council Forms FL-355, FL-341.

(19) *If appropriate, refer parties to Family Court Services programs, which provide mediation services to resolve disputes about care of children.*

C. [§200.6] Requests for Temporary Emergency (Ex Parte) Custody or Visitation (Parenting Time) Orders

(1) *If you are hearing a request for temporary emergency (ex parte) custody or visitation (parenting time) orders, determine whether*:

- The child is faced with immediate harm that includes:
  - — A recent act of domestic violence directed to child or to other party or in presence of child;
  - — A pattern of domestic violence in the past; or
  - — Lack of supervision for the child.

OR

- There is an immediate risk that the child will be removed from the state.

(2) *If any of the factors in item 1 are present:*

- Grant a temporary emergency child custody order.
- Set a hearing date within 20 days.
- Enter an order restraining the party receiving custody from removing the child from the state pending notice and the hearing on the order.

For discussion of temporary emergency orders, see §200.49.

☛ JUDICIAL TIP: Many, if not most, ex parte or emergency order requests for custody and visitation orders or modifications will be denied because of Fam C §3064.

Note: The term "ex parte order" is being replaced with the term "emergency order" in the Family Code, California Rules of Court and relevant forms (except in the case of ex parte applications for domestic violence restraining orders under the Domestic Violence Prevention Act). See Cal Rules of Ct 5.151. As such, the term "emergency order" will supplement or replace "ex parte" as applicable in this benchguide.

D. Move-Away Checklists

1. [§200.7] Initial Custody Determinations

When the parent with primary custody of the child intends to move with the child, the court must consider the following when making a custody determination:

(1) All relevant circumstances bearing on the best interest of the child, *e.g.*, the child's health, safety, welfare, and history of abuse (best interest standard).

(2) The effects of the move as it bears on the nature of the child's contact with both parents, the child's age, community ties, and health and education needs. Also take into account the child's preferences. In the case of an Indian child, the court must also consider the child's membership in the Indian tribe and connection to the tribal community. Fam C §175(a)(2).

(3) Whether the move is in good faith and not intended to frustrate the other parent's contact with the child. The nonmoving parent must establish that the move is in bad faith. Otherwise, the trial court is not required to question the motivation for the move.

(4) The nature and length of the custodial relationship as it existed just before the move. When the moving parent has maintained custody for a significant period, the nonmoving parent will bear the burden of persuading the court that a change in custody is in the child's best interest.

For a comprehensive discussion, see §§200.134–200.144. See Appendix A: Move-Away Flow Chart.

2. [§200.8] Modification of Existing Judicially Determined Custody Order

(1) *When existing order grants one parent sole physical custody:*

- The noncustodial parent must show that the move
  - — Is made in bad faith; or
  - — Would cause detriment to the child, requiring a reevaluation of the child's custody. If this showing is made, the court must determine whether a change in custody is in the child's best interest.

OR

- The parents have a de facto shared physical custody, in which case the court must conduct a de novo determination of custody based on the child's best interest.

(2) *When existing order grants joint or shared physical custody:*

- The court must conduct a de novo determination of custody based on the child's best interest.

OR

- One parent must show that the other parent has not shared in his or her parenting responsibilities, thereby establishing de facto sole physical custody. In that case, the actual custodial parent is entitled

to a presumption of the ability to change the residence unless the other parent shows that:

— The move is in bad faith; or

— The move would cause detriment to the child, requiring a reevaluation of the child's custody. If this showing is made, the court must determine whether a change in custody is in the child's best interest.

For a comprehensive discussion, see §§200.134–200.144.

III. APPLICABLE LAW

A. Parentage Determinations

1. [§200.9] Statutory Authority to Determine Parentage

A preliminary issue that must be resolved before custody can be determined is that of parentage. Parentage determinations concern whom the law recognizes as a child's legal parent. The legal parent and child relationship gives rise to custody and visitation rights and support obligations. Fam C §§7601, 3000–3204.

The Uniform Parentage Act (UPA) establishes the grounds, authority, and procedural framework for parentage actions in California. Fam C §§7601, 7610–7611, 7630–7644, 7650. A California court may also determine parentage in child support actions brought by the Department of Child Support Services (DCSS) (Fam C §17404(a)) in actions brought to make or enforce child support under the Uniform Interstate Family Support Act (UIFSA) (Fam C §5700.402), and in actions under the Domestic Violence Prevention Act (DVPA) (Fam C §§6323 and 6346). Parentage of children born before a marriage may be determined in proceedings for dissolution, legal separation, or child support. Fam C §2330.1.

For further discussion of parentage issues and proceedings see California Judges Benchguide 203: *AB 1058 Child Support Proceedings: Establishing Support* (Cal CJER) and California Judges Benchguide 204: *AB 1058 Child Support Proceedings: Enforcing Support* (Cal CJER).

2. [§200.10] Establishing Parentage: Summary

The parent and child relationship may be established in the following ways:

- Giving birth to a child (outside the surrogate context). Fam C §7610(a).

- Being a natural mother's actual or putative spouse or registered domestic partner. Fam C §§7540, 7611(a)–(c).
- Receiving a child into one's home and holding the child out as one's own natural child. Fam C §7611(d).
- Signing a parentage declaration. Fam C §§7570–7577.
- Signing a stipulation of parentage in a domestic violence case (Fam C §6323(b)(2)) or other action under the UPA (Fam C §§7600 et seq).
- Being the spouse of a woman who conceives through assisted reproductive techniques with the consent of the spouse or being the intended parents of a child conceived through assisted reproductive techniques. Fam C §7613; see also *Marriage of Buzzanca* (1998) 61 CA4th 1410, 1413, 72 CR2d 280.
- Adoption. Fam C §§7610(b), 8616.

3. [§200.11] Establishing Parentage: Presumptions

Some of the methods to establish paternity or for making determinations of nonparentage are based upon presumptions provided in the UPA.

a. [§200.12] Marital Conclusive Presumption

A child born to a wife cohabiting with her husband who is not impotent or sterile is conclusively presumed to be a child of the marriage. Fam C §7540. Family Code §7540 requires that three elements, (1) marriage, (2) cohabitation, and (3) potency and fertility of the husband, exist at the time of conception of the child in order for the conclusive presumption to apply. *City and County of San Francisco v Strahlendorf* (1992) 7 CA4th 1911, 9 CR2d 817.

Family Code §7540 has been held not to apply as a matter of due process where application of the presumption in particular circumstances would not further the social policy of promoting family unity that underlies the statute. See *Comino v Kelley* (1994) 25 CA4th 678, 30 CR2d 728; *County of Orange v Leslie B.* (1993) 14 CA4th 976, 17 CR2d 797.

b. [§200.13] Other Marital Presumptions

There are three circumstances in which a person is presumed to be the parent of a child as a result of marriage to the natural mother (Fam C §7611(a)–(c)):

- If the child is born during the marriage or within 300 days after termination of the marriage by death, annulment, divorce, declaration of invalidity, or separation.

- If the presumed parent and the child's natural mother attempted to legally marry each other before the child's birth, and either
  - — The child was born during the attempted marriage or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce; or
  - — If the attempted marriage is invalid without a court order and the child is born within 300 days after the termination of cohabitation.
- If after the child is born, the presumed parent and the child's natural mother have married, or attempted to marry, and either of the following is true:
  - — With the person's consent, the presumed parent is named as the child's parent on the child's birth certificate, or
  - — The presumed parent is obligated to support the child under a written voluntary promise or by court order.

c. [§200.14] Presumption Based on Holding Child Out as Own

Family Code §7611(d) provides a presumption of parentage if the presumed parent receives the child into his or her home and openly holds out the child as his or her natural child. There is no durational minimum for a person to receive the child into their home; instead, "receipt of the child into the home must be sufficiently unambiguous as to constitute a clear declaration regarding the nature of the relationship. . . ." As well, no "particular number or sorts of public acknowledgements are necessary to satisfy [Fam C] section 7611(d)," as to the requirement of holding out the child as one's own. See *Charisma R. v Kristina S.* (2009) 175 CA4th 361, 374–375, 96 CR3d 26, overruled on other grounds in 50 C4th 512, 532 n7. The question is factual—has there been a showing of a public acknowledgment of a parental relationship.

d. [§200.15] Presumptions Are To Be Applied on a Gender-Neutral Basis

Family Code §7650 provides that the UPA provisions applicable to determining a father and child relationship shall be applied insofar as practicable to "an action to determine the existence or nonexistence of a mother and child relationship." In *Elisa B. v Superior Court* (2005) 37 C4th 108, 33 CR3d 46, the California Supreme Court applied Fam C §7611(d) in a gender-neutral manner to hold that a natural mother's former lesbian partner could establish a legal parent-child relationship. In *S.Y. v S.B.* (2011) 201 CA4th 1023, 134 CR3d 1, Fam C §7611(d) was

applied without regard to gender in support of a finding that a same-sex partner was the presumed parent of her partner's adopted children.

e. [§200.16] Rebutting the Presumptions

Family Code §7612 provides that the presumptions in Fam C §7611 are rebuttable presumptions affecting the burden of proof and may be rebutted in an appropriate action by clear and convincing evidence.

An "appropriate action" is one in which there is another candidate for paternity "vying for parental rights and seek[ing] to rebut a [Fam C] §7611(d) presumption in order to perfect his claim, or in which a court decides that the legal rights and obligations of parenthood should devolve upon an unwilling candidate." *In re Nicholas H.* (2002) 28 C4th 56, 70, 120 CR2d 146.

f. [§200.17] Family Code §7611 Presumptions

In *In re Nicholas H.* (2002) 28 C4th 56, 120 CR2d 146, the California Supreme Court held that a presumption arising under Fam C §7611 is not necessarily rebutted by clear and convincing evidence that the presumed father is not the biological father. In *Elisa B. v Superior Court* (2005) 37 C4th 108, 33 CR3d 46, the Court held that lack of a biological relationship did not preclude the former same-sex partner of a child's birth mother from being a presumed parent under Fam C §7611(d).

4. [§200.18] Parentage by Voluntary Declaration

Parentage may also be determined by a written voluntary declaration of paternity filed with DCSS and has the same force and effect as a judgment for paternity issued by a court of competent jurisdiction. Fam C §§7570 et seq. The voluntary declaration is recognized as a basis for an order for child custody, visitation, or child support. Fam C §7573. As a judgment, the voluntary declaration rebuts a presumption of paternity under Fam C §7611 pertaining to another alleged parent, unless a court makes a determination that more than two persons are parents. Fam C §7612(d); *Kevin Q. v Lauren W.* (2009) 175 CA4th 1119, 95 CR3d 477 (voluntary declaration trumps rebuttable presumption of paternity); cf. *In re Cheyenne B.* (2012) 203 CA4th 1361, 1374 n17, 138 CR3d 267 (in 2011 Fam C §7612 was amended in response to *Kevin Q.*)

Note: A person's offer or refusal to sign a voluntary declaration of paternity may be considered as a factor, but is not determinative, as to the issue of legal parentage in any proceedings that establish or terminate parental rights. Fam C §7612(g).

5. [§200.19] Parentage by Stipulation

In an action under the DVPA, the court may accept a stipulation of paternity by the parties and, if paternity is uncontested, enter a judgment establishing paternity subject to the set aside provisions in Fam C §7646. Fam C §6323(b)(2).

The parties may also stipulate to parentage in any action brought under the UPA or in an action brought by DCSS under Fam C §17410. Such stipulations are res judicata and may not be relitigated even if nonbiology is later established. *Robert J. v Leslie M.* (1997) 51 CA4th 1642, 59 CR2d 905.

6. [§200.20] Parentage by Estoppel

A line of cases holds that the conduct of a husband with no biological ties to a child may nonetheless estop the husband from avoiding parental responsibilities even after the husband's marriage to the child's mother is dissolved. *Marriage of Freeman* (1996) 45 CA4th 1437, 1447, 53 CR2d 439. The elements of parentage by estoppel exist where, although biological parentage is unknown or lacking, the facts show that (*Clevenger v Clevenger* (1961) 189 CA2d 658, 11 CR 707; *Marriage of Valle* (1975) 53 CA3d 837, 126 CR 38; *Marriage of Johnson* (1979) 88 CA3d 848, 152 CR 121):

- The person represented to the child he or she is the natural father or mother, and intended the child to rely on the representation;
- The child relied on the representation; and
- The child was ignorant of the true facts.

See also *Marriage of Pedregon* (2003) 107 CA4th 1284, 1290, 132 CR2d 861 ("The courts have recognized the importance of a putative father continuing his paternal relationship with a child, including providing emotional and financial support, when the father has represented to the child and the child has been led to believe over a lengthy period of time that the father is his natural father.")

Unlike the presumption under Fam C §7611(d), parentage by estoppel requires a long-term relationship between the parent and the child which frustrates the child's opportunity to discover the natural father. *Clevenger v Clevenger, supra.*

Parentage by estoppel does not apply if the father believed he was the natural father of the child. *County of San Diego v Arzaga* (2007) 152 CA4th 1336, 1347–1348, 62 CR3d 329.

7. [§200.21] Assisted Reproduction

If a woman, with consent of an intended parent, conceives through physician-supervised assisted reproduction with semen or ova or both

donated by a donor who is not her spouse, the intended parent is treated by law as if he or she were the natural parent of a child thereby conceived; the donor is not considered the parent. Fam C §7613. Family Code §7613 specifies mandatory procedures for written consent. If the requirements of Fam C §7613 are met, blood tests may not be used to challenge paternity of the resulting child. Fam C §7541(e).

Optional forms to use to show intent to be a parent of a child conceived by ova or sperm donation are provided in Fam C §7613.5 and satisfy the written consent requirement of Fam C §7613.

Note: A sperm donor, although precluded from establishing presumed parentage under Fam C §7613, was not precluded from establishing presumed parentage based on post-birth conduct under Fam C §7611. *Jason P. v Danielle S.* (2014) 226 CA4th 167, 171 CR3d 789.

If an intended parent or parents use a gestational carrier or surrogate, the requirements for the written agreement to be used in this situation are set forth in Fam C §7962. When a properly executed agreement is lodged with the court in an action to establish a parent-child relationship, it rebuts any presumptions created by Fam C §§7540–7541, 7610(b), 7611 and 7613 that the gestational carrier surrogate, her spouse, or partner are a parent of the child or children. Fam C §7962(f)(1).

8. [§200.22] Resolving Multiple Presumptions of Parentage

Family Code §7612 provides that if two or more presumptions arise under Fam C §7610 or §7611 which conflict, the presumption which on the facts is founded on weightier considerations of policy and logic will control.

In a provision added in 2013, the Legislature overturned the long-standing assumption that a child may have only two parents. Family Code §7612(c) now provides that in appropriate actions, more than two persons with a claim to parentage may be found to be a parent, if the court finds that recognizing only two parents would be detrimental to the child. In determining detriment to the child, the court must consider all relevant factors, including, but not limited to, the harm of removing the child from a stable placement with a parent who has fulfilled the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time.

An appropriate action under Fam C §7612(c) is one that protects an *existing* relationship with a nonparent, not a parental relationship that has not yet developed. *In re Donovan L., Jr.* (2016) 244 CA4th 1075, 1088–1091, 198 CR3d 550. Stable placement does not just mean a living arrangement but also means a parent-child relationship has been established. *Martinez v Vaziri* (2016) 246 CA4th 373, 384–385, 200 CR3d 884.

9. [§200.23] Standing to Bring a Parentage Action

Standing varies according to the basis of parentage or nonparentage underlying the action as follows:

- An action to establish the existence or nonexistence of the parent and child relationship under Fam C §7611(a), (b), or (c) may be brought by (Fam C §7630(a)):
  - The child,
  - The child's natural mother,
  - The presumed parent,
  - An adoption agency to whom the child has been released, or
  - A prospective adoptive parent.
- An action to establish the existence or nonexistence of the parent and child relationship under Fam C §7611(d) may be brought by any interested party. Fam C §7630(b).
- An action to establish the existence or nonexistence of the parent and child relationship, except in cases of a wife cohabitating with her husband (Fam C §§7540 et seq), may be brought by (Fam C §7630(c)):
  - The child;
  - The child's representative;
  - DCSS;
  - A presumed parent, or a deceased or minor presumed parent's parent or personal representative; or
  - In cases where the natural mother is the only presumed parent or a Welf & I C §300 action or adoption is pending, the alleged father or, if deceased or a minor, his parent or personal representative.
- An action to determine the existence or nonexistence of the mother-child relationship may be brought by any interested party. Fam C §7650(a).
- A party to an assisted-reproduction agreement may bring an action to establish a parent and child relationship consistent with the intent of the agreement. Fam C §7630(f).
- A local child support agency may bring a parentage action in any case in which the agency believes it to be appropriate. Fam C §7634.

B. Types of Custody Orders

1. Overview and Definitions

a. [§200.24] Legal and Physical Custody

In California, custody is of two types: legal and physical. See Fam C §§3002–3007. "Legal" custody refers to the right and responsibility to make decisions related to the health, education, and welfare of the child. Fam C §§3003, 3006. "Physical" custody refers to the time periods during which a child resides with and is under the supervision of a parent or other party. Fam C §§3004, 3007.

Legal and/or physical custody may be granted solely to one parent. This is called "sole custody." It may also be awarded jointly to both parents. This is called "joint custody." See Fam C §§3002–3007.

The type of custody (legal or physical) and the means of holding it (jointly or solely) can have an impact on future decisions the court is called on to make, such as whether a parent is allowed to relocate or change the residence of the minor child, and where the child attends school.

See Judicial Council Forms FL-341(D), Physical Custody Attachment, FL-341, Child Custody and Visitation (Parenting Time) Order Attachment, and FL-341(C), Children's Holiday Schedule Attachment.

b. [§200.25] Sole Custody

Sole legal custody means that one parent has the right and responsibility to make the decisions relating to the health, education, and welfare of the child. Fam C §3006.

Sole physical custody means that the child resides with and is under the primary supervision of one parent, subject to court-ordered visitation by the other parent. Fam C §3007.

☛ JUDICIAL TIP: Even if one parent has sole legal or physical custody, the noncustodial parent cannot be denied access to records and information regarding the child, including medical, dental, and school records. Fam C §3025. As this rule is not well-known, you can state it in an order.

If a noncustodial parent has unsupervised access to a child, some judges also state in their orders that the noncustodial parent has the ability to provide medical consent for the child in the event of an emergency.

c. [§200.26] Joint Custody

"Joint custody" means both joint physical custody and joint legal custody. Fam C §3002.

"Joint legal custody" means both parents share the right and responsibility to make decisions related to the health, education, and welfare of the minor child. Fam C §3003.

☛ JUDICIAL TIP: Joint custody does not require parents to make every decision relating to the child together. You must state in an order which decisions the parents must make jointly. In all other circumstances each parent is able to make a decision on a particular issue. You can state in an order which parent is to make which decisions.

"Joint physical custody" means that each parent has significant periods of physical custody, and it must be shared in a way that assures the child of frequent and continuing contact with both parents subject to the factors and public policy determining the child's best interestdescribed in Fam C §§3011 and 3020. Fam C §3004.

☛ JUDICIAL TIP: An award of joint physical custody does not necessarily mean that the parties have an equal or approximately equal share of time. The court must specify the times of physical control and the rights of each party during these times.

See Judicial Council Form FL-341(E), Joint Legal Custody Attachment.

2. [§200.27] Presumption and Special Rules Applicable to Joint Custody Orders

Presumption. There is a presumption that joint custody is in the minor child's best interest when the parents have agreed to joint custody or when they agree in open court at a custody hearing. Fam C §3080. The court, however, in applying this presumption, must still give consideration to the factors that determine the child's best interest as described in Fam C §3011.

If the parents do not agree to a joint custody order, the court may make such an order on the request of either parent. Fam C §3081. Again, the court must consider and apply the factors that determine the child's best interest as described in Fam C §3011.

There is not, however, a preference or presumption for or against joint legal custody, joint physical custody, or sole custody, and the court and the family are allowed the widest discretion to choose a parenting plan that is in the child's best interest. Fam C §3040(c).

Special rules. When the court grants or denies a parent's request for joint custody in the absence of an agreement between both parents, it must, if requested by one of the parties, state the reasons for granting or denying the request. A broad statement that the joint custody order is or is

not in the child's best interest is insufficient as a statement of the reasons for the court's action. Fam C §3082.

Joint legal custody may be awarded without awarding joint physical custody. Fam C §3085. When it makes a joint legal custody order, the court must specify the circumstances under which the consent of both parents is required to exercise legal control of the minor and the consequences of the failure to obtain mutual consent before acting. In all other circumstances, either parent acting alone may exercise legal control. A joint legal custody order also is not to be construed to permit an action that is inconsistent with the physical custody order unless the court expressly authorizes the action. Fam C §3083.

An award of joint physical custody does not necessarily mean that the parties have an equal or approximately equal share of time. However, it does mean that both parties have significant periods of physical custody. Fam C §3004. The court must specify the times of physical control for each party and the rights of each party during such times "in sufficient detail to enable a parent deprived of such control to implement laws for relief of child snatching and kidnapping." Fam C §3084.

The court may specify one parent as primary caretaker and one home as primary home for the purposes of determining eligibility for public assistance even when making an order for joint legal and joint physical custody. Fam C §3086.

Although Fam C §§3080 and 3081 appear to preclude the court from ordering joint custody on its own motion in the absence of an agreement by the parties or request of one party, the court may modify or terminate a joint custody order on its own motion. Fam C §3087.

In counties that have a conciliation court, the court or the parties may, at any time, consult with the conciliation court for assistance in formulating a plan to implement a joint custody order or resolving disputes arising during the implementation of a joint custody order. Fam C §3089. In addition, the court may require the parties to submit a plan for implementing the custody order. Fam C §3040(a)(1).

The court may also refer parties to Family Court Services programs.

C. Jurisdiction

1. [§200.28] Family Court Proceedings

Family Code §3022 provides that the superior court may, during the pendency of a proceeding, or at any time thereafter, make such orders for the custody of a child during minority as may be necessary or proper. Family Code custody and visitation proceedings are governed by Fam C §§3000 et seq, and these statutes apply to the following (Fam C §3021):

- Proceedings for dissolution of marriage, nullity of marriage, and legal separation of the parties.

- An action for exclusive custody under Fam C §3120.
- A proceeding to determine physical or legal custody or visitation in a proceeding under the Domestic Violence Prevention Act (DVPA) (Fam C §§6200 et seq).
- A proceeding to determine physical or legal custody or visitation in an action under the Uniform Parentage Act (UPA) (Fam C §§7600 et seq).
- A proceeding to determine physical or legal custody or visitation in an action brought by the local child support agency under Fam C §17404.

2. Preemption of Family Court Custody Jurisdiction

a. [§200.29] Juvenile Court Jurisdiction

When a minor has been adjudged a dependent of the juvenile court under Welf & I C §§300 et seq, that court acquires sole and exclusive jurisdiction over matters relating to the custody of and visitation with the child. Welf & I C §§302(c), 304; Cal Rules of Ct 5.620. Any custody or visitation order issued by the juvenile court is a final judgment and remains in effect after the court's jurisdiction is terminated. It may not be modified in a family court proceeding or action unless the court finds that there has been a significant change of circumstances since the issuance of the order, and modifying the order is in the child's best interest. Welf & I C §302(d). See JV-200, Custody Order—Juvenile—Final Judgment.

The juvenile court has preemptive jurisdiction to adjudicate dependency notwithstanding a family court's preexisting custody order in a marital action, regardless of the degree to which the same issues will be heard in a dependency action. *In re Desiree B.* (1992) 8 CA4th 286, 291–293, 10 CR2d 254 (juvenile court not collaterally estopped from reconsidering custody issues already decided in family court); *In re Travis C.* (1991) 233 CA3d 492, 499–503, 284 CR 469 (juvenile court had jurisdiction over petition containing same factual allegations despite fact that hearing on those allegations was pending in family law court; juvenile court's power to protect children even if family law court has prior jurisdiction is single exception to the rule that the first court to take jurisdiction among courts of concurrent jurisdiction has exclusive jurisdiction).

b. [§200.30] Tribal Jurisdiction Under Indian Child Welfare Act

Indian tribes recognized by the Department of the Interior have exclusive jurisdiction over certain child custody proceedings involving Indian children residing or domiciled within their reservation under the

Indian Child Welfare Act (ICWA) (25 USC §§1901 et seq), except where federal law has otherwise vested the state court with jurisdiction over such proceedings. 25 USC §1911(a). In California, the terms of Public Law 280 (Act of August 15, 1953, ch 505, 67 Stat 588–590 (now codified as 18 USC §1162, 28 USC §1360, and other sections in Titles 18, 25 and 28)) provide California courts with concurrent jurisdiction over child welfare matters involving Indian children residing on most reservations in the state. See *Doe v Mann* (9th Cir 2005) 415 F3d 1038, 1061. The Washoe Tribe of California and Nevada is currently the only tribe in California with exclusive jurisdiction over child welfare matters involving Indian children who reside on the tribe's reservations. See BENCH HANDBOOK: INDIAN CHILD WELFARE ACT §1.9 (Cal CJER). However, Indian children from exclusive jurisdiction tribes may be temporarily located in California. Further, a tribe retains exclusive jurisdiction of a child who is already a ward of a tribal court, even if that child is no longer a resident of the reservation. 25 USC §1911(a); Welf & I C §305.5(a).

In custody proceedings involving Indian children who are not domiciled or residing within the reservation, or are not already subject to tribal court jurisdiction, the tribes have concurrent but presumptive jurisdiction. In these cases, the tribes have the right to notice and to intervene in state court proceedings and may seek a transfer of the proceedings to tribal court. 25 USC §§1911(b)–(c), 1912(a). Such transfer must be granted unless one of the parents objects or there is good cause not to transfer. 25 USC §1911(b); Welf & I C §305.5; Cal Rules of Ct 5.483.

The ICWA does not apply to child custody disputes arising out of dissolution or legal separation proceedings, as long as custody is awarded to one of the parents. 25 USC §1903. Therefore, the impact of the ICWA is limited in custody proceedings. However, because tribes are treated as "states" for the purposes of the UCCJEA, and the public acts, records, and judicial proceedings of Indian tribes are entitled to full faith and credit in the state court (25 USC §1911(d)) in a case involving an Indian child, it is important to determine whether there are any existing orders or proceedings in a tribal court. A custody proceeding involving an Indian child generally is the same as any child custody proceeding, except that under the ICWA, there are a number of additional substantive and procedural requirements. In addition the court must recognize that an Indian child has an interest in maintaining the connection with the tribe. Welf & I C §224(a)(2). Further, in these cases the court must not only consider the child's interests, but it must also consider the Indian tribe's interests and legal rights. *In re Crystal K.* (1990) 226 CA3d 655, 661, 276 CR 619. Under the ICWA, a child's tribe has rights to protects its interests that are independent of the rights of the child and the child's parents. *In re Kahlen W.* (1991) 233 CA3d 1414, 1425, 285 CR 507.

The U.S. Department of the Interior's Bureau of Indian Affairs has issued regulations (25 CFR pt 23) and guidelines (Guidelines for Implementing the Indian Child Welfare Act, December 2016, www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf) for courts to consider in applying the ICWA. Consistent with the statute itself (25 USC §1921) and California statutes (Welf & I C §224(d)), the regulations and guidelines provide that the ICWA, the regulations and guidelines themselves, and any state statutes and regulations designed to implement the ICWA should be liberally construed in favor of a result that is consistent with the congressional preference of deferring to tribal judgment on matters concerning Indian children. Although the guidelines are not binding, "the construction of a statute by the executive department charged with its administration is entitled to great weight." *In re Desiree F.* (2000) 83 CA4th 460, 474, 99 CR2d 688, citing *In re Krystle D.* (1994) 30 CA4th 1778, 1801 n7, 37 CR2d 132.

Note: Judicial officers must be cautious of relying upon cases decided prior to 2016 to the extent that those decisions are inconsistent with the requirements of the new ICWA regulations and guidelines.

Because the ICWA establishes minimum federal standards (25 USC §1902), the regulations and guidelines provide that state laws may offer broader protections, if the state laws do not infringe on rights afforded by the ICWA. Under the ICWA, a court may apply a state or other federal law to a child custody proceeding involving an Indian child if that law provides a higher standard of protection to the rights of the child's parents or the Indian custodian of the child, than that provided by the ICWA. 25 USC §1921.

California law also recognizes that (Welf & I C §224(a)(1), (2); Fam C §175(a); Prob C §1459(a)):

- No resource is more vital to the continued existence and integrity of an Indian tribe than its children;
- California has an interest in protecting Indian children who are members of or eligible for membership in an Indian tribe;
- California is committed to promoting practices to prevent involuntary out-of-home placement for Indian children;
- When involuntary out-of-home placement is necessary, California is committed to putting Indian children in a placement that reflects the child's unique tribal culture and promotes tribal ties; and
- It is in the interest of an Indian child that the child's tribal membership and connection to the tribal community be encouraged and protected, even if the Indian child was not originally in the custody of an Indian parent or Indian custodian.

In all Indian child custody proceedings, as defined in the ICWA, the court must (Welf & I C §224(b); Fam C §175(b); Prob C §1459(b)):

- Consider these legislative findings,
- Strive to promote the stability and security of Indian tribes and families,
- Comply with the ICWA, and
- Seek to protect the child's best interests.

Many provisions of the ICWA were codified into the Welfare and Institutions Code, the Family Code, and the Probate Code in an effort to increase compliance with the ICWA and to improve outcomes for Indian foster children. SB 678 (2006). The California Legislature has expressed its commitment to promoting practices in accordance with the ICWA. Fam C §175. In all Indian child custody proceedings, the courts must strive to comply with the ICWA and any higher state or federal standards of protection accorded to the rights of the child, parent, Indian custodian, or tribe. Fam C §175(b), (d).

The Judicial Council has adopted Rules of Court to govern ICWA proceedings in juvenile, family, and probate proceedings (see Cal Rules of Ct 5.480–5.487 and Cal Rules of Ct 7.1015).

The ICWA regulates custody awards to nonparents to a higher degree. For a comprehensive discussion of the ICWA, see BENCH HANDBOOK: INDIAN CHILD WELFARE ACT (Cal CJER).

☛ JUDICIAL TIP: The provisions of the Indian Child Welfare Act are very technical and must be strictly followed.

3. [§200.31] Interstate Disputes

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (Fam C §§3400 et seq) determines the proper subject matter jurisdiction as being between interested states for virtually any custody or visitation dispute. Fam C §3402(c)–(d). Remember that a federally recognized Indian tribe is considered to be a "state" for UCCJEA purposes. UCCJEA requirements must be met whenever a California court is called on to make an initial or modified custody or visitation determination. Unless California is an appropriate court under UCCJEA guidelines, there is no jurisdiction to make any custody orders other than emergency orders. Fam C §§3421–3424.

The federal Parental Kidnapping Prevention Act (PKPA) (28 USC §1738A) should also be consulted for jurisdictional requirements in appropriate cases. The PKPA was enacted to provide nationwide enforcement of custody orders made in accordance with the UCCJEA. *Marriage of Zierenberg* (1992) 11 CA4th 1436, 1441–1442, 16 CR2d 238. The PKPA contains provisions that are similar to those of the UCCJEA,

but they are not identical in every aspect. The provisions of the PKPA are controlling in cases where its provisions conflict with those of the UCCJEA. *Marriage of Zierenberg*, *supra*.

A custody proceeding pertaining to an Indian child is not subject to the UCCJEA to the extent it is governed by the Indian Child Welfare Act. See §200.30.

4. Initial Custody Determinations

a. [§200.32] Grounds for Jurisdiction

The UCCJEA provides exclusive grounds for a California court's jurisdiction to make an initial child custody determination. Fam C §3421(a), (b). A child custody determination is defined as a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to the child. Child custody determinations include permanent, temporary, initial, and modification orders. Fam C §3402(c).

Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination. Fam C §3421(c).

Except as otherwise provided in the UCCJEA provisions for emergency jurisdiction under Fam C §3424, there are four individual grounds for jurisdiction for making initial child custody determinations. See §§200.33–200.36. The corresponding grounds on which a California court may assume jurisdiction under the PKPA are found in 28 USC §1738A(c)(2)(A)–(D).

b. [§200.33] California Is Child's Home State

Jurisdiction is established in California under the UCCJEA if California was the child's home state on the date of the commencement of the proceeding; *or* was the child's home state within 6 months before the commencement of the proceeding and the child is absent from California, but a parent or person acting as a parent continues to live in California. Fam C §3421(a)(1); see *Schneer v Llaurado* (2015) 242 CA4th 1276, 195 CR3d 858 (discusses how Fam C §§3402 and 3421 work together to provide two bases for home state jurisdiction).

Home state. A child's home state is the state in which the child lived with a parent or a person acting as a parent for at least 6 consecutive months immediately before the commencement of the custody proceeding. If the child is less than 6 months of age, the home state is the state in which the child lived from birth with a parent or person acting as a parent. A period of temporary absence of any of the mentioned persons counts as part of the time period. Fam C §3402(g); see *Ocegueda v Perreira* (2015) 232 CA4th 1079, 181 CR3d 845 (physical presence of child determines

where child lived; Hawaii was home state of 6-month-old child born in Hawaii and intent of parent to move was irrelevant).

Person acting as a parent. A person acting as a parent means a person, other than a parent, who (Fam C §3402(m)):

- has physical custody of the child or has had physical custody for a period of 6 consecutive months, including any temporary absence, within 1 year immediately before the commencement of the custody proceeding; and
- has been awarded legal custody by a court or claims a right to legal custody under California law.

c. [§200.34] No Other Home State; California More Appropriate Forum

Under the UCCJEA, California may exercise jurisdiction if no other state is the child's home state as specified in Fam C §3421(a)(1), *or* a court of the child's home state has declined to exercise jurisdiction on the grounds that California is the more appropriate forum under Fam C §3427 or §3428, and both of the following are true (Fam C §3421(a)(2)):

- The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with California other than mere physical presence.
- Substantial evidence is available in California concerning the child's care, protection, training, and personal relationships.

d. [§200.35] Other Courts Having Jurisdiction Deferred to California

Jurisdiction is established in California under the UCCJEA if all courts having jurisdiction under Fam C §3421(a)(1) or (a)(2) have declined to exercise jurisdiction on the ground that a California court is the more appropriate forum to determine the child's custody under Fam C §3427 or §3428. Fam C §3421(a)(3).

e. [§200.36] Jurisdiction in No Other Court

Under the UCCJEA, California may exercise jurisdiction if no court of any other state would have jurisdiction under the criteria specified in Fam C §3421(a)(1), (a)(2), or (a)(3). Fam C §3421(a)(4).

5. [§200.37] Declining Exercise of Jurisdiction

There are three situations in which a California court that has jurisdiction under Fam C §3421 may choose or be required to decline to exercise its jurisdiction to make an initial child custody determination.

a. [§200.38] Simultaneous Proceedings in Another State

Except as otherwise provided in Fam C §3424 (emergency jurisdiction), a California court may not exercise its jurisdiction under Fam C §§3421–3430 if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with the UCCJEA, unless the proceeding has been terminated or is stayed by the court of the other state because a California court is a more convenient forum under Fam C §3427. Fam C §3426(a).

Except as otherwise provided in Fam C §3424, a California court, before hearing a child custody proceeding, must examine the court documents and other information supplied by the parties under Fam C §3429. Fam C §3426(b). If the court determines that a child custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance the UCCJEA, it must stay its proceeding and communicate with the court of the other state. If the court of the state having jurisdiction does not determine that the California court is a more appropriate forum, the California court must dismiss the proceeding. Fam C §3426(b).

For a discussion of modification jurisdiction when an out-of-state court has commenced a proceeding to enforce a child custody order, see §200.43.

b. [§200.39] Inconvenient Forum

A California court that has jurisdiction under the UCCJEA to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised on motion of a party, the court's own motion, or request of another court. Fam C §3427(a).

Before determining whether it is an inconvenient forum, the court must consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court must allow the parties to submit information and must consider all relevant factors, including (Fam C §3427(b)):

- Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child.
- The length of time the child has resided outside California.
- The distance between the California court and the court in the state that would assume jurisdiction.

- The degree of financial hardship to the parties in litigating in one forum over the other.
- Any agreement of the parties as to which state should assume jurisdiction.
- The nature and location of the evidence required to resolve the pending litigation, including testimony of the child.
- The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence.
- The familiarity of the court of each state with the facts and issues in the pending litigation.

If the California court determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it

- Must stay the proceedings on condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper (Fam C §3427(c)); and
- May require the party who commenced the proceeding to pay, in addition to the costs of the proceeding in this state, necessary travel and other expenses, including attorney's fees, incurred by the other parties or their witnesses (Fam C §3427(e)).

A court may decline to exercise its jurisdiction of a child custody determination if it is incidental to an action for dissolution of marriage or other proceeding and still retain jurisdiction over the dissolution or other proceeding. Fam C §3427(d).

c. [§200.40] Unjustifiable Conduct of Petitioner

Except as otherwise provided in Fam C §3424 (emergency jurisdiction) or by any other law of this state, if a California court has jurisdiction under the UCCJEA because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court must decline to exercise its jurisdiction unless one of the following is true (Fam C §3428(a)):

- The parents and all persons acting as parents have acquiesced in the exercise of jurisdiction.
- A court of another state otherwise having jurisdiction under Fam C §§3421–3423, determines that California is a more appropriate forum under Fam C §3427.
- No court of any other state would have jurisdiction under the criteria specified in Fam C §§3421–3423.

Family Code §3428 is directed at a petitioning parent's wrongful taking of a child from another state in an attempt to create jurisdiction in a chosen forum. California courts, interpreting the former Uniform Child Custody Jurisdiction Act "wrongful conduct" provision (former Fam C §3408), have generally limited application of the provision to situations in which a child has been removed from a state in violation of an existing custody order or injunction. See *Haywood v Superior Court* (2000) 77 CA4th 949, 956–957, 92 CR2d 182.

If a California court declines to exercise its jurisdiction under Fam C §3428(a), it may fashion an appropriate remedy to ensure the safety of the child and prevent a recurrence of the unjustifiable conduct, including staying the proceeding until a child custody proceeding is commenced in a court having jurisdiction under Fam C §§3421–3423. Fam C §3428(b).

If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction under Fam C §3428(a), it must assess necessary and reasonable expenses against the party seeking to invoke its jurisdiction. These include costs for communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate. Fam C §3428(c).

In making a determination under Fam C §3428, a court may not consider as a factor weighing against the petitioner any taking or retention of the child after a visit, or other temporary relinquishment of physical custody, from the person who has legal custody, if there is evidence that the taking or retention of the child was a result of domestic violence against the petitioner, as defined in Fam C §6211. Fam C §3428(d).

6. [§200.41] Emergency Jurisdiction

Even when UCCJEA jurisdiction rests with another state, a California court may exercise temporary custody jurisdiction if the child is present in this state and either (1) the child has been "abandoned," that is, left without provision for reasonable and necessary care or supervision; or (2) the exercise of such jurisdiction is "necessary in an emergency" to protect the child because the child, the child's sibling, or the child's parent is subjected to, or threatened with, "mistreatment or abuse." Fam C §§3424(a), 3402(a). See *Marriage of Fernandez-Abin & Sanchez* (2011) 191 CA4th 1015, 120 CR3d 227 (in a case involving prior custody order from Mexico, the fact that a California judge declined to exercise emergency jurisdiction over the children would not preclude a second California judge from revisiting the issue under Fam C §3424(a) after finding that the children witnessed husband's domestic violence against wife).

Unless there is a previous child custody determination that is entitled to enforcement under the UCCJEA, or a child custody proceeding has been commenced in a state with proper UCCJEA jurisdiction, an emergency child custody order remains in effect until an order is obtained from the court having jurisdiction. Such an order will become a final determination if the order so provides and if California becomes the home state of the child. Fam C §3424(b).

If there is a previous child custody determination entitled to UCCJEA enforcement or an action properly commenced, any emergency order must specify a period of time that the court considers adequate to allow the person seeking an order to obtain it from the proper state. Fam C §3424(c). If a California court learns of a valid prior order or commencement of an action in another state, it must immediately communicate with the out-of-state court to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order. Fam C §3424(d).

7. Modification Jurisdiction

a. [§200.42] Modification of Prior California Order

Except as otherwise provided in Fam C §3424 (emergency jurisdiction), a California court that has made a child custody determination consistent with Fam C §3421 or §3423 has exclusive, continuing jurisdiction over the determination unless either of the following occurs (Fam C §3422(a)):

- A California court determines that the child, the child and one parent, or the child and a person acting as a parent no longer have a "significant connection" with California, and that substantial evidence is no longer available in California concerning the child's care, protection, training, and personal relationships. A "significant connection" exists as long as the parent exercising visitation rights still lives in California and the relationship with the child has not deteriorated to the point at which the exercise of jurisdiction would be unreasonable. *Grahm v Superior Court* (2005) 132 CA4th 1193, 1200, 34 CR3d 270.
- A California court or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in California.

A California court that has made a child custody determination and does not have exclusive, continuing jurisdiction under Fam C §3422 may modify that determination only if it has jurisdiction to make an initial determination under Fam C §3421. Fam C §3422(b).

b. [§200.43] Modification of Order of Another State

Except as otherwise provided in Fam C §3424, if another state has made a child custody determination, a California court may not modify it unless California would have jurisdiction to make an initial custody determination under Fam C §3421(a)(1) or (a)(2) and either of the following occur (Fam C §3423):

- The court of the other state determines it no longer has exclusive, continuing jurisdiction under Fam C §3422 or that a California court would be a more convenient forum under Fam C §3427; or
- A California court or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

c. [§200.44] Duty to Communicate in Simultaneous Proceedings

Before hearing a child custody proceeding, the court must examine court documents and other information supplied by the parties. If the court determines that the proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with the UCCJEA, the California court must stay the proceedings and communicate with the out-of-state court on the question of that state's exclusive, continuing jurisdiction. If the out-of-state court does not determine that California is a more appropriate forum, the California court must dismiss the proceeding. Fam C §3426(b).

☛ JUDICIAL TIP: Ask your clerk to obtain copies of the pleadings in the other state's files and offer to provide copies of your pleadings. Except for "housekeeping" matters (*i.e.*, those related to schedules, calendars, court records, and the like), the communication must be on the record and counsel and parties may be given an opportunity to participate in the communication. If the parties are unable to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made. Fam C §3410.

d. [§200.45] Proceeding To Enforce Order in Another State

In a proceeding to modify a child custody determination, a California court must determine whether a proceeding to enforce the determination has been commenced in another state. Fam C §3426(c). If a proceeding to enforce a child custody determination has been commenced in another state, the court may do any of the following (Fam C §3426(c)):

- Stay the proceeding for modification pending the entry of an order of a court of the other state enforcing, staying, denying, or dismissing the proceeding for enforcement.
- Enjoin the parties from continuing with the proceeding for enforcement.
- Proceed with the modification under conditions it considers appropriate.

☛ JUDICIAL TIP: You must recognize and enforce registered child custody determinations from other states. Fam C §3446. The procedure for registering child custody determinations made in other states is set forth in Fam C §3445.

e. [§200.46] Declining Exercise of Jurisdiction To Modify Order

A California court that has jurisdiction under the UCCJEA to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. Fam C §3427 (applicable to both initial custody orders and modification of custody orders). See detailed discussion of Fam C §3427 in §200.39.

8. [§200.47] Venue

Venue, in cases where the custody issues are part of dissolution proceedings, lies in a county in which either party has been a resident for 3 months immediately before the filing, as long as the party was also a California resident for 6 months immediately before the filing. Fam C §2320; CCP §395. "[R]esidency, for purposes of dissolution, means *domicile* which requires both physical presence and intent to remain 'indefinitely.'" *Marriage of Obrecht* (2016) 245 CA4th 1, 13–14, 199 CR3d 438 (citations omitted, emphasis in original).

In cases where the custody issues are part of an action for legal separation or nullity, proper venue is a county in which either party resides at the commencement of the action. CCP §395.

A motion to change venue may be brought on grounds that the ends of justice would be promoted by the change. CCP §397(e); See *Silva v Superior Court* (1981) 119 CA3d 301, 173 CR 832.

In proceedings to determine parentage under the Uniform Parentage Act, the case must be brought in one of the following counties (Fam C §7620(c) and 7962(e)):

- The county in which the child resides or is found;

- If the child is the subject of a pending or proposed adoption, any county where the licensed California adoption agency to which the child has been or is proposed to be relinquished to maintains an office, or the county where an office of the department or a public adoption agency that is investigating the petition is located; or
- If the parent is deceased, the county where probate proceedings for the estate of the parent of the child has been or could be commenced.
- If the child was conceived pursuant to an assisted-reproduction agreement for gestational carriers, the case may be brought in the county where the (Fam C §7962(e)):
  - Child is anticipated to be born;
  - Intended parent or intended parents reside;
  - Surrogate resides;
  - Assisted-reproduction agreement for gestational carriers is executed; or
  - Medical procedures pursuant to the agreement are to be performed.

D. Initial Custody Orders

1. [§200.48] Temporary or Pendente Lite Order

Most often the first custody order the court is asked to make is a temporary or pendente lite order made on an order to show cause or a notice of motion. A request for a temporary custody order may be included with the initial petition or action or at any time after the initial filing. Fam C §3060. If parties agree or reach an understanding about custody or temporary custody, they may attach a copy of the agreement or an affidavit setting forth their understanding to the petition, and the court is bound, except in "exceptional circumstances," to enter an order granting temporary custody in accordance with the agreement, understanding, or stipulation of the parties. Fam C §3061.

Often the parties are satisfied with the pendente lite orders and stipulate or ask that those orders be incorporated into the dissolution judgment. Thus, the orders made at the initial hearing may be the only time the court is called on to make any custody or visitation determinations.

However, the parties may return to court before entry of a judgment setting forth custody and visitation rights to seek changes in the initial temporary orders. The court may modify the pendente lite orders any time before entry of judgment.

☛ JUDICIAL TIP: Parties and their attorneys often believe that the first or initial custody determination is critically important because many judges frequently maintain the status quo through subsequent custody proceedings. Although the initial ruling is important, the court may diffuse the situation by recognizing that an immediate decision must be made but that orders may be modified when warranted by the facts.

2. [§200.49] Temporary Emergency (Ex Parte) Order

A party who files a Request for Order (Judicial Council Form FL-300) seeking an initial or modified custody order may request a temporary emergency child custody order before the hearing date if there is no agreement, understanding, or stipulation. A temporary emergency child custody order may be granted if there is a showing of "immediate harm to the child or immediate risk that the child will be removed from the State of California." Fam C §3064(a). These are the only circumstances under which a court may issue a temporary emergency child custody order or modify the custody orders.

"Immediate harm to the child" includes:

- Having a parent who has committed recent acts of domestic violence or when such acts are a part of a demonstrated and continuing pattern. Fam C §3064(b)(1).
- Failing to provide supervision for a young child. *Marriage of Slayton* (2001) 86 CA4th 653, 656–657, 103 CR2d 545 (also relying on definitions of neglect and matters subject to mandatory reporting laws in analyzing what constitutes "immediate harm"; see Pen C §§11165.2 and 11166).
- Sexual abuse of the child, where the court determines that the acts of sexual abuse are of recent origin or are a part of a demonstrated and continuing pattern of acts of sexual abuse. Fam C §3064(b)(2).

If the court issues a temporary emergency order, it must set a hearing date within 20 days. That date may be extended pending entry of final judgment if the responding party is served and does not appear or respond within the time set. Fam C §3062(a). The temporary emergency orders may be extended up to an additional 90 days and a hearing date reset if the responding party is not served, despite good faith efforts, and the party who received temporary emergency orders shows by affidavit or other proof under penalty of perjury that the responding party has possession of the minor child and seeks to avoid the jurisdiction of the court or is concealing the child. Fam C §3062(b).

In conjunction with a temporary emergency order, the court must enter an order restraining the person receiving custody from removing the

child from the state pending notice and a hearing on the order. Fam C §3063.

☛ JUDICIAL TIP: A determination of whether to issue a temporary emergency child custody order involves some of the most difficult decisions the court will make. In most cases, the court will not have sufficient information to make confident custody decisions, and most of these requests will be denied because of Fam C §3064. But if the court does not grant appropriate interim relief, there can be tremendous harm to a spouse, domestic partner, or children due to domestic violence.

E. Guidelines for Custody Determinations

1. [§200.50] Best Interest of Child

The broad legal standard that governs a court's decisions in matters of custody and visitation is the child's best interest. Fam C §3011. The standard is "an elusive guideline that belies rigid definition. Its purpose is to maximize a child's opportunity to develop into a stable, well-adjusted adult." *Adoption of Matthew B.* (1991) 232 CA3d 1239, 1263, 284 CR 18 (citation omitted). The "best interest" standard is a relative one. The question is not whether a particular set of circumstances is in the child's best interest, but whether a particular set of circumstances in relation to an alternative set of circumstances is in the child's best interest. 232 CA3d at 1264.

The court must consider the following factors in determining the child's best interest (Fam C §3011(a)–(d)):

- The child's health, safety, and welfare. See §§200.51, 200.53.
- The nature and amount of the child's contact with both parents. See §§200.52–200.53.
- History of drug or alcohol abuse. See §§200.56–200.58.
- History of abuse. See §§200.59–200.65.
- Any other factors the court deems relevant.

The court must weigh these factors and determine a child's best interest solely from the child's standpoint. The court should not consider the feelings and desires of the contesting parents except as they affect the child's best interest. 232 CA3d at 1264.

☛ JUDICIAL TIP: In contentious custody disputes, some judges remind the parties that the hearing is not a contest between them, but an effort to arrive at a coparenting agreement that is in the child's best interest. The process itself can create conflict and

result in parties emphasizing negatives, which the court should discourage.

Indian Law Caution: As long as tribal ordinances or customs are consistent with state civil law, they must be given full force and effect when state courts decide civil causes of action involving Indian parties residing in Indian Country. 28 USC §1360. Thus, if a case involves Indian parties residing in Indian Country, tribal customs may have to be accommodated.

a. [§200.51] Child's Health, Safety, and Welfare

The court must take into account the child's health, safety, and welfare when making a determination of the best interest of the child. Fam C §3011(a). In addition, the Legislature has declared that it is the state's public policy that the health, safety, and welfare of the child must be the court's *primary* concern in determining the child's best interest when making custody or visitation orders. Fam C §3020(a). Consistent with this policy is the legislative finding that child abuse or domestic violence in a household where a child resides is detrimental to the child. Fam C §3020(a).

Indian Law Caution: Both state and federal law have found that it is in an Indian child's interest to maintain a connection with their tribe and tribal culture. 25 USC §1902; Welf & I C §224(a)(2); Fam C §175(a)(2).

b. [§200.52] Contact With Parents

In determining the child's best interest, the court must take into account the nature and amount of contact with both parents, except as provided in Fam C §3046 (absence or relocation from residence; see §200.68). Fam C §3011(c). This is an adjunct to the "frequent and continuing contact" policy under Fam C §3020(b). See §200.53.

c. [§200.53] Dual Public Policy Concerns When Determining Best Interest of the Child

It is California public policy that the health, safety, and welfare of children is the court's primary concern in determining the best interest of children during custody and visitation disputes. Fam C §3020(a). It also public policy that children have 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, unless contact would not be in the child's best interest. Fam C §3020(b).

If the two policies conflict, the court's order must ensure the child's health, safety, and welfare, and the safety of all family members. Fam C §3020(c).

d. [§200.54] Statutory Preferences

Family Code §3040 sets forth the following order of preference for awarding custody according to the child's best interest, as described in Fam C §§3011 and 3020:

(1) To both parents jointly, or to either parent. Fam C §3040(a)(1). The court must consider, among other factors, which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent. But the court may not use a parent's sex as a factor. Fam C §3040(a)(1).

(2) To the person or persons in whose home the child has been living in a "wholesome and stable environment." Fam C §3040(a)(2).

(3) To any person or persons the court deems suitable and able to provide "adequate and proper" care and guidance for the child. Fam C §3040(a)(3).

The immigration status of a parent, legal guardian, or relative must not disqualify that person from receiving custody. Fam C §3040(b).

Family Code §3040 does not establish a preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody, but instead gives the court and the family the widest discretion to choose a parenting plan that is in the child's best interest. Fam C §3040(c).

When a child has more than two parents, custody and visitation must be allocated among the parents based on the child's best interest, including, but not limited to, addressing the child's need for continuity and stability. Fam C §3040(d).

☛ JUDICIAL TIP: The court may order that not all parents share legal or physical custody if the court finds that it would not be in the child's best interest.

In granting custody under Fam C §3040(a)(2) and (3), the court must consider and give appropriate weight to a nomination of guardian by a parent under Prob C §§1500 et seq. Fam C §3043. For a discussion of requirements and considerations for awarding custody to a nonparent, see §§200.75–200.76.

e. [§200.55] Child's Need for Bonding, Stability, and Continuity

The importance of stability and continuity in the child's life and the harm that may result from disrupting established patterns of care and emotional bonds is crucial to a best-interest determination. *Adoption of Matthew B.* (1991) 232 CA3d 1239, 1264, 284 CR 18. When making a custody determination, the court must assess the emotional bonds between a parent and child, and must consider how best to provide continuity of attention, nurturing, and care of the child. The assessment requires an

inquiry into the heart of the parent-child relationship; that is, the ethical, emotional, and intellectual guidance that the parent gives throughout the child's formative years. *Adoption of Matthew B., supra*. Therefore, the court must consider the length of time the child has been in continuous physical custody of the parent who has custody at the time of the custody hearing. When a child has lived with one parent for a significant period, the need for continuity and stability will often dictate that maintaining the current arrangement is in the child's best interest. *Burchard v Garay* (1986) 42 C3d 531, 538, 229 CR 800.

☛ JUDICIAL TIP: If custody is the only disputed issue in the proceeding, the case must be prioritized over other civil cases when assigning a trial date, and it must be given an early hearing. Fam C §3023(a). If there are other contested issues, the custody issue must be bifurcated and prioritized for trial. Fam C §3023(b). Support issues must be tried with the custody issues. Fam C §4003.

☛ JUDICIAL TIP: A parent with a temporary or ex parte custody order may attempt to delay a full custody hearing for as long as possible in order to obtain a de facto custody determination based on continuity and stability. If a court suspects such conduct, it should consider ordering a comprehensive review as soon as possible.

f. [§200.56] History of Drug or Alcohol Abuse

In determining the child's best interest, the court must also consider either parent's habitual illegal use of controlled substances or continual abuse of alcohol. Fam C §3011(d). Before considering allegations of a parent's drug or alcohol abuse, the court may require independent corroboration. Fam C §3011(d). See §200.57.

If the court makes an order for sole or joint custody to a parent against whom allegations of drug or alcohol abuse have been made, the court must state its reasons in writing or on the record (Fam C §3011(e)(1)) unless the custody award is made under the parties' written or on-the-record stipulation (Fam C §3011(e)(2)). Any order made in these circumstances must be specific as to time, day, place, and manner of transfer of the child as provided in Fam C §6323(c). Fam C §3011(e)(1).

(1) [§200.57] Corroborative Evidence of Drug or Alcohol Abuse

Before considering allegations of drug or alcohol abuse, the court may require substantial independent corroboration, including, but not limited to, written reports by (Fam C §3011(d)):

- Law enforcement agencies,
- Courts,
- Probation departments,
- Social welfare agencies,
- Medical facilities,
- Rehabilitation facilities, and
- Other public agencies or nonprofit organizations providing drug and alcohol abuse services.

(2) [§200.58] Drug Testing

If a court determines, based on a preponderance of the evidence, that there is the habitual, frequent, or continual illegal use of controlled substances or the habitual or continual abuse of alcohol by a parent or legal custodian, it may order that parent or legal custodian to undergo testing for illegal use of controlled substances and alcohol use. Fam C §3041.5. The evidence may include, but may not be limited to, a conviction within the last 5 years for the illegal use or possession of controlled substances. Fam C §3041.5.

The court must order the least intrusive method of testing for the use of controlled substances or alcohol. If a parent or legal custodian tests positive for controlled substance or alcohol use, he or she may request a hearing to challenge the test result. Fam C §3041.5. A positive test result may not, by itself, constitute grounds for an adverse custody decision. Rather, it must be weighed with all relevant factors in determining the child's best interest. Fam C §3041.5.

☛ JUDICIAL TIP: If substance abuse testing is ordered, the testing must be performed in conformance with procedures and standards established by the United States Department of Health and Human Services for drug testing of federal employees. Fam C §3041.5.

Test results are confidential and must be maintained as a sealed record. The results may be released only to the court, the parties and their counsel, the Judicial Council (for study purposes), and any person to whom the court grants access by written authorization with prior notice to the parties. Fam C §3041.5.

☛ JUDICIAL TIP: Some courts issue protective orders concerning the use of the test results.

The test results are to be used exclusively to help the court determine the child's best interest under Fam C §3011 and the content of a custody

or visitation order, and may not be used for any other purpose in a criminal, civil, or administrative proceeding. Fam C §3041.5.

The court may order either party, or both parties, to pay the costs of the drug or alcohol testing. Fam C §3041.5.

☛ JUDICIAL TIP: Allegations of drug or alcohol abuse are easily made and difficult to disprove. Drug testing of one party (or of both parties if the charges are mutual) is a quick and convenient way to obtain some independent (and/or mutual) verification of a party's probable abuse of drugs or alcohol. Frequently, the accused party or parties will be willing to take a drug test voluntarily in order to eliminate that issue from consideration by the court and to allay the fears of the charging party.

You may consider ordering the requesting party to pay for the cost of the test, subject to reimbursement by the tested party if he or she tests positive for drugs.

Note: The court can order open-ended drug testing as a condition to further visitation or custody, and order that a positive drug test result can immediately trigger a reduced *visitation* schedule (Fam C §3041.5 states a positive result cannot by itself trigger a change to *custody*). *Heidi S. v David H.* (2016) 1 CA5th 1150, 1173–1174, 205 CR3d 335.

g. [§200.59] History of Abuse

The court must consider any history of abuse by one parent or any other person seeking custody against:

- Any child to whom he or she is related by blood or affinity or with whom he or she has had a caretaking relationship, no matter how temporary (Fam C §3011(b)(1));
- The other parent (Fam C §3011(b)(2)); or
- A parent, current spouse or cohabitant, or person with whom he or she has a dating or engagement relationship (Fam C §3011(b)(3)).

If the court makes an order for sole or joint custody to a parent against whom allegations of abuse have been made, the court must state its reasons in writing or on the record (Fam C §3011(e)(1)) unless the custody award is made under the parties' written or on-the-record stipulation (Fam C §3011(e)(2)). Any order made in these circumstances must be specific as to time, day, place, and manner of transfer of the child as provided in Fam C §6323(c). Fam C §3011(e)(1).

(1) [§200.60] Definition of Abuse

Abuse against a child described in Fam C §3011(b)(1) is defined as nonaccidental infliction of physical injury, sexual abuse, neglect, willful harming or injuring, or unlawful corporal punishment. See Pen C §11165.6. Abuse against any other person described in Fam C §3011(b)(2) or (b)(3) is defined as intentionally or recklessly causing or attempting to cause bodily injury, sexual assault, placing a person in reasonable apprehension of imminent serious bodily injury to that person or to another, or engaging in any behavior that has been or could be enjoined under Fam C §6320. See Fam C §6203(a). Abuse is not limited to the actual infliction of physical injury or assault. Fam C §6203(b).

(2) [§200.61] Corroborative Evidence of Physical Abuse

Before considering allegations of abuse, the court may require substantial independent corroboration, including, but not limited to, written reports by (Fam C §3011(b)(3)):

- Law enforcement agencies,
- Child protective services or other social welfare agencies,
- Courts,
- Medical facilities, and
- Other public agencies or private nonprofit organizations providing services to victims of sexual assault or domestic violence.

(3) [§200.62] Family Code §3044 Presumption Against Awarding Custody to Domestic Violence Perpetrator

If the court finds that a party seeking custody of a child has perpetrated an act of domestic violence against the other party seeking custody, or against the child or the child's siblings within the previous 5 years, there is a rebuttable presumption that granting sole or joint legal or physical custody to the perpetrator is detrimental to the child's best interest under Fam C §3011. Fam C §3044(a). Note that this presumption is distinct from the mandatory consideration of physical abuse as a factor in determining a child's best interest under Fam C §3011(b) (see §§200.54–200.56) and applies to a narrower category of cases than Fam C §3011.

Note: The presumption is mandatory. It is an abuse of discretion if the trial court fails to apply the presumption that it is detrimental to the child's best interest to award joint or sole physical or legal custody to a parent if the court has found that the parent has perpetrated any act of

domestic violence against the other parent in the preceding 5 years. *Marriage of Fajota* (2014) 230 CA4th 1487, 179 CR3d 569.

Under Fam C §3044(c), a person has "perpetrated domestic violence" when he or she is found by a court to have:

- Intentionally or recklessly caused or attempted to cause bodily injury or sexual assault;
- Placed a person in reasonable apprehension of imminent serious bodily injury to that person or to another; or
- Engaged in behavior for which a court may issue an ex parte order—such as threatening, harassing, striking, destroying personal property, or disturbing the peace of another—to protect the other parent seeking custody, the child, or the child's siblings under Fam C §6320.

When a party in a custody or restraining order proceeding alleges that the other party has perpetrated domestic violence under the terms of Fam C §3044, the court must advise the parties of Fam C §3044 and provide them a copy of the code before any custody mediation in the case. Fam C §3044(f).

Note: *Ellis v Lyons* (2016) 2 CA5th 404, 206 CR3d 687, held that an out-of-state domestic violence order against the father gave rise to a Fam C §3044 rebuttable presumption that an award of joint custody to him would be detrimental to the child's best interest. Preference for frequent and continuing contact with noncustodial parent was not a proper factor for overcoming the rebuttable presumption against joint custody, even if the California court did not believe the allegations of abuse.

☛ JUDICIAL TIP: It is common that the first allegation of abuse occurs in mediation, not in the courtroom. Some counties require Family Court Services to serve the parties with a copy of Fam C §3044.

(4) [§200.63] Finding of Domestic Violence Within the Past 5 Years (Fam C §3044)

The finding required under Fam C §3044(a) (perpetration of domestic violence within previous 5 years) can be satisfied by, but not limited to (Fam C §3044(d)):

- Evidence that a party seeking custody has been convicted within the previous 5 years of any crime against the other party that comes within the definition of domestic violence contained in Fam C §6211 and of abuse contained in Fam C §6203, including, but not limited to, Pen C §243(e) (domestic battery); Pen C §261 (rape); Pen C §262 (spousal rape); Pen C §273.5 (inflicting

corporal injury); Pen C §422 (criminal threats); and Pen C §646.9 (stalking).

- A finding under Fam C §3044(a) by any court, whether or not that court hears or has heard the custody proceedings, based on conduct occurring within the previous 5 years.

The court may not base its finding that a party has perpetrated domestic violence solely on the conclusions reached by a child custody evaluator or on the recommendation of the Family Court Services staff. It must consider all relevant and admissible evidence submitted by the parties. Fam C §3044(e).

☛ JUDICIAL TIP: Typically the court handling the custody and visitation orders makes this finding. Mark the finding on a visible spot in the court file. Some courts place a stamp mark on the left side of the file. Others reference the finding in the calendar history.

(5) [§200.64] Rebutting Fam C §3044 Presumption

The presumption in Fam C §3044(a) may be rebutted only by a preponderance of the evidence, and the court must consider all the following factors in determining whether the presumption has been overcome (Fam C §3044(b)):

- Whether the perpetrator has demonstrated that being given sole or joint legal or physical custody is in the child's best interest. In determining the child's best interest, the preference for frequent and continuing contact with both parents, as set forth in Fam C §3020(b), or with the noncustodial parent, as set forth in Fam C §3040(a)(1), may not be used to rebut the presumption in whole or in part.
- Whether the perpetrator has successfully completed a batterer's treatment program that meets the criteria in Pen C §1203.097(c).
- Whether the perpetrator has successfully completed a drug or alcohol abuse counseling program, if the court determines that such a program is appropriate.
- Whether the perpetrator has completed a parenting class, if the court determines that such a class is appropriate.
- Whether the perpetrator is on probation or parole, and whether he or she has complied with the terms and conditions of probation or parole.
- Whether the perpetrator is restrained by a protective or restraining order, and has complied with its terms and conditions.

- Whether the perpetrator has committed any further acts of domestic violence.

(6) [§200.65] Child Sexual Abuse Allegations

If allegations of child abuse, including child sexual abuse are made during a child custody proceeding and the court has concerns regarding the child's safety, the court may take any reasonable, temporary steps as the court, in its discretion, deems appropriate under the circumstances to protect the child's safety until an investigation can be completed. Fam C §3027(a). The court may request the local child welfare services agency to conduct an investigation of the allegations and report its findings to the court. Fam C §3027(b).

☛ JUDICIAL TIP: If, in any contested proceeding involving child custody or visitation rights, the court determines that there is a serious allegation of child sexual abuse, the court must order an evaluation, assessment, or investigation pursuant to Fam C §§3111 and 3118. For further discussion, see §200.116.

No parent may be placed on supervised visitation, be denied custody of or visitation with his or her child, or have his or her custody or visitation rights limited, solely because the parent (1) lawfully reported suspected sexual abuse of the child; (2) otherwise acted lawfully, based on a reasonable belief, to determine if his or her child was the victim of sexual abuse; or (3) sought treatment for the child from a licensed mental health professional for suspected sexual abuse. Fam C §3027.5(a). But the court may order supervised visitation or limit a parent's custody or visitation if the court finds substantial evidence that the parent, with the intent to interfere with the other parent's lawful contact with the child, knowingly made a false report of child sexual abuse during a child custody proceeding or at any other time. Any limitation of custody or visitation may be imposed only after the court has determined that the limitation is necessary to protect the child's health, safety, and welfare, and the court has considered the state's policy of ensuring that children have frequent and continuing contact with both parents as stated in Fam C §3020(b). Fam C §3027.5(b).

Sanctions for false accusation. If the court determines, based on the investigation or other evidence, that a witness, party, or a party's attorney knowingly made a false accusation of child abuse or neglect during a child custody proceeding, the court may impose reasonable money sanctions, not to exceed all costs incurred by the party accused as a direct result of defending the accusation, and reasonable attorney's fees incurred in recovering the sanctions, against the person making the accusation. For purposes of this section, "person" includes a witness, a party, or a party's

attorney. Fam C §3027.1(a). Under Fam C §271, only a party maybe sanctioned.

A party moving for sanctions under Fam C §3027.1 must file the motion on or before the earliest of 60 days after the judgment or order exonerating him or her from such allegations is served, or 180 days from the entry of such judgment or order. *Robert J. v Catherine D.* (2009) 171 CA4th 1500, 1522–1523, 91 CR3d 6.

On motion by any person requesting sanctions, the court must issue its order to show cause why the requested sanctions should not be imposed. The order to show cause must be served on the person against whom the sanctions are sought at least 15 days before the hearing date. Fam C §3027.1(b).

Reconsideration of custody order. The court must grant a motion by a parent for reconsideration of an existing child custody order if the motion is based on the fact that the other parent was convicted of a crime in connection with falsely accusing the moving parent of child abuse. Fam C §3022.5.

2. Preference of Child

a. [§200.66] In General

Family Code §3042 governs when and how a child must be allowed to address the court regarding the child's preference as to custody or visitation. It provides that (Fam C §3042):

- If a child 14 years of age or older wishes to address the court about custody or visitation, the child must be permitted to do so, unless the court determines that doing so is not in the child's best interest;
- The court may hear from a child who is under 14 years of age if it determines it is in the child's best interest;
- If the court precludes calling any child as a witness, it must provide alternative means of obtaining input from the child and other information regarding the child's preferences;
- A minor's counsel, evaluator, investigator, or child custody recommending counselor is required to indicate to the judge if he or she knows the child would like to address the court; and
- The child is not required to state a preference regarding custody or visitation, and the court is required to control the examination.

The court must consider and give "due weight" to the child's wishes in granting or modifying a custody order if the child is of sufficient age and capacity to reason so as to form an "intelligent preference" regarding custody or visitation. Fam C §3042(a).

Age alone is not the determinative factor. Rather, the court should look to the child's degree of maturity, sincerity, and ability to reason. Thus, the preference of children as young as 10 may be considered and given some weight if they appear mature and capable of reason (*Marriage of Rosson* (1986) 178 CA3d 1094, 1103, 224 CR 250, disapproved on other grounds in 13 C4th 25, 38 n10), while older children's preferences may be disregarded if those preferences are not supported by well-thought-out reasons (*Marriage of Mehlmauer* (1976) 60 CA3d 104, 110–111, 131 CR 325). Most cases that have said the court did not abuse its discretion in refusing to hear evidence of the child's preference have involved children under the age of 14. *Coil v Coil* (1962) 211 CA2d 411, 27 CR 378 (12-year-old child); *Marriage of Slayton* (2001) 86 CA4th 653, 103 CR2d 545 (5-year-old child). On the other hand, the court is free to hear evidence of preference for children who are not yet teenagers. See *Marriage of Rosson, supra.* In either event, the court is not bound to follow the child's preferences, no matter the child's age. See *Marriage of Mehlmauer, supra*, and *Coil v Coil, supra*.

b. [§200.67] Obtaining Evidence of Child's Preference

The court may preclude calling the child as a witness when it is in the child's best interest; if it does so it must use alternative means to obtain information of the child's preference. Fam C §3042(e).

If the court allows testimony from a child witness, it must follow the requirements of Evid C §765(b) and control the child's examination so as to protect the child's best interest. Fam C §3042(b). Under Evid C §765(b), the court, when taking testimony from a witness under the age of 14, must take special care to protect the witness from repetitious questioning and from undue harassment or embarrassment. The court must also ensure that questions are stated in an age-appropriate form and may forbid questions not likely to be understood by a person of the witness's age.

California Rules of Ct 5.250 sets forth the procedures for the examination of child witnesses in family court proceedings. The court must determine the children's participation on a case-by-case basis. No statutory mandate, rule, or practice either requires children to participate in court, nor prohibits them from doing so. Cal Rules of Ct 5.250(a).

When a child indicates that he or she wishes to testify, the court must consider whether allowing the child to do so is in his or her best interest. If the child is 14 years or older, the court must allow him or her to testify unless it makes a finding that testifying is not in the child's best interest and states so on the record. Cal Rules of Ct 5.250(c).

When determining whether addressing the court is in the child's best interest, the court should consider (Cal Rules of Ct 5.250(c)):

- Whether the child is of sufficient age and capacity to form an intelligent preference as to custody or visitation (parenting time);
- Whether the child is of sufficient age and capacity to understand the nature of testimony;
- Whether information has been presented indicating that the child may be at risk emotionally if he or she is permitted or denied the opportunity to address the court or that the child may benefit from addressing the court;
- Whether the subject areas about which the child is anticipated to address the court are relevant to the court's decision-making process; and
- Whether any other factors weigh in favor of or against having the child address the court, taking into consideration the child's desire to do so.

If the court allows a child to testify, it should balance the necessity of doing so in the courtroom with the parents and attorneys present against the need to create an environment in which the child can be open and honest. In each case, the court should consider (Cal Rules of Ct 5.250(d)(3)):

- Where the testimony will be taken;
- Who should be present;
- How the child will be questioned; and
- Whether a court reporter is available.

If the court does not allow the child to testify, alternatives for obtaining information may include, but are not limited to (Cal Rules of Ct 5.250(d)(1)):

- the child's participation in mediation under Fam C §3180;
- appointment of an evaluator or investigator under Fam C §3110 or Evid C §730;
- admissible evidence provided by the parents, parties, or witnesses in the proceedings;
- information provided by a child custody recommending counselor under Fam C §3183(a); and
- information provided from a child interview center or professional, to avoid unnecessary multiple interviews.

When a child testifies, the court must take special care to protect him or her from harassment or embarrassment and to restrictunnecessary repetition of questions. The court must also take special care to state the questions in a form appropriate to the child's age or cognitive level. Cal

Rules of Ct 5.250(d)(4). Also, the court must allow, but not require, the child to state a preference regarding custody or visitation (parenting time). Cal Rules of Ct 5.250(d)(4).

In any case in which a child is testifying, the court may consider appointing counsel for the minor. Cal Rules of Ct 5.250(d)(5).

3. [§200.68] Party's Absence or Relocation

The court must not consider a party's absence or relocation from the family residence as a factor in determining custody or visitation in either of the following circumstances when (Fam C §3046(a)):

- The absence or relocation is of short duration, and the court makes a finding that during the absence or relocation, the party
  - — Has demonstrated an interest in maintaining custody or visitation,
  - — Maintains or makes reasonable efforts to maintain regular contact with the child, and
  - — Has not demonstrated behavior indicating an intent to abandon the child.
- The party is absent or relocates because of an act or threat of domestic or family violence by the other party.

In determining whether a party has satisfied either of the above requirements, the court may consider attempts by one party to interfere with the other party's regular contact with the child. Fam C §3046(b).

The court may consider absence or relocation from the family home as a factor in determining custody in the following situations when (Fam C §3046(c)):

- A protective or restraining order has issued against the party, which excludes the party from the other party's or child's dwelling or otherwise enjoins assault or harassment against the other parent or child, including
  - — Orders issued under the Domestic Violence Prevention Act (DVPA) (Fam C §§6300 et seq),
  - — Civil harassment or workplace violence orders issued under CCP §527.6 or §527.8, or
  - — Criminal protective orders issued under Pen C §136.2.
- A party abandons a child as provided in Fam C §7822.

As to a party's intent to move to another location as a factor in an award of custody or modification of custody, see §§200.134–200.144.

4. [§200.69] Separation of Siblings

The court may enter a custody order that has the effect of separating siblings only when compelling circumstances dictate that the separation is in the children's best interest. *Marriage of Williams* (2001) 88 CA4th 808, 813–815, 105 CR2d 923 (move-away case).

Note: There appears to be only one published opinion in which the Court of Appeals upheld a custody award separating siblings. *Marriage of Steiner & Hosseini* (2004) 117 CA4th 519, 529, 11 CR3d 671. The custody order separating the siblings was within reason as there was substantial evidence the mother had "poisoned" the older child against the father, so that division of the siblings should prevent that occurring with the younger child, who was awarded to father. Splitting stepsiblings is not the same as splitting siblings. See also *J.M. v G.H.* (2014) 228 CA4th 925, 939, 175 CR3d 371 (compelling circumstances not required to separate stepsiblings; mother permitted to move away with child to Israel despite the child having formed a bond with stepsibling from father's new marriage.)

5. [§200.70] Emergency or Protective Orders in Effect; Domestic Violence Allegations

Any time a court considers issues of custody or visitation, it is encouraged to make a reasonable effort to ascertain whether any emergency protective orders, protective orders, or other restraining orders concerning the parties or child are in effect. Fam C §3031(a).

☛ JUDICIAL TIP: Consult your local rules regarding communication between courts concerning protective orders. If your order supersedes a prior order, state that in your order.

The court is further encouraged not to make a custody or visitation order that is inconsistent with such orders unless it makes both of the following findings (Fam C §3031(a)):

- The custody or visitation order cannot be made consistent with the emergency protective order, protective order, or other restraining order; and
- The custody or visitation order is in the child's best interest.

If the court grants custody or visitation in a case in which domestic violence is alleged, and an emergency protective order, protective order, or other restraining order has been issued, the court must consider whether the child's best interest requires that any custody or visitation arrangement be supervised by a third party specified by the court or whether custody or visitation be suspended or denied. Fam C §§3031(c), 3100(b). In reviewing all circumstances of the case, the court must specifically include

consideration of the nature of the acts from which the parent was enjoined and the period of time that has elapsed since the injunctive order was issued. Fam C §3100(b).

☛ JUDICIAL TIP: Advise any party who is the subject of the protective order or domestic violence allegation that any statements made in this proceeding may be used as evidence against the party in any criminal proceedings arising from the allegations or incidents involved, and that the party has a right to remain silent, to refuse to testify or respond, and to not self-incriminate.

If domestic violence is alleged and there is an emergency protective order, protective order, or other restraining order, and the court decides that it is in the child's best interest to allow custody or visitation with the perpetrator, the order must specify the time, day, place, and manner of the minor child's transfer for custody or visitation with the goal of limiting the child's exposure to potential domestic violence or conflict and to ensure the safety of all family members. Fam C §§3031(b), 3100(c).

☛ JUDICIAL TIP: An order that awards custody on "alternate weekends from after school on Friday to Sunday night," is not specific enough. Rather, the order should award custody "from after school," or "3:00 p.m. on Friday of the first, third, and fifth weekends of the month to Sunday at 6:00 p.m." The order should also set forth the specific location where the child will be picked up and dropped off.

Note that the weekend with the first Saturday in it is considered the first weekend of the month, unless the court orders some other day to be determinative of the applicable week of the month.

In addition, if a party is staying at a domestic violence shelter or other confidential location, the court's order must be designed to prevent the disclosure of that location. Fam C §§3031(b), 3100(d).

☛ JUDICIAL TIP: If an alleged victim seeks a domestic violence restraining order, the court must conduct a search of all records and databases readily available and reasonably accessible to determine whether the alleged abuser has any prior violent felony convictions, misdemeanor conviction involving weapons or domestic violence, outstanding warrants, prior restraining orders, a registered firearm, or is on parole or probation. Fam C §6306. The court is required to notify probation or parole officers, as well as consider this information when making custody or visitation orders. Fam C §6306(b)(1), (f).

6. Restriction of Custody to Violent Offenders

a. [§200.71] Registered Sex Offenders; Child Abusers

The court may not award custody or unsupervised visitation to any person who is required to be registered as a sex offender under Pen C §290 when the victim was a minor, or has been convicted of Pen C §273a (child abuse), Pen C §273d (corporal punishment of child), or Pen C §647.6 (child molestation), unless the court finds that there is no significant risk to the child and states its reasons in writing or on the record. Fam C §3030(a)(1). Nor may a child be placed in a home in which a sex offender resides unless the court states the reasons for its findings on the record. Fam C §3030(a).

If a child is permitted unsupervised contact with a person required to be registered under Pen C §290 when the victim was a minor, that alone constitutes prima facie evidence that the child is at significant risk affecting the burden of producing evidence. Fam C §3030(a)(3). When making a determination regarding significant risk to the child, the presumption does not apply if there are factors mitigating against its application, including whether the party seeking custody or visitation is also subject to the above registration requirements when the victim was a minor. Fam C §3030(a)(3).

b. [§200.72] Person Convicted of Rape

Without exception, a person convicted of rape under Pen C §261 may not be awarded custody or visitation of a child conceived as a result of the rape. Fam C §3030(b).

c. [§200.73] Person Convicted of Murder of the Other Parent

No person convicted of first-degree murder (Pen C §189) of the child's other parent may be awarded custody or unsupervised visitation, unless the court finds that there is no risk to the child's health, safety, and welfare, and states its reasons in writing or on the record. Fam C §3030(c).

In making its finding of no risk to the child, the court may consider, among other factors, the following (Fam C §3030(c)(1)–(3)):

- The child's wishes, if the child is of sufficient age and capacity to reason so as to form an intelligent preference.
- Credible evidence that the convicted parent was the victim of abuse (as defined in Fam C §6203), committed by a deceased parent. The evidence may include, but is not limited to, written reports by:
  - Law enforcement agencies,
  - Child protective services or other social welfare agencies,

  - Courts,
  - Medical facilities, and
  - Other public agencies or private nonprofit organizations providing services to victims of domestic abuse.
- Testimony of an expert witness qualified under Evid C §1107 that the convicted parent experiences effects of intimate partner battering.

Unless and until a custody or visitation order is issued to the convicted parent, the child may not be permitted to visit or remain in the convicted parent's custody without the consent of the child's custodian or legal guardian. Fam C §3030(c).

7. [§200.74] Improper Factors in Custody Determinations

The court may not consider the following factors in determining the suitability of a parent to have custody, absent a showing of harm to the child in the particular circumstances:

- *Sex of parent*. Fam C §3040(a)(1).
- *Race*. Custody determinations may not be made on the basis of race. *Palmore v Sidoti* (1984) 466 US 429, 104 S Ct 1879, 80 L Ed 2d 421 (trial court improperly removed custody from the mother after mother entered into interracial marriage because it feared possible harm to child because of racial prejudice).
- *Physical disability*. It is impermissible for the trial court simply to rely on a physical disability as prima facie evidence of the person's unfitness as a parent or of probable detriment to the child. *Marriage of Carney* (1979) 24 C3d 725, 736, 157 CR 383. See also Fam C §3049 (codifies *Carney*).
- *Religion.* Religion is not a factor that should enter into a custody decision unless there is a showing of harm to the child. *Marriage of Murga* (1980) 103 CA3d 498, 505, 163 CR 79 (noncustodial or joint custodial parent may not be prohibited from discussing religion with or involving the child in the parent's religious activities absent showing that such involvement would be harmful to the child); see also *Marriage of Urband* (1977) 68 CA3d 796, 798, 137 CR 433 (court rejecting contention that mother's religious belief as a member of the Jehovah's Witnesses rendered her unfit to have custody because, among other things, of her belief against blood transfusions and her refusal to permit children to participate in sports, absent compelling evidence that her religious beliefs and observances were harmful to the children).

- *Parents' comparative income*. Comparative income or economic advantage is not a permissible basis for awarding custody. There is no basis for assuming a correlation between wealth and good parenting or wealth and happiness. If the custodial parent's income is insufficient to provide proper care for the child, the court should award child support rather than remove custody from the parent. *Burchard v Garay* (1986) 42 C3d 531, 539–540, 229 CR 800 (trial court's reasoning that care given by a mother who, because of her work and study must entrust the child to daycare centers and babysitters, is per se inferior to care given by a father who also works, but who can leave the child with a stepmother at home, was not suitable basis for custody order). See also *Marriage of Loyd* (2003) 106 CA4th 754, 759–760, 131 CR2d 80 (trial court erred, in response to modification motion, by changing physical custody from father to mother based on fact that the father would have to place children in daycare).
- *Sexual orientation.* A parent's sexual orientation alone is not determinative in awarding custody or restricting visitation. Rather, insofar as the court finds it relevant, it is but one factor to be considered, in determining custody. *Nadler v Superior Court* (1967) 255 CA2d 523, 63 CR 352; *Marriage of Birdsall* (1988) 197 CA3d 1024, 243 CR 287 (court order prohibiting homosexual father from exercising overnight visitation with son in presence of other persons known to be homosexual vacated for lack of affirmative showing of detriment of child).
- *Parent's sexual relations*. A parent's sexual conduct is not relevant in awarding custody unless there is compelling evidence that such conduct has significant bearing on the child's welfare. *Marriage of Wellman* (1980) 104 CA3d 992, 994, 999, 164 CR 148 (abuse of discretion to restrain a custodial parent from having overnight visitors of the opposite sex unless the minor children's welfare is thereby directly placed in jeopardy); *Marriage of Slayton* (2001) 86 CA4th 653, 661–662, 103 CR2d 545 (mother did not show that father's adultery would adversely affect the child's home environment).

F. Awarding Custody to Nonparent Over Parent's Objection

1. [§200.75] Detriment Test

Before making an order granting custody to a person or persons other than a parent, over the objection of a parent, the court must make a finding that granting custody to a parent would be detrimental to the child and that granting custody to the nonparent is required to serve the child's best interest. Fam C §3041(a). See *H.S. v N.S.* (2009) 173 CA4th 1131, 1137,

93 CR3d 470, in which the court found Fam C §3041 constitutional. Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate fact, must not appear in the pleadings. Fam C §3041(a). The court may, in its discretion, exclude the public from the hearing on this issue. Fam C §3041(a).

Indian Law Caution: If the child is an Indian child, the court must apply all requirements of the Indian Child Welfare Act, including the evidentiary standards described in 25 USC §1912(d), (e), (f) of the ICWA (25 USC §§1901 et seq), Welf & I C §§224.6 and 361.7, and the placement preferences and standards set out in Welf & I C §361.31 and 25 USC §1912. Fam C §3041(e). See *Erika K. v Brett D.* (2008) 161 CA4th 1259, 75 CR3d 152.

In a case decided under former CC §4600 (predecessor statute of Fam C §3041), the court held that there must be a clear showing that an award to the nonparent is "essential to avert harm to the child." *In re B.G.* (1974) 11 C3d 679, 698–699, 114 CR 444.

As used in Fam C §3041, "detriment to the child" includes the harm caused by removing a child from a stable placement with a person who has assumed, on a day-to-day basis, the role of his or her parent, fulfilling both the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time. Fam C §3041(c). A finding of detriment does not require any finding of unfitness of the parents. Fam C §3041(c).

2. [§200.76] Standard of Proof

Subject to Fam C §3041(d), a finding that parental custody would be detrimental to the child must be supported by clear and convincing evidence. Fam C §3041(b).

Notwithstanding Fam C §3041(b), if the court finds by a preponderance of the evidence that the person to whom custody may be given is a person described in Fam C §3041(c) (one who has taken on the role of a parent), this finding will constitute a finding that the custody is in the child's best interest and that parental custody would be detrimental to the child absent a showing by a preponderance of the evidence to the contrary. Fam C §3041(d).

See *H.S. v N.S.* (2009) 173 CA4th 1131, 1137, 93 CR3d 470, in which the court found Fam C §3041 constitutional.

G. Visitation Rights

1. [§200.77] Reasonable Visitation by Parent

The court must grant a parent reasonable visitation rights unless it is shown that such visitation would be detrimental to the child's best interest.

Fam C §3100(a). Noncustodial parents with court-ordered visitation rights have a liberty interest in the companionship, care, custody, and management of their children. *Brittain v Hansen* (9th Cir 2006) 451 F3d 982, 992.

In determining what is "reasonable visitation," the court has broad discretion and may craft a variety of orders. All visitation orders must be made to protect the child's best interest and must take into account the broad policy of ensuring the child's health, safety, and welfare, and to the extent consistent therewith, the policy preference for frequent and continuing contact with both parents. See §§200.51–200.52, 200.61.

As it does when making a decision on whether to award any form of joint custody, the court must also consider a variety of factors that may create presumptions or be indicators of detriment to the child's best interest. Such factors include domestic violence, alcohol abuse, illegal drug use, and parenting skills. Such considerations of detriment must also be balanced against the policy of ensuring frequent and continuing contact with both parents.

☛ JUDICIAL TIP: Many judges avoid the terms "visitation" and "noncustodial parent" in favor of "parenting or coparenting schedules," "parenting time or schedule," "custody plans," or "custody time-shares," even to the extent of crossing out the word "visitation" on Judicial Council forms. In emotionally charged custody disputes, "visitation" and "noncustodial parent" may appear to diminish the childrearing contributions of the parent with less than an equal time share.

2. [§200.78] Visitation by Incarcerated Parent

An incarcerated parent has a right to reasonable visitation with his or her child. Therefore, visitation between children and their incarcerated parents cannot be denied without a detriment finding. *Hoversten v Superior Court* (1999) 74 CA4th 636, 640–641, 88 CR2d 197. The *Hoversten* case outlines some alternative means by which an incarcerated parent can secure meaningful access to the court to self-represent when determining visitation rights (74 CA4th at 642–644):

- Deferring the action until the parent's release.
- Appointing counsel for the parent.
- Ordering the transfer of parent to court.
- Using depositions instead of personal appearances.
- Propounding written discovery.
- Conducting hearing by telephone or closed circuit television.

- Using services of the family court mediator (*Note:* Mediation mandatory in contested cases (see §200.88)).

Bar to visitation. An incarcerated parent cannot be granted visitation rights with a child conceived by the parent's act of rape for which the parent was convicted. See §200.72.

3. [§200.79] Visitation by Nonparents

The court has discretion to grant reasonable visitation rights to nonparents having an interest in the child's welfare. Fam C §3100(a). Provision is also made for reasonable visitation by stepparents, grandparents, and specified relatives of a deceased parent if the court determines that such visitation is in the child's best interest. Fam C §§3101–3104. Nonparent visitation may be ordered based on stipulation of the parents. *Marriage of Ross & Kelley* (2003) 114 CA4th 130, 140, 7 CR3d 287.

The United States Supreme Court in *Troxel v Granville* (2000) 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49, has set limits on nonparent visitation orders. Several California cases interpreting the state's nonparent visitation laws since *Troxel* have found the laws to be unconstitutional as applied. These cases and the application of the *Troxel* standards are discussed in more detail below.

a. [§200.80] *Troxel* Limits on Visitation

Troxel centered on a Washington State statute, similar to Fam C §§3101–3104, permitting "any person" to petition for visitation and allowing the court to grant visitation "whenever visitation may serve the best interest of the child." Over objections of the child's mother, the state trial court granted the paternal grandparents extensive visitation of their deceased son's children. The Supreme Court held that, in the context of grandparent visitation, the statute violated the due process rights of a fit parent and her family to make decisions concerning the care, custody and control of their family. *Troxel v Granville* (2000) 530 US 57, 64–66, 73, 120 S Ct 2054, 147 L Ed 2d 49. Several California cases since *Troxel* have found court-ordered visitation for parents of a deceased mother or father under Fam C §3102 unconstitutional as applied, although none have held that the statute is unconstitutional on its face. See *Zasueta v Zasueta* (2002) 102 CA4th 1242, 1254–1255, 126 CR2d 245; *Punsly v Ho* (2001) 87 CA4th 1099, 1110, 105 CR2d 139 (overruled on other grounds in 50 C4th 1206, 1226 n4); and *Kyle O. v Donald R.* (2000) 85 CA4th 848, 851, 102 CR2d 476. The court in *Herbst v Swan* (2002) 102 CA4th 813, 125 CR2d 836, found that the application of Fam C §3102 was unconstitutional as applied to a visitation request by the adult sibling of a child when they have a deceased parent.

According to *Troxel*, the court may not rely solely on the best-interest-of-the-child standard when considering nonparent visitation if there is a fit custodial parent. *Troxel v Granville, supra*, 530 US at 67. Such reliance infringes on the fundamental rights of a parent simply because a judge believes a "better" decision could be made. To the extent Fam C §3102 is applied to requests by nonparent relatives for visitation using only a best-interest-of-the-child standard, it is unconstitutional. See *Troxel v Granville, supra; Zasueta v Zasueta, supra; Punsly v Ho, supra;* and *Kyle O. v Donald R., supra*.

In determining whether to grant visitation to nonparents, the above cases require the court to:

- Determine if the parent is fit. If so, there is a presumption that the fit parent acts in the child's best interest.
- Give special weight to a fit parent's determination of what is in the child's best interest.
- Not shift the burden to the fit parent to show that the visits are not in the child's best interest.
- Consider whether the fit parent has voluntarily allowed visits, no matter how limited.

In other words, the court may *not* presume that nonparent visits are in the child's best interest and it *must* presume that a fit custodial parent's decision is in the child's best interest. Thus, any order for nonparent visits must be narrowly tailored to advance the interest of the nonparent relatives and the child in maintaining a natural relationship and cannot unduly infringe on the parent's fundamental right to make decisions for a child.

b. [§200.81] Visitation by Relatives of Deceased Parent

If a minor's parent is deceased, the deceased parent's children, siblings, parents, and grandparents may be granted reasonable visitation with the child if the court finds that such visitation would be in the child's best interest. Fam C §3102(a).

Before granting such visitation to persons other than a grandparent, the court must consider the amount of personal contact between the party seeking visitation and the child before the application for the visitation order. Fam C §3102(b). If the living parent objects to visitation of relatives of the deceased parent, the *Troxel* analysis, discussed in §200.78, is applicable, and the court should in most cases respect the living parent's wishes. See *Kyle O. v Donald R.* (2000) 85 CA4th 848, 863, 102 CR2d 476 (fit parent presumed to act in child's best interests, and his or her decision regarding the amount of visitation and preference for less structured and more spontaneous manner of visitation is given deference).

The family of a deceased parent may not seek visitation if a person other than a stepparent or grandparent has adopted the child. Fam C §3102(c).

Family Code §3102 has withstood constitutional review even though it may allow for nonparent visitation over the objection of two fit parents. *Fenn v Sherriff* (2003) 109 CA4th 1466, 1477–1478, 1 CR3d 185 (*Troxel* requirement that parental decisions be given special weight does not mean they are insulated from any court intervention).

c. [§200.82] Stepparent Visitation

The court may grant visitation to a stepparent if it is determined to be in the child's best interest, provided such visitation rights do not conflict with the custody or visitation rights of a birth parent who is not a party to the proceeding. Fam C §3101. This statute does not authorize the court to grant joint custody to the stepparent. See *Marriage of Lewis & Goetz* (1988) 203 CA3d 514, 517–518, 250 CR 30. Visitation under Fam C §3101 is not available to a natural parent who has relinquished the child to adoption. *Marckwardt v Superior Court* (1984) 150 CA3d 471, 478–479, 198 CR 41. But see Fam C §3100(a) (visitation may be granted to "any other person" having an interest in the child's welfare).

If a birth parent objects to visitation of a stepparent, the rationale of *Troxel* and the California cases interpreting it apply (see §200.79), and the court should in most cases respect the birth parent's wishes. *Marriage of W.* (2003) 114 CA4th 68, 72–75, 7 CR3d 461 (court ordered stepparent visitation without applying presumption favoring birth parent's decision that visitation was not in child's best interest; Fam C §3101 found unconstitutional as applied).

A stepparent visitation order may not interfere with the custody or visitation rights of a birth parent who is not a party to the proceeding. Fam C §3101(c).

If a protective order under Fam C §6218 (part of the Domestic Violence Prevention Act) has been directed to a stepparent, the court must consider whether the child's best interest requires that any visitation by the stepparent be denied. Fam C §3101(b).

d. [§200.83] Grandparent Visitation

Family Code §§3103 and 3104 authorize the court to award visitation to grandparents when both parents are still living. Note that under Fam C §3103, grandparents may seek visitation in any custody proceeding between the parents, while under Fam C §3104, grandparents may bring an independent petition to seek visitation.

Under Fam C §3103, grandparent visitation claims are incidental to a custody proceeding between the parents that is properly before the court.

Thus, the grandparents must be joined in the action between the parents. In contrast, Fam C §3104 was adopted to fill the gap in cases where neither parent had died (Fam C §3102) and there was no custody proceeding between the parents pending (Fam C §3103). See *White v Jacobs* (1988) 198 CA3d 122, 124–125, 243 CR 597.

Unlike the broad general statute for nonparent visitation when a parent is deceased (Fam C §3102), California's specific grandparent visitation statutes when both parents are still living do not appear to run up against the constitutional limitations established in *Troxel*. See *Lopez v Martinez* (2000) 85 CA4th 279, 287–288, 102 CR2d 71, superseded by Fam C §3104(b)(5) on another ground as stated in 223 CA4th 529, 534–535.

Until the case of *Rich v Thatcher* (2011) 200 CA4th 1176, 132 CR3d 897, no appellate decision had ever addressed the standard of proof to be applied in a situation where one parent was deceased and the surviving parent opposed visitation by the parent of the deceased parent. In *Rich v Thatcher*, the court acknowledged that Fam C §3102 permitted such grandparents to have visitation with the child if the visitation would be in the child's best interest. The Court held that to overcome the opposition to visitation by a "fit" surviving parent, the grandparent must prove by clear and convincing evidence that denial of such visitation would be detrimental to the child. 200 CA4th at 1180.

Both Fam C §§3103 and 3104 contain rebuttable presumptions that visitation with a grandparent is not in the child's best interest if both parents oppose such visits or if the parent with sole legal custody, or with whom the child resides, objects to the grandparent's visitation. Fam C §§3103(d), 3104(e), (f).

Family Code §3104 governs requests for grandparent visitation once judgment has been entered dissolving a marriage and awarding sole custody to one parent. *Marriage of Harris* (2004) 34 C4th 210, 223, 17 CR3d 842. The California Supreme Court has upheld the constitutionality of Fam C §3104, holding that the statute does not violate either the federal or state constitutional rights of the custodial parent. 34 C4th at 230. Supporting the statute's constitutionality is its requirement that there be "a preexisting relationship between the grandparent and the grandchild that has engendered a bond such that visitation is in the best interest of the child" and directing the court to balance "the interest of the child in having visitation with the grandparent against the right of the parents to exercise their parental authority" before ordering grandparent visitation. 34 C4th at 225–226.

(1) [§200.84] Visitation Request in Pending Custody Proceeding (Fam C §3103)

When there is an action under Fam C §3021, a grandparent who is permitted to join the action and seek visitation is subject to several statutory requirements other than the rebuttable presumption affecting the burden of proof discussed in §200.81:

- The grandparent must give notice, by certified mail, return receipt requested, postage prepaid, to each parent of the child, to any stepparents, and to any person who has physical custody of the child, or to the attorneys of record of the parties to the proceedings. Fam C §3103(c).
- No visitation rights may be ordered if they would conflict with the custody or visitation rights of a birth parent who is not a party to the proceeding. Fam C §3103(e).
- If a protective order under Fam C §6218 (part of the Domestic Violence Prevention Act) has been directed to the grandparent seeking visitation, the court must consider whether the child's best interest requires that visitation by the grandparent be denied. Fam C §3103(b).
- Court-ordered grandparent visitation may not be used as a basis for or against a change of residence of the child, although it is one factor the court must consider in ordering a change of residence. Fam C §3103(f).
- The court may exercise its discretion to allocate the percentage of grandparent visitation between the parents for purposes of calculating guideline child support (Fam C §3103(g)(1)) and may order a parent or grandparent to pay to the other an amount for transportation (Fam C §3103(g)(2)(A)) or basic expenses related to the visitation (Fam C §3103(g)(2)(B)). "Basic expenses" includes medical expenses, daycare costs, and other necessities. Fam C §3103(g)(2)(B). Note that only costs essential to facilitate the grandparent's visitation may be assessed against the grandparent. *Marriage of Perry* (1998) 61 CA4th 295, 312–314, 71 CR2d 499 (trial court erred when it assessed costs of counseling for the child when there was insufficient evidence to show that counseling was necessary to facilitate or redress problems arising during grandmother's visitation).

(2) [§200.85] Independent Action to Request Visitation (Fam C §3104)

When there is no pending custody action between living parents, grandparents may file an independent petition for a visitation order under

Fam C §3104. In this case, the petitioner-grandparent must give notice by personal service under CCP §415.10 to each parent, any stepparent, and any person who has physical custody of the child. Fam C §3104(c).

Before ordering visitation, the court must do both of the following (Fam C §3104(a)):

- Find that there is a preexisting relationship between the grandparent and grandchild that has "engendered a bond such that visitation is in the best interest of the child."
- Balance the child's interest in having visitation with the grandparent against the right of the parents to exercise their parental authority. (*Note:* The court must balance the child's interest against parental rights, not the grandparent's interest.)

These two requirements, together with the rebuttable presumptions affecting the burden of proof that such visits are not in the child's best interest in the face of parental opposition (Fam C §3104(e), (f)), appear to satisfy the constitutional requirements of *Troxel.* See *Marriage of Harris* (2004) 34 C4th 210, 226, 230, 17 CR3d 842 ("section 3104 does not suffer from the constitutional infirmities that plagued the Washington statute considered in *Troxel*"); *Lopez v Martinez* (2000) 85 CA4th 279, 287–288, 102 CR2d 71 (noting that unlike the state statute in *Troxel*, the California statute only allows a petition to be filed when some disruption to the nuclear family has already occurred, and makes clear a court must accord extreme deference to parental authority while considering the child's best interest), superseded by Fam C §3104(b)(5) on another ground as stated in 223 CA4th 529, 534–535; Fam C §3104(e) (presumption when the natural or adoptive parents agree that there should be no visitation), Fam C §3104(f) (presumption when a parent who has been awarded sole legal and physical custody in another proceeding or a parent with whom the child resides if there is no custody order objects to the grandparent visitation).

The California Supreme Court has upheld the constitutionality of Fam C §3104, holding that the statute did not violate either the federal or state constitutional rights of the custodial parent based in part on the above two requirements. *Marriage of Harris, supra*, 34 C4th at 225–226, 230 (supporting the statute's constitutionality is its requirement that there be "a preexisting relationship between the grandparent and the grandchild that has engendered a bond such that visitation is in the best interest of the child" and directing the court to balance "the interest of the child in having visitation with the grandparent against the right of the parents to exercise their parental authority" before ordering grandparent visitation).

If a grandparent seeks visitation when the natural or adoptive parents are still married, one or more of the following circumstances must exist in order for the grandparent to file a visitation petition (Fam C §3104(b)):

- The parents, at the time of filing, are living separately and apart on a permanent or indefinite basis.
- One parent has been absent for more than 1 month without the other spouse knowing the absent spouse's whereabouts.
- One parent joins in the petition with the grandparents.
- The child is not residing with either parent.
- The child has been adopted by a stepparent.
- One parent is incarcerated or involuntarily institutionalized.

If at any time a change of circumstances occurs so that none of these circumstances exist, the parent or parents may move the court to terminate the grandparent visitation, and the court must grant the termination. Fam C §3104(b).

The statutory requirements under Fam C §3104 parallel those of a grandparent visitation request under Fam C §3103:

- The court must consider whether the child's best interest requires that the request for grandparent visitation be denied if a protective order as defined in Fam C §6218 (Domestic Violence Prevention Act) has been directed to the grandparent. Fam C §3104(d).
- No visitation rights may be ordered if they would conflict with a right of custody or visitation of a birth parent who is not a party to the proceeding. Fam C §3104(g).
- Court-ordered grandparent visitation may not be used as a basis for or against a change of residence for the child, although it is one factor the court must consider when ordering a change of residence. Fam C §3104(h).
- The court may allocate the percentage of grandparent visitation between the parents for purposes of calculating guideline child support (Fam C §3104(i)(1)) and may order a parent or grandparent to pay to the other an amount for transportation (Fam C §3104(i)(2)(A)) or basic expenses related to the visitation (Fam C §3104(i)(2)(B)).

Note: The case *Stuard v Stuard* (2016) 244 CA4th 768, 199 CR3d 821, held that where parents are divorced, awarding grandparents visitation rights over the father's objection even though there were no allegations of parental unfitness, did not violate his due process rights. There was a preexisting relationship between the grandparents and child, and the court also held that the father could not unilaterally terminate that relationship which he had previously fostered.

H. [§200.86] Supervised Visits and Exchanges

When there is concern for the safety or welfare of a child during visits with a noncustodial parent, the court may order that the visits be supervised by a relative, friend, or a professional. See Fam C §§3200 et seq. The Judicial Council developed standards for supervised visitation providers in conformance with Fam C §3200.5. See Judicial Council Form FL-341(A), Supervised Visitation Order. The standards are set forth in Cal Rules of Ct, Standards of J Admin 5.20.

1. [§200.87] Court's Determination of Need and Manner of Visitation

Under Cal Rules of Ct, Standards of J Admin 5.20(c), the court must make the final decision about the need for and the manner, terms, and conditions of any supervision. This decision depends on several factors, including the degree of risk in each case, the financial situation of the parties, and the local resources available for supervision. The court may consider recommendations regarding the need for supervision and the level and manner of supervision from the parties and their attorneys, the attorney for the child, Family Court Services staff, valuators, and therapists.

☛ JUDICIAL TIP: The process of obtaining appropriate supervised visitation is one of the most difficult problems for a court. In many situations, an order for supervised visitation is tantamount to an order for no visitation. If the parties cannot afford a professional provider or cannot agree on a nonprofessional provider, then there will be no visitation. Judges should determine what resources are available in their county for no cost or low cost supervisory services to ensure contact between the child and the noncustodial parent. The court should also explore with the parties reasons for objecting to proposed nonprofessional providers to determine whether those reasons actually relate to the child's welfare.

2. [§200.88] Types of Supervised Visitation Providers and Qualifications

The Judicial Council has established rules and standards for the qualifications, training, and experience of supervised visit providers. See Cal Rules of Ct, Standards of J Admin 5.20. The goal of the Judicial Council standards, and the court's goal in ordering supervised visitation or exchanges should be to ensure the safety and welfare of the child, adults, and providers of supervision services. Fam C §3200; Cal Rules of Ct, Standards of J Admin 5.20(a). Once safety is ensured, the child's best

interest is paramount, especially in deciding the manner of supervision. Fam C §3200; Cal Rules of Ct, Standards of J Admin 5.20(a).

The rules apply to all providers of supervised visitation, whether the provider is paid or volunteers, whether he or she is a relative, friend, paid independent contractor, or works through a supervised visitation agency or center, unless otherwise specified. Cal Rules of Ct, Standards of J Admin 5.20(a).

The rules describe two kinds of supervised visitation providers: nonprofessional or professional. Cal Rules of Ct, Standards of J Admin 5.20(c)–(e).

Nonprofessional provider. A nonprofessional provider is anyone not paid for providing the supervised visitation services. Cal Rules of Ct, Standards of J Admin 5.20(d)(1). Unless otherwise ordered by the court or stipulated by the parties, a nonprofessional provider should (Cal Rules of Ct, Standards of J Admin 5.20(d), (i)):

- Be 21 years of age or older;
- Have no driving under the influence conviction within the last 5 years;
- Not have been on probation or parole for the last 10 years;
- Have no record of a conviction for child molestation, child abuse, or other crimes against a person;
- Have proof of automobile insurance, if transporting the child;
- Have no civil, criminal, or juvenile restraining orders within the last 10 years;
- Have no current or past court orders in which the provider is the person being supervised;
- Not be financially dependent on the person being supervised;
- Have no conflict of interest (see §200.84); and
- Agree to adhere to and enforce the court order regarding supervised visitation.

☛ JUDICIAL TIP: See *A Guide for the Non-Professional Provider of Supervised Visitation*, published by the Center for Families, Children & the Courts. Consider providing any nonprofessional provider a copy of this useful booklet.

Professional provider. A professional provider is any person paid for providing supervised visitation services or an independent contractor, employee, volunteer, or intern operating independently or through a supervised visitation center or agency. Cal Rules of Ct, Standards of J Admin 5.20(e). A professional provider should meet the same conditions required of a nonprofessional provider, except for the condition that he or

she not be financially dependent on the person being supervised. In addition, a professional provider must speak the language of the child and the party being supervised or provide a neutral interpreter over the age of 18, meet certain training requirements, and sign a declaration stating all requirements have been met. Cal Rules of Ct, Standards of J Admin 5.20(e).

3. [§200.89] Responsibilities of Supervised Visitation Providers

All providers must make every reasonable effort to ensure the safety of all parties during the visitation. Cal Rules of Ct, Standards of J Admin 5.20(g). Professional providers must (see Cal Rules of Ct, Standards of J Admin 5.20(f)–(o)):

- Receive certain types of training;
- Institute certain safety and security procedures;
- Maintain detailed records of visitation;
- Enforce the terms and conditions of visitation; and
- If necessary, suspend or terminate visitation.

All providers, including nonprofessional providers, are bound by conflict-of-interest rules that prohibit (Cal Rules of Ct, Standards of J Admin 5.20(i)):

- Financial dependence on the person being supervised;
- Being an employee of the person being supervised;
- Being in an intimate relationship with the person being supervised; and
- Being an employee of the court that orders the supervision unless specified in the employment contract.

In addition, providers must not allow discussion of the court case or possible outcomes during supervision, nor may providers take sides with any of the parties. Cal Rules of Ct, Standards of J Admin 5.20(*l*). There is no confidential privilege during supervision. Providers are bound to report any suspected child abuse to appropriate authorities. Cal Rules of Ct, Standards of J Admin 5.20(k), (n).

I. Mandatory Confidential Mediation of Custody and Visitation Disputes

1. [§200.90] General Provisions

All contested child custody and visitation issues must be referred to mediation (Fam C §3170(a)), and each superior court must provide mediation services and make a mediator available (Fam C §3160).

The mediator may be a professional staff member of a family conciliation court, probation department, or mental health services agency, or any other person designated by the court, but must meet the minimum qualifications required of a counselor of conciliation under Fam C §1815. Fam C §3164.

On an order of the presiding judge of a superior court authorizing the procedure in that court, a petition may be filed for mediation of a dispute related to an existing order for custody, visitation, or both, and such mediations must be set within 60 days after the filing of the petition. Fam C §3173.

Domestic violence cases that involve disputed custody and visitation issues are also referred to mediation but are handled by Family Court Services under a separate written protocol approved by the Judicial Council, and may include additional services beyond mediation, such as referral to community resources, video recordings, parent education programs, or informational booklets. Fam C §3170(b). See also Cal Rules of Ct 5.215.

If a stepparent or grandparent has applied for visitation rights as authorized by law, the matter must also be referred to mediation. Fam C §3171(a). In such cases, a natural or adoptive parent who is not a party to the proceeding is not required to participate in mediation, but his or her failure to do so is a waiver of the right to require a hearing on the matter or to object to a settlement reached by the other parties. Fam C §3171(b).

Mediation services are available even if paternity is at issue in the case before the court. Fam C §3172.

2. [§200.91] Purposes of Mediation

The purposes of a family court mediation proceeding are to (Fam C §3161):

- Reduce the acrimony that may exist between the parties;
- Develop an agreement ensuring that the child will have close and continuing contact with both parents that is in the child's best interest, consistent with Fam C §§3011 and 3020; and
- Bring about a settlement of visitation rights that is in the child's best interest.

3. [§200.92] Two Types of Confidential Mediation

While all mediation is confidential (Fam C §3177), there are two types of confidential mediation. Depending on a county's local rules, mediation may result in a recommendation regarding custody and/or visitation to the parties and the court from a mediation professional. In such counties, mediation is called "child custody recommending

counseling." In counties that do not so provide, mediation is simply referred to as "mediation."

a. [§200.93] Child Custody Recommending Counseling

In those counties in which the mediation process is known as "child custody recommending counseling," the professional is called a "child custody recommending counselor." Fam C §3183(a). A recommendation regarding child custody or visitation may be provided to the court if the child custody recommending counselor has first provided the parties and their attorneys, including counsel for any minor children, with the recommendation in writing before the hearing. Fam C §3183(a). The court must confirm that the parties received the recommendation in writing. Fam C §3183(a). Such recommendations are authorized only if written local rules permit it. Fam C §3183(a); *Marriage of Rosson* (1986) 178 CA3d 1094, 1104–1105, 224 CR 250, disapproved on other grounds in 13 C4th 25, 38 n10.

A mediator's recommendations are evidence to be weighed with all other relevant evidence in the case, and it is the court, not the mediator, who is charged with deciding the custody or visitation issues. 178 CA3d at 1104.

b. [§200.94] Mediation

The mediation process in counties that do not have local rules providing for "child custody recommending counseling" is simply referred to as "mediation." In such counties, the mediator simply reports to the court whether the parties have reached an agreement and, if there is an agreement, the mediator reports the terms of the agreement. Fam C §§3185–3186.

Some counties have adopted local rules that, subject to limited exceptions, follow a policy of strict confidentiality in custody and visitation mediation proceedings, precluding the mediator from testifying or otherwise sharing his or her report or recommendations with the court. See San Francisco Uniform Rule 11.7(C)(2)(a) (exceptions when the child is perceived as being at risk of harm and when there are threats of death or bodily harm directed at any party).

4. [§200.95] Mediator's Role

The mediator must assess the child's needs and interests to make the best effort to bring about a settlement of the custody or visitation dispute in the child's best interest as provided in Fam C §3011 (best interest factors). Fam C §3180. See also Fam C §3161(b) (agreement must be consistent with Fam C §3020 policies).

5. Mediation Procedures

a. [§200.96] Notice of Mediation and Hearing

Mediation is to be held before or concurrent with the setting of the matter for hearing. Fam C §3175. Notice of the mediation is to be given by certified mail, return receipt requested, postage prepaid, to the parties' last known address, to each party and each party's counsel of record, and, when a stepparent or grandparent is seeking visitation, to the stepparent or grandparent, each parent, and each parent's counsel of record. Fam C §3176(a), (b). Notice of mediation under Fam C §3188 must state that all communications involving the mediator must be kept confidential between the mediator and the disputing parties. Fam C §3176(c).

b. [§200.97] Confidentiality of Proceedings

Mediation proceedings are private and confidential, and all communications from the parties to the mediator made during the proceedings, whether verbal or written, are considered official information within the meaning of Evid C §1040 (official information privilege). Fam C §3177. Because the privilege under Evid C §1040 belongs to court personnel and not the parties, Fam C §3177 does not give either party a right to raise confidentiality of the mediation process to bar a mediator's testimony if a local court rule permits it. Court personnel receiving the confidential information must not make any disclosure to the public. But the official information privilege does not preclude disclosure of information if received in court under a local court rule. *Marriage of Rosson* (1986) 178 CA3d 1094, 1105, 224 CR 250, disapproved on other grounds in 13 C4th 25, 38 n10.

c. [§200.98] Limits of Agreement

The subject of mediation is limited as follows (Fam C §3178):

- When involving a contested issue of custody or visitation, the agreement must be limited to resolution of issues relating to parenting plans (how parents and other appropriate parties will share and divide their decision-making and caretaking responsibilities to protect the health, safety, welfare, and best interest of the child (Cal Rules of Ct 5.210(c)(2)), custody, visitation, or a combination of these issues.
- When a stepparent or grandparent seeks visitation, the agreement must be limited to resolving issues related to that visitation.

d. [§200.99] Interview of Child

The mediator may interview the child when the mediator deems it necessary or appropriate. Fam C §3180(a); Cal Rules of Ct 5.210(e)(3).

e. [§200.100] Issuance of Restraining Orders

Except as provided in Fam C §3188 (see §200.94), and when consistent with local court rules, the mediator may recommend that restraining orders be issued, pending the determination of the controversy, to protect the child's well-being. Fam C §3183(c).

f. [§200.101] Appointment of Counsel To Represent Child

Except as provided in Fam C §3188 (see §200.94), the mediator may make a recommendation to the court that counsel be appointed, under Fam C §§3150–3153, to represent the child. The recommendation must be accompanied by a statement of the reasons explaining why appointment of counsel is in the child's best interest. Fam C §3184.

g. Special Procedures When History of Domestic Violence Exists Between Parties

(1) [§200.102] Separate Meetings

When there has been a history of domestic violence between the parties or a Fam C §6218 protective order is in effect, the party alleging domestic violence in a written declaration under penalty of perjury or the party protected by the order may request that the Family Court Services mediator, counselor, evaluator or investigator meet with the parties separately and at separate times. Fam C §§3181(a), 3113; Cal Rules of Ct 5.215(d)(6). When appropriate, arrangements for separate sessions must protect the confidentiality of each party's times of arrival, departure, and meeting. Cal Rules of Ct 5.215(d)(6).

(2) [§200.103] Presence of Support Person

When a Fam C §6218 protective order is in effect, a support person, as defined in Fam C §6303(a), must be permitted to accompany the protected party during any mediation orientation or session, including separate mediation sessions. Fam C §6303(c). The support person's presence does not waive the confidentiality of the mediation. Fam C §6303(c).

h. [§200.104] Exclusion of Counsel or Support Person

The mediator has authority and discretion, when appropriate or necessary, to exclude counsel from the mediation proceedings. Fam C

§3182(a); see *Marriage of Slayton* (2001) 86 CA4th 653, 659, 103 CR2d 545 (exclusion of counsel from mediation sessions did not deprive parties of right to counsel when mediator subject to full cross-examination at custody hearing).

The mediator may also exclude a domestic violence support person from the mediation proceeding if the support person participates in the session, acts as an advocate in the session, or disrupts the mediation process. Fam C §§3182(b), 6303(c).

6. [§200.105] Procedure When Agreement Is Reached

When the parties reach an agreement in mediation, the mediator must report that agreement to counsel for the parties on the day of mediation or as soon thereafter as practical, but before the agreement is reported to the court. Fam C §3186(a); see also Cal Rules of Ct 5.210(e)(8)(A).

No agreement reached at mediation may be confirmed or otherwise incorporated in an order unless each party, in person or through counsel, affirms and assents to the agreement in open court or through written stipulation. Fam C §3186(b). The only exception to this is that the court may confirm or otherwise incorporate a mediation agreement in an order if a party fails to appear at a noticed hearing on the issue involved in the agreement. Fam C §3186(c).

The court is not bound by a custody or visitation agreement reached in mediation and is free to modify such an agreement at any time consistent with and subject to the legislative dictates and public policies set forth in Fam C §§3020–3032, 3040–3049, 3080–3089, and 3100–3105. See Fam C §3179.

☛ JUDICIAL TIP: Often one party will state that he or she did not consent to the provisions to the agreement allegedly reached before the mediator. On inquiry, if the court determines the differences are minor, the court can modify the agreement to reflect the true determinations of the parties. However, if the dispute is significant, the court may refer the matter for another mediation with specific instructions to the mediator to resolve the point or points that the contesting party is alleging were not part of his or her agreement.

7. [§200.106] Procedure When Agreement Is Not Reached

When no agreement is reached at mediation or agreement is reached on only some of the issues, the mediator must give the parties a written or oral description of any subsequent court procedures for resolving outstanding issues, including instructions for obtaining temporary orders. Cal Rules of Ct 5.210(e)(8)(B).

In a nonrecommending county, the mediator must inform the court in writing that no agreement was reached on the specified issues, and the court may resubmit the matter to a different mediator or must set the matter for hearing. Fam C §§3185(a), 3188(a)(4).

In a recommending county, the mediator may also add his or her recommendations to the court as to custody or visitation. Fam C §§3183, 3185(a). The mediator also may recommend that a custody investigation be conducted, under Fam C §§3110 et seq, or that other services be offered to help resolve the dispute before a hearing on the issue. Fam C §3183(b).

In all counties, if the case involves a request for visitation by a stepparent or grandparent, each natural or adoptive parent must be given an opportunity to appear and be heard on the issue. Fam C §3185(b).

8. [§200.107] Standards of Practice for Mediation

Family Code §3162 sets minimum standards for mediation practice and requires the Judicial Council to develop uniform standards of mediation practice for use throughout California. Fam C §3162(a). The Judicial Council standards are found in Cal Rules of Ct 5.210 and include:

- Training, education, and experience requirements for mediators (Cal Rules of Ct 5.210(f));
- Specific procedures to be followed by mediators in the course of mediation and in communicating with the parties (Cal Rules of Ct 5.210(d)–(e)); and
- Ethics for mediators (Cal Rules of Ct 5.210(h)).

Each court must provide mediation services that meet the above standards as well as additional standards set forth in Cal Rules of Ct 5.210(d). Each court must also develop local rules to respond to requests for a change in mediators or to general problems related to mediation. Fam C §3163.

Note: Ex parte communications are generally prohibited in legal proceedings, including between parties' counsel and mediators, or mediators and the court. See Cal Rules of Ct 5.235 and Fam C §216 for further discussion and the limited exceptions in child custody matters.

J. [§200.108] Court-Ordered Counseling for Parents and Children

The court may require the parties and child involved in a custody or visitation dispute to participate in outpatient counseling with a licensed mental health professional, or through other community programs and services that provide appropriate counseling, such as mental health or substance abuse services. Fam C §3190(a). The court may order counseling for no more than 1 year and must ascertain that the program

ordered or chosen by the court has counseling available for the designated period of time. Fam C §3190(a).

The court must make the following three findings before it orders counseling (Fam C §3190(a), (d)):

- The dispute between the parents, between one or more parents and the child, between one or more parents and another party seeking custody or visitation, or between a party seeking custody or visitation and the child poses a substantial danger to the child's best interest;
- The counseling is in the child's best interest; and
- The financial burden created by the court order for counseling does not otherwise jeopardize a party's other financial obligations.

The court must set forth in its findings the reasons why it has found the above criteria are present. Fam C §3190(d).

In determining whether a custody dispute poses a substantial danger to the child's best interest and thus requires counseling, the court must consider, in addition to any other relevant factors, any history of domestic violence, as defined in Fam C §6211, within the past 5 years between the parents or the parent and other party seeking visitation or custody with the child or between the parents or such other party and the child. Fam C §3190(b).

The court is barred from ordering the parties to return to court on completion of the counseling. Fam C §3190(e). However, any party may file a new order to show cause or motion after counseling is completed, and the court may again order counseling consistent with the above restrictions. Fam C §3190(e).

1. [§200.109] Goals of Counseling

Counseling must be specifically designed to (Fam C §3191):

- Facilitate communication between the parties regarding their minor child's best interest;
- Reduce conflict regarding custody or visitation; and
- Improve the parenting skills of each parent.

2. [§200.110] Special Procedure When History of Abuse Exists Between Parties

When there is a history of abuse by either parent against the child or by one parent against the other parent and when a protective order as defined in Fam C §6218 is in effect, the court may order the parties to participate in counseling separately and at separate times. Fam C §3192.

3. [§200.111] Cost of Counseling

The court may apportion the counseling costs as it deems appropriate if it makes a specific finding that the costs assigned to each party will not otherwise jeopardize the party's ability to meet other financial obligations. Fam C §3190(c). When separate counseling has been ordered under Fam C §3192, each party must bear his or her own costs, unless good cause is shown for a different apportionment. Fam C §3192. In such cases, the child's counseling is considered "additional child support" (Fam C §4062), and is to be apportioned accordingly. See Fam C §§4062–4063.

K. Custody Evaluation and Report

1. [§200.112] Appointment of Evaluator

In any contested custody or visitation proceeding, the court may appoint a child custody evaluator to conduct a child custody evaluation and prepare a confidential written report for the court's consideration when the court determines that an evaluation is in the child's best interests. Fam C §3111(a). A child custody evaluator may be a probation officer, a domestic relations investigator, or a court-appointed evaluator. Cal Rules of Ct 5.220(c)(1); Fam C §3110. If the parties can agree on an evaluator, the court will typically appoint that evaluator. See Cal Rules of Ct 5.220(h)(10) (evaluator may not accept appointment except by court order or parties' stipulation).

Unlike mediation, a custody evaluation is not required in all cases. In some cases, however, it may be an abuse of discretion to deny a parent's request for an independent custody evaluation, at least when it appears the parties' self-serving representations might not present the "complete picture" necessary to ascertain the child's best interest. See *Marriage of McGinnis* (1992) 7 CA4th 473, 481, 9 CR2d 182, disapproved on other grounds in 13 C4th 25, 38 n10.

See Judicial Council Form FL-327, Order Appointing Child Custody Evaluator.

2. [§200.113] Monetary Sanctions for Unwarranted Disclosure of Confidential Reports

If the court determines that an unwarranted disclosure of a written confidential report has been made, the court may impose a monetary sanction against the disclosing party. The sanction must be in an amount sufficient to deter repetition of the conduct, and may include reasonable attorney's fees, costs incurred, or both unless the court finds that the disclosing party acted with substantial justification or that other circumstances make the sanction unjust. The court must not impose a

sanction under this subdivision that imposes an unreasonable financial burden on the party. Fam C §3111(d).

See mandatory Judicial Council Form FL-328, Notice Regarding Confidentiality of Child Custody Evaluation Report.

3. [§200.114] Required Qualifications of Evaluators

All evaluators, whether appointed by stipulation or without, must have completed domestic violence and child abuse training as outlined in Fam C §1816, and have complied with training, experience, and continuing education requirements of Cal Rules of Ct 5.220, 5.225 and 5.230. Fam C §3110.5(a); Cal Rules of Ct 5.220(g). These requirements govern both court-connected and private child custody evaluators appointed under Fam C §3111; Evid C §730; or CCP §§2032.010 et seq and Cal Rules of Ct 5.220(b).

4. [§200.115] Duties of Evaluator

The evaluator must conduct a "child custody evaluation," defined in Cal Rules of Ct 5.220(c)(3) as an expert investigation and analysis of the child's health, safety, welfare, and best interest, with regard to disputed custody and visitation issues. Fam C §3111(a).

The evaluator must prepare and file a report with the court clerk and serve the report on the parties or their attorneys and any counsel appointed for the child under Fam C §3150 at least 10 days before the custody hearing. Fam C §3111(a).

The court cannot consider the evaluation report unless the evaluation was conducted in accordance with the standards set forth pursuant to Fam C §3117. Fam C §3111(a). *Note*: This provision, effective January 1, 2016, went into effect because of *Marriage of Winternitz* (2015) 235 CA4th 644, 185 CR3d 458 (no abuse of discretion where judge denied move-away request despite the evaluator's failure to follow procedure). See California Committee Report, 2015 SB 594 (May 4, 2015).

Absent waiver, the court may not act on the evaluation report and recommendations unless the parties are given the opportunity to cross-examine the evaluator. *Fewel v Fewel* (1943) 23 C2d 431, 436, 144 P2d 592. See Fam C §3117(b). Each party's right to cross-examine the evaluator may only be waived after the party or his or her attorney has received the report. Fam C §3115.

Incident to the investigation and report, a custody evaluator may recommend that independent counsel be appointed for the child. See Fam C §3114; see also discussion of appointment of counsel in §200.118.

The report may be received in evidence on stipulation of all interested parties and is competent evidence as to all matters contained in the report. Fam C §3111(c).

See mandatory Judicial Council Form FL-328, Notice Regarding Confidentiality of Child Custody Evaluation Report.

Note: Pursuant to *Leslie O. v Superior Court* (2014) 231 CA4th 1191, 180 CR3d 863, the evaluator should be removed when the totality of circumstances show bias in favor of one parent.

5. [§200.116] Investigation of Sexual Abuse Allegations

Special rules concerning custody evaluations are triggered in cases involving child sexual abuse allegations. Fam C §3118. If, in any contested proceeding involving child custody or visitation rights, the court determines there is a serious allegation of child sexual abuse, the court must order an evaluation, assessment, or investigation under Fam C §3118. But if a child abuse allegation arises in any other circumstances in a custody or visitation proceeding, the court has the discretion to order an evaluation, investigation, or assessment. Fam C §3118(a). A "serious allegation of child sexual abuse" means an allegation based in whole or in part on statements made by the child to law enforcement, a child welfare services agency investigator, any person deemed a mandated reporter, or any other court-appointed personnel, or an allegation that is supported by substantial independent corroboration under Fam C §3011(b). Fam C §3118(a).

The provisions of Fam C §3118 do not apply to any emergency court-ordered partial investigation that is conducted for the purpose of helping the court determine what immediate temporary orders may be necessary to protect and meet the child's immediate needs, but it does apply when the emergency is resolved and the court is considering permanent child custody or visitation orders. Fam C §3118(a)(1).

The provisions of Fam C §3118 do not prohibit a court from considering evidence relevant to determining the child's safety and protection needs. Fam C §3118(a)(2).

On ordering a Fam C §3118 evaluation, investigation, or assessment, the court must consider (a) whether the child's best interest requires issuance of a temporary order requiring supervised visitation with the party against whom the allegations have been made, or (b) suspending or denying visitation outright. Fam C §3118(f).

Note: As written, Fam C §3118 comes into play when an evaluation was already ordered. However, under Fam C §3111 the court can order evaluation where it appears it is in the child's best interest. So if no evaluation has been ordered but abuse is suspected, it is in the child's best interest to order evaluation (Fam C §3111) conducted pursuant to Fam C §3118.

6. [§200.117] Cost of Investigation

The court must inquire into the financial condition of the parent, guardian, or other person charged with the support of the minor. If the court finds that the parent, guardian, or other person charged with the support of the minor is able to pay all or a portion of the expenses of the investigation, report, and recommendation, the court may make an order for that person to repay the court an amount it deems proper. Fam C §3112.

L. Appointment of Counsel for the Child

1. [§200.118] Request for Appointment

The court may appoint private counsel to represent the child's interests in a custody or visitation proceeding if the court determines that it would be in the child's best interest; the court and counsel must comply with the requirements set forth in Cal Rules of Ct 5.240, 5.241, and 5.242. Fam C §3150(a). The court may appoint counsel to represent the best interest of a child on the court's own motion or if requested to do so by (Cal Rules of Ct 5.240(b)):

- A party;
- The attorney for a party;
- The child or any relative of the child;
- A mediator;
- A custody evaluator;
- A court-appointed guardian ad litem or special advocate;
- A county counsel, district attorney, city attorney, or city prosecutor authorized to prosecute child abuse and neglect or child abduction cases under state law; or
- Any other person who the court deems appropriate.

The court must issue written orders when appointing and terminating counsel for a child. Cal Rules of Ct 5.240(c).

2. [§200.119] Factors for Court To Consider

In determining whether to appoint counsel to represent a child under Fam C §3150, the court should consider the following factors, as set forth in Cal Rules of Ct 5.240(a):

- Whether the issues of child custody and visitation are highly contested or protracted;

- Whether because of the dispute, the child is subjected to stress that might be alleviated by the intervention of counsel representing the child;
- Whether an attorney representing the child would be likely to provide the court with relevant information not otherwise readily available or likely to be presented;
- Whether the dispute involves allegations of physical, emotional, or sexual abuse or neglect of the child;
- Whether it appears that one or both parents are incapable of providing a stable, safe, and secure environment;
- Whether counsel is available for appointment who is knowledgeable about the issues being raised regarding the child in the proceeding;
- Whether the child's best interest appears to require independent representation; and
- Whether any child would require separate counsel to avoid a conflict of interest if there are two or more children.

3. [§200.120] Duties and Rights of Appointed Counsel

The child's counsel's role is to gather evidence that bears on the child's best interests and present that admissible evidence to the court, including the child's wishes if the child desires. Fam C §3151(a).

☛ JUDICIAL TIP: Under Fam C §3151(a), the child's attorney *must* report the child's wishes to the court, if the child desires.

The counsel's duties include interviewing the child, reviewing the court files and all accessible relevant records available to both parties, and making any further investigations as the counsel considers necessary to ascertain evidence relevant to the custody or visitation hearing. Fam C §3151(a).

The rights of a child's counsel include, among others (Fam C §3151(c)):

- Reasonable access to the child;
- Standing to seek affirmative relief on the child's behalf;
- Notice of all proceedings;
- Right to take any action available to a party to the proceeding;
- Access to the child's health and education records and to interview persons involved in the child's education, health care, and caretaking;
- Right to assert or waive any privilege on the child's behalf;

- Right to seek independent physical or psychological examination or evaluation of the child, with the court's approval; and
- The right to reasonable advance notice of and the right to refuse any physical or psychological examination or evaluation, for purposes of the proceeding that has not been court-ordered.

On the rights and responsibilities of counsel for a child, see also Cal Rules of Ct 5.242(i)–(k).

☛ JUDICIAL TIP: It is not uncommon for zealous parents to misunderstand or resist the efforts and rights of a child's counsel to represent the child independently. To reduce confusion, conflict and delay, judicial officers often make express orders regarding the rights of child's counsel at the time of appointment.

4. [§200.121] Cost of Appointed Counsel

Appointed counsel is to receive reasonable attorney's fees and costs, paid for by the parties and allocated as the court deems appropriate. Fam C §3153(a); Cal Rules of Ct 5.241. "Parties" who may be liable for these fees include third parties joined on custody and visitation issues, but that responsibility is limited to the fees and costs incurred as a result of the third party's custody and visitation claims. *Marriage of Perry* (1998) 61 CA4th 295, 309, 71 CR2d 499. If the court determines the parties together are financially unable to pay all or a portion of the cost of counsel, the county is to pay that portion the parties are unable to afford. Fam C §3153(b). See also Govt C §77003(a)(4).

☛ JUDICIAL TIP: Because counties have different procedures for controlling the costs of court-appointed counsel, judicial officers must familiarize themselves with the procedures in their county.

M. [§200.122] Appointing Referee

On the agreement of the parties, or on the court's own motion, a referee may be appointed to hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision, or to ascertain a fact necessary to enable the court to determine an action or proceeding. CCP §§638(a), (b), 639.

☛ JUDICIAL TIP: Consult with your presiding judge on your court's use of this practice.

N. Child Abduction Prevention

1. [§200.123] Determining Risk of Abduction

In cases in which the court becomes aware of facts that may indicate that there is a risk of abduction of a child, the court must, either on its own motion or at the request of a party, determine whether measures are needed to prevent the child's abduction by one parent. Fam C §3048(b)(1). To make that determination, the court must consider the risk of the child's abduction, obstacles to location, recovery, and return if the child is abducted, and potential harm to the child if he or she is abducted. To determine whether there is a risk of abduction, the court must consider whether a party (Fam C §3048(b)(1)):

- Has previously taken, enticed away, kept, withheld, or concealed a child in violation of the right of custody or of visitation of a person, or whether a party has threatened to do any of the foregoing.
- Lacks strong ties to California.
- Has strong familial, emotional, or cultural ties to another state or country, including foreign citizenship. This factor must be considered only if evidence exists in support of another factor specified in Fam C §3048.
- Has no financial reason to stay in California, including whether the party is unemployed, is able to work anywhere, or is financially independent.
- Has engaged in planning activities that would facilitate the removal of a child from California, including quitting a job, selling his or her primary residence, terminating a lease, closing a bank account, liquidating other assets, hiding or destroying documents, applying for a passport, applying to obtain a birth certificate or school or medical records, or purchasing airplane or other travel tickets, with consideration given to whether a party is carrying out a safety plan to flee from domestic violence.
- Has a history of a lack of parental cooperation or child abuse, or there is substantial evidence that a party has perpetrated domestic violence.
- Has a criminal record.

Family Code §3048(b)(1) does not affect the applicability of Pen C §278.7 that immunizes persons with a right to custody from the crime of taking, enticing away, keeping, or concealing a child, when that person has a reasonable belief that the child will suffer immediate bodily injury or emotional harm if left with the other parent. Fam C §3048(d).

2. [§200.124] Preventive Measures

If the court makes a finding that there is a need for preventive measures after considering the factors in Fam C §3048(b)(1) (see §200.118), the court must consider taking one or more of the following actions to prevent the child's abduction (Fam C §3048(b)(2)):

- Ordering supervised visitation.
- Requiring a parent to post a bond in an amount sufficient to serve as a financial deterrent to abduction, the proceeds of which may be used to offset the cost of the child's recovery if there is an abduction.
- Restricting the right of the custodial or noncustodial parent to remove the child from the county, California, or the United States.
- Restricting the right of the custodial parent to relocate with the child, unless the custodial parent provides advance notice to, and obtains the written agreement of, the noncustodial parent, or obtains the court's approval, before relocating with the child.
- Requiring the surrender of passports and other travel documents.
- Prohibiting a parent from applying for a new or replacement passport for the child.
- Requiring a parent to notify a relevant foreign consulate or embassy of passport restrictions and to provide the court with proof of that notification.
- Requiring a party to register a California order in another state as a prerequisite to allowing a child to travel to that state for visits, or to obtain an order from another country containing terms identical to the custody and visitation order issued in the United States (recognizing that these orders may be modified or enforced under the laws of the other country), as a prerequisite to allowing a child to travel to that country for visits.
- Obtaining assurances that a party will return from foreign visits by requiring the traveling parent to provide the court or the other parent or guardian with any of the following:
  - The child's travel itinerary.
  - Copies of round trip airline tickets.
  - A list of addresses and telephone numbers where the child can be reached at all times.
  - An open airline ticket for the left-behind parent in case the child is not returned.

- Including provisions in the custody order to facilitate use of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (Fam C §§3400 et seq) and the Hague Convention on the Civil Aspects of International Child Abduction (implemented under 22 USC §§9001 et seq (formerly 42 USC §§11601 et seq)) such as identifying California as the child's home state or otherwise defining the basis for the California court's exercise of jurisdiction under the UCCJEA, identifying the United States as the child's country of habitual residence under the Hague Convention, defining custody rights under the Hague Convention, obtaining the express agreement of the parents that the United States is the child's country of habitual residence, or that California or the United States is the most appropriate forum for addressing custody and visitation orders.
- Authorizing the assistance of law enforcement.

If the court imposes any or all of the conditions listed in Fam C §3048(b)(2), those conditions must be specifically noted on the minute order of the court proceedings. Fam C §3048(b)(3). If the court determines that there is a risk of abduction that is sufficient to warrant the application of one or more preventive measures authorized by Fam C §3048, the court must inform the parties of the telephone number and address of the Child Abduction Unit in the office of the district attorney in the county where the custody or visitation order is being entered. Fam C §3048(b)(4). See Judicial Council Forms FL-312, Request for Child Abduction Prevention Orders, adopted for mandatory use, and FL-341(B), Child Abduction Prevention Order Attachment.

O. Missing Party or Child

1. [§200.125] Missing Party in Possession of Child

The district attorney of each county is authorized to find a missing party in possession of a child under California's statutory scheme. Fam C §§3130–3135.

If the whereabouts of a party in possession of a child are not known or if there is reason to believe a party ordered to appear personally with a child will not appear, and a petition to determine custody has been filed in a court of competent jurisdiction or a temporary order has issued, the district attorney must take all necessary actions to find the party and the child and procure compliance with the order to appear. Fam C §3130. The district attorney may even file the petition to determine custody. Fam C §3130.

In performing these functions, the district attorney does not represent any party to the custody proceeding, but acts on the court's behalf. Fam C §3132.

2. [§200.126] Child Taken or Detained

The district attorney must take all actions necessary to find a party who has taken or detained a child in violation of a custody or visitation order and return the child and violator and help enforce the custody or visitation order by use of an appropriate civil or criminal proceeding. Fam C §3131.

In performing these functions, the district attorney does not represent any party to the custody proceeding but acts on the court's behalf. Fam C §3132.

3. [§200.127] Temporary Custody Orders

The district attorney may request a temporary custody order when necessary to recover a child who has been concealed or detained in violation of a court order and may recommend that a parent or other person be the party given sole temporary custody to facilitate the child's return to the court's jurisdiction. Fam C §3133. If the court determines that it is not in the child's best interest to be placed in the sole temporary custody of the parent or other party recommended by the district attorney, the court must appoint a person to take charge of the child and return the child to the court's jurisdiction. Fam C §3133.

In addition, the court may issue a protective custody warrant for an unlawfully detained or concealed child if the district attorney presents an affidavit under penalty of perjury that such a warrant is necessary for the district attorney to perform the duties listed in Fam C §§3130 and 3131. Fam C §3134.5(a). The protective custody warrant may also contain an order to freeze the California assets of the party alleged to be in possession of the child. Fam C §3134.5(a). The warrant can be dismissed without further court proceedings on the district attorney's declaration that the child has been recovered or the warrant is no longer necessary. Fam C §3134.5(b). On noticed motion, any order to freeze assets may be terminated, modified, or vacated by the court on a finding that the release of assets will not jeopardize the child's safety or best interest. Fam C §3134.5(c). If an asset freeze order is entered and the court subsequently dismisses the warrant, notice of the dismissal must be immediately served on the depository institutions holding any assets under the freeze order. Fam C §3134.5(d).

The district attorney's authority to act under Fam C §§3130–3134.5 is not limited by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (Fam C §§3400 et seq). Fam C §3135.

4. [§200.128] Costs Incurred by District Attorney

If appropriate, the court must order one or both parties to the proceedings to reimburse the district attorney for actual expenses incurred in finding a missing party or child. Fam C §3134(b).

5. [§200.129] National Crime Information Center Missing Person System

If one or both parents of a child have not appeared in a case, the court, before granting or modifying a custody order, must require the parent or petitioner to submit a certified copy of the child's birth certificate to the court. Fam C §3140(a). The court must then forward the certified copy to the local police or sheriff department, which must check with the National Crime Information Center Missing Person System to ascertain whether the child has been reported missing or is the victim of an abduction. Fam C §3140(a). The law enforcement agency must report the results of the check to the court. Fam C §3140(a).

The purpose of this requirement is to assure the court that the party petitioning for custody or modification of custody has not abducted the child in violation of an existing court order.

The missing person check is not required if the custody matter before the court also involves a petition for dissolution of marriage or the adjudication of paternity rights or duties and there is proof of personal service of the petition on the absent parent. Fam C §3140(b).

In addition, the court may waive the requirement of Fam C §3140 for good cause. Fam C §3140(c).

P. [§200.130] Modification of Custody

Family Code §3022 provides that the court may, during the pendency of a proceeding, or at any time thereafter, make such orders for the custody of a child during minority as may be necessary or proper. See also Fam C §§3087–3088. Parents cannot, by stipulation, divest the court of jurisdiction to modify custody and visitation orders. *Marriage of Goodarzirad* (1986) 185 CA3d 1020, 1026, 230 CR 203.

Even if a spouse defaults on a judgment that awards custody and visitation, he or she still has standing to file a motion for modification without first obtaining relief from the default judgment. See *Marriage of Olson* (2015) 238 CA4th 1458, 190 CR3d 715.

For a discussion of the jurisdictional requirements for modification of custody orders, see §§200.42–200.46. For discussion of modification of custody based on the custodial parent's intent to relocate with the child to a new residence, see §§200.140–200.144.

☛ JUDICIAL TIP: Parties must serve and file with the court an address verification form if the request for postjudgment modifications of custody, visitation or support orders is served by mail on the other parent. See Fam C §215 and Judicial Council Form FL-334, Declaration Regarding Address Verification—Postjudgment Request to Modify A Child Custody, Visitation, or Child Support Order.

1. [§200.131] Showing of Changed Circumstances

To justify a change in custody other than in a temporary custody arrangement (see §200.133), there must generally be a persuasive showing of changed circumstances affecting the child. The change of circumstances must be substantial; a child will not be removed from the prior custody of one parent and given to the other unless the material facts and circumstances occurring subsequently are of a kind to render it essential or expedient for the child's welfare that there be a change. *Marriage of Burgess* (1996) 13 C4th 25, 37–38, 51 CR2d 444; *Marriage of Carney* (1979) 24 C3d 725, 730, 157 CR 383. The rule serves the goals of judicial economy and protecting stable custody arrangements. *Burchard v Garay* (1986) 42 C3d 531, 535, 229 CR 800; *Marriage of Carney*, *supra*, 24 C3d at 730–731. The burden of showing a sufficient change in circumstances is on the party seeking the change in custody. 24 C3d at 731; *Speelman v Superior Court* (1983) 152 CA3d 124, 129, 199 CR 784. See *Marriage of Dunn* (2002) 103 CA4th 345, 347–349, 126 CR2d 636 (party entitled to formal court hearing on contested facts relating to the alleged change of circumstances).

Although an alteration of legal custody may not necessarily be as disruptive as an alteration of physical custody, the rule requiring a change of circumstances applies even when a party is only seeking to change legal custody. *Marriage of McLoren* (1988) 202 CA3d 108, 111, 247 CR 897. However, changes in the parenting schedule, affecting the timeshare with each parent, do not normally require such a showing. See §200.133.

Note: The trial court should not isolate particular circumstances and declare them determinative of a finding of changed circumstances that would warrant a change of custody. In *Anne H. v Michael B.* (2016) 1 CA5th 488, 204 CR3d 495, a trial court judge making a custody order noted that if the mother's family members moved from the area where custodial father resided it could constitute changed circumstances for change of custody. This dicta was not binding on a different judge who considered mother's request for modification.

2. [§200.132] Requirement of a Prior Determination

The changed circumstance rule applies only when there has been a final judicial determination of custody whether established by the parties' agreement, default judgment, or litigation. *Montenegro v Diaz* (2001) 26 C4th 249, 256, 109 CR2d 575; *Burchard v Garay* (1986) 42 C3d 531, 535, 229 CR 800.

A custody order stipulated by the parties is a final judicial determination of custody for purposes of the changed circumstance rule only if there is a clear, affirmative indication that the parties intended that result. *Montenegro v Diaz, supra*, 26 C4th at 256–259 (orders including detailed visitation schedules and not providing for further hearings did not constitute final judicial custody determinations, when they did not clearly state they were final judgments on custody, and the parties' conduct following entry of orders strongly suggested they did not intend orders to be final); *Marriage of Rose & Richardson* (2002) 102 CA4th 941, 950–953, 126 CR2d 45 (judgment reciting that the parties would meet with a therapist or counselor to resolve custody and visitation issues and, if unsuccessful, would make appointment with Conciliation Court before filing a request for hearing, was not intended to be final custody determination).

3. [§200.133] When Changed Circumstance Rule Does Not Apply

The changed circumstance rule does not apply to a temporary custody arrangement that has been implemented under a pendente lite stipulation, request for order or order to show cause, or pretrial order. In such cases, the court may award custody to the noncustodial parent if it determines that it is in the child's best interest regardless of whether circumstances have changed. *Marriage of Lewin* (1986) 186 CA3d 1482, 1485–1489, 231 CR 433.

The rule also does not apply to a modification of the time-share schedule under a joint physical custody order. Modification of a coparenting residential arrangement, without modifying the order for joint physical custody, is not considered a change of custody. *Marriage of Birnbaum* (1989) 211 CA3d 1508, 1513, 260 CR 210.

Nor does it apply to requests made to a family court for modification of a time-share schedule made in a final judgment of a dependency court. A substantial change of circumstances is required for modification of the dependency court orders. *Heidi S. v David H.* (2016) 1 CA5th 1150, 1164, 205 CR3d 335.

Q. [§200.134] Change of Child's Residence ("Move-Aways")

Move-away cases are among the most difficult and heart-wrenching decisions for a family law judicial officer. As noted by the California Supreme Court in the seminal case of *Marriage of LaMusga* (2004) 32 C4th 1072, 1091, 12 CR3d 356, "The difficulty of the task facing the courts in these matters is exemplified by the quandary posed in *In re Marriage of Abargil* (2003) 106 CA4th 1294, 131 CR2d 429, which the Court of Appeal correctly observed would challenge the wisdom of King Solomon."

The Supreme Court in *LaMusga* quoted another Court of Appeal decision which summarized the all-too-frequent challenge of these cases, "Unfortunately where, as here, both parents are competent and loving, there is frequently no solution that is fair to everyone involved." *Marriage of LaMusga*, *supra*, 32 C4th at 1091, quoting *Marriage of Bryant* (2001) 91 CA4th 789, 794, 110 CR2d 791 (rejected on other grounds in 32 C4th 1072, 1099–1100).

1. [§200.135] Standards for Custody Determination in Move-Away Cases

In a series of decisions, the California Supreme Court has set forth the standards for resolving custody disputes involving a move-away by one parent. *Marriage of Burgess* (1996) 13 C4th 25, 51 CR2d 444; *Marriage of LaMusga* (2004) 32 C4th 1072, 12 CR3d 356; *Marriage of Brown & Yana* (2006) 37 C4th 947, 38 CR3d 610. These standards vary depending upon the custodial circumstances of the parties and children.

See also Appendix A: Move-Away Flow Chart.

a. [§200.136] Joint Physical Custody

In circumstances of joint custody pursuant to temporary orders or upon the making of initial orders, a request by one parent to move away with a child is to be decided according to the basic rule for determining custody, that is, the best-interest-of-the-child standard. *Marriage of Burgess* (1996) 13 C4th 25, 40 n12, 51 CR2d 444 (when parents share joint physical custody "[t]he trial court must determine de novo what arrangement for primary custody is in the best interest of the minor children"); *Mark T. v Jamie Z.* (2011) 194 CA4th 1115, 1124, 124 CR3d 200 ("[w]here, as here, a parent who shares joint custody of a minor makes a request to relocate the child in the context of an initial custody determination, the trial court must decide de novo what physical custody arrangement would be in the child's best interests"); see also Fam C §3087.

The de novo/best-interest-of-the-child standard also applies in the case of a move-away request by a party sharing joint physical custody

pursuant to a final judgment, according to the majority opinion in *Niko v Foreman* (2006) 144 CA4th 344, 50 CR3d 398. A vigorous dissent argues, however, that the change-of-circumstances rule should apply because of the policies favoring finality of judgments and stability of custodial arrangements. *Niko v Foreman, supra*, 144 CA4th at 370.

b. [§200.137] Sole Physical Custody

A more rigorous standard applies to a challenge by a noncustodial parent to a move-away proposed by a parent having sole physical custody. "[T]he noncustodial parent bears the initial burden of showing that the proposed relocation of the children's residence would cause detriment to the children, requiring a reevaluation of the children's custody." *Marriage of LaMusga* (2004) 32 C4th 1072, 1078, 12 CR3d 356. "If the noncustodial parent makes the required initial showing of detriment, the court is then obligated to 'perform the delicate and difficult task of determining whether a change in custody is in the bests interests' of the child." *Marriage of Brown & Yana* (2006) 37 C4th 947, 960, 38 CR3d 610.

A showing that the proposed move will cause detriment to the relationship between the children and the noncustodial parent does not mandate a change in custody. Rather, such a showing then triggers consideration of the childrens' best interests. *Marriage of LaMusga, supra*, 32 C4th at 1094–1095. In other words, unlike consideration of a move-away in a case of joint custody where the court in the first instance determines the child's best interest, the court in a case of sole physical custody considers the child's best interest only if the noncustodial parent makes an initial showing of detriment to the child caused by the move-away.

The noncustodial parent has the initial burden of showing detriment because of "the presumptive right of a custodial parent to change the residence of the minor children, so long as the removal would not be prejudicial to their rights or welfare." *Marriage of Burgess* (1996) 13 C4th 25, 32, 51 CR2d 444, citing Fam C §7501 ("A parent entitled to custody of a child has a right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child.") Moreover, the policy concern "for continuity and stability in custody arrangements—and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker" requires a showing of changed circumstances whenever a parent seeks modification of an established custody arrangement or final custody order. *Marriage of Brown & Yana, supra*, 37 C4th at 956. Changed circumstances arises in the context of a move-away where the relocation would be detrimental to the child's rights or welfare.

Notably, and as the foregoing indicates, the presumptive right of a parent entitled to sole physical custody to move away with the child is not absolute. "[T]he noncustodial parent opposing the relocation may seek and obtain a custody modification based on a proper showing pursuant to the changed circumstance rule." *Marriage of Brown & Yana*, *supra*, 37 C4th at 959.

If detriment is shown in a particular case, the trial court has "wide discretion" to choose a parenting plan in the child's best interest. *Marriage of Brown & Yana*, *supra*, 37 C4th at 961; *Marriage of LaMusga*, *supra*, 32 C4th at 1095, 1097. The showing of detriment must be particular to the child or children and not merely abstract differences in the communities involved. *Marriage of Brown & Yana*, *supra*, 37 C4th at 964. While the mere change of residence does not automatically constitute detriment,

> [t]he likely consequences of a proposed change in the residence of a child, when considered in the light of all the relevant factors, may constitute a change of circumstances that warrants a change in custody, and the detriment to the child's relationship with the noncustodial parent that will be caused by the proposed move, when considered in light of all the relevant factors, may warrant denying a request to change the child's residence or changing custody.

Marriage of LaMusga, *supra*, 32 C4th at 1097.

c. [§200.138] Sole or Joint Custody in a Move-Away Case

"Joint physical custody" means that each parent is to have significant periods of physical custody. It must be shared by the parents in such a way that the child is assured of frequent and continuing contact with both parents. Fam C §3004.

A de novo determination is required even when the parent who wishes to relocate was awarded primary physical custody under an existing custody order, but the parents worked out an actual joint physical custody arrangement. *Marriage of Burgess* (1996) 13 C4th 25, 40 n12, 51 CR2d 444; *Brody v Kroll* (1996) 45 CA4th 1732, 1736–1737, 53 CR2d 280. The de novo consideration rule is triggered only if the parents in substance genuinely shared joint physical custody for significant periods of time. *Marriage of Whealon* (1997) 53 CA4th 132, 137, 142, 61 CR2d 559.

Case law provides some guidance on differentiating actual joint physical custody from sole custody with liberal visitation:

- Joint physical custody: Parent with whom the children do not reside sees them four to five times a week. *Brody v Kroll*, *supra*.
- Joint physical custody: Children shuttle back and forth between parents spending equal time with each parent. *Marriage of*

Whealon, supra (citing *Marriage of Battenburg* (1994) 28 CA4th 1338, 1342, 33 CR2d 871).

- Sole custody with mother: Father has children 20 percent of time (alternate weekends and 2 weekday evenings for dinner). *Marriage of Lasich* (2002) 99 CA4th 702, 715, 121 CR2d 356, rejected on other grounds in 32 C4th 1072, 1097.
- Sole custody with mother: Father has children 30 percent of time (Thursday evening to Friday morning, alternate extended weekends from Friday evening to Monday morning). *Marriage of Biallas* (1998) 65 CA4th 755, 760, 76 CR2d 717.

☛ JUDICIAL TIP: When a parent has a time-share of 45 percent or more, courts generally characterize the parenting arrangement as joint custody. If the parent's time-share is less than 30 percent, courts will generally find that sole custody resides with the other parent. In custody situations when the parent has more than 30 percent visitation but clearly less than equal time with the primary custodial parent, the court may look to other factors to determine whether, in fact, the parties have a joint custodial type of arrangement, *e.g.*, parent visits during the week to help the child with homework, and participation in health and doctor visits, education conferences, or extracurricular activities, over and above the parent's clearly designated custody time.

d. [§200.139] No Final Custody Determination

In the absence of final custody orders, it has been held in different contexts that the parent opposing the move-away does not have a burden to show detriment to the child and that the best interest standard applies. In *Keith R. v Superior Court* (2009) 174 CA4th 1047, 1054, 96 CR3d 298, the court held that the best interest standard applied where the only existing custody orders were made in a case under the Domestic Violence Prevention Act because orders in such a case are not a permanent custody determination. "The changed circumstances rule articulated in *Burchard* and *Burgess* does not apply because there has not yet been a final judicial custody determination. . . . [A] domestic violence finding in a family law case changes the burden of persuasion as to the best interest test, but it does not limit the evidence cognizable by the court, and it does not eliminate the best interest requirement." *Keith R. v Superior Court, supra*. In *Ragghanti v Reyes* (2004) 123 CA4th 989, 20 CR3d 522, the court held that the best interest standard applied where no final custody determination had been made although the child had lived primarily with one parent for a significant period of time. Accord *F.T. v L.J.* (2011) 194 CA4th 1, 123 CR3d 120.

e. [§200.140] Motive or Reason for the Move-Away

Many experienced family law judges believe that a finding that a reason for the move constitutes bad faith is grounds alone for denying permission for the children to relocate. The Supreme Court has observed, however, that "[a]bsolute concepts of good faith versus bad faith often are difficult to apply because human beings may act for a complex variety of sometimes conflicting motives." *Marriage of LaMusga* (2004) 32 C4th 1072, 1100, 12 CR3d 356. It is certainly the law that "'[c]onduct by a custodial parent designed to frustrate visitation and communication may be grounds for changing custody,'" *Marriage of Burgess* (1996) 13 C4th 25, 36 n6, 51 CR2d 444, quoting *Burchard v Garay* (1986) 42 C3d 531, 540 n11, 229 CR 800. More recently the Court of Appeals in *Mark T. v Jamie Z.* (2011) 194 CA4th 1115, 1131, 124 CR3d 200 stated, in what may be dicta, that "even where the court finds that a move-away request is being made in bad faith, the court must view this finding as only one potential factor in deciding whether to allow the child's residence to be moved."

It should also be noted that a parent seeking to relocate has no burden of establishing that the move is "necessary." *Marriage of Burgess, supra*, 13 C4th at 34.

f. [§200.141] Assumption That Parent Will Move

In deciding whether to change custody as a result of a proposed move-away, the trial court must assume that the relocation will occur. "The question for the trial court is not whether the parent may be *permitted* to move; the question is what arrangement for custody should be made [if and when the parent moves]." *Ruisi v Thieriot* (1997) 53 CA4th 1197, 1205–1206, 62 CR2d 766 (citation omitted, emphasis in original); see also *Brody v Kroll* (1996) 45 CA4th 1732, 1736, 53 CR2d 280. "The court must decide de novo what physical custody arrangement would be in the child's best interests, assuming that the requesting parent will relocate." *Mark T. v Jamie Z.* (2011) 194 CA4th 1115, 1127, 124 CR3d 200 (emphasis omitted).

g. [§200.142] Best Interest Factors

The court should consider the following factors, among others, when deciding whether to modify a custody order in response to a custodial parent's request to change the child's residence (*Marriage of LaMusga* (2004) 32 C4th 1072, 1101, 12 CR3d 356):

- The child's interest in stability and continuity in the custodial arrangement;
- The distance of the move;

- The child's age;
- The child's relationship with both parents;
- The relationship between the parents including, but not limited to, their ability to communicate and cooperate effectively and their willingness to put the child's interests above their individual interests;
- The child's wishes, if the child is mature enough for such an inquiry to be appropriate;
- The reasons for the proposed move; and
- The extent to which the parents currently are sharing custody.

In *Burgess*, the Supreme Court also indicated that the following considerations were relevant in a move-away case (*Marriage of Burgess* (1996) 13 C4th 25, 39, 51 CR2d 444):

- The child's circle of friends;
- The child's particular sports or academic activities within a school or community;
- The child's community ties;
- The nature of the child's exiting contact with both parents, including de facto as well as de jure custody arrangements; and
- The child's health and educational needs.

In the context of a move-away, it has been held that siblings may be separated only upon a finding of compelling circumstances. *Marriage of Williams* (2001) 88 CA4th 808, 105 CR2d 923.

2. [§200.143] Procedure in a Move-Away Case

Family Code §3024 provides that in making custody orders a court may, if not inappropriate, require a parent to notify the other parent in advance of a proposed move-away. The notice is to be given, to the extent feasible, at least 45 days before the proposed change of the child's residence.

A meaningful hearing is required before any judicial determination regarding an out-of-state move-away request for parents who share joint legal and physical custody pursuant to a final judicial custody order. A trial court erred in allowing a "temporary" move-away before conducting a meaningful hearing. *Andrew V. v Superior Court* (2015) 234 CA4th 103, 183 CR3d 517.

Marriage of McGinnis (1992) 7 CA4th 473, 481, 9 CR2d 182, held that "an order changing custody should be made only after adequate notice, a meaningful mediation, and the parents have been given the opportunity for an outside evaluation." It should be noted that the

McGinnis decision was disapproved in *Marriage of Burgess* (1996) 13 C4th 25, 38 n10, 51 CR2d 444, with respect to the burden of proof upon a parent seeking to move away with the children.

A noncustodial parent who opposes a move-away does not have "an absolute right to an evidentiary hearing for purposes of establishing detriment to a child or determining the best interest of a child." *Marriage of Brown & Yana* (2006) 37 C4th 947, 965, 38 CR3d 610. "Where . . . a trial court in a move-away case diligently inquires into the matter of detriment in a formal court hearing, and duly considers the noncustodial parent's claims, evidence, and offers of proof but properly finds them insufficient to establish the detriment required for a custody modification under the changed circumstance rule, the court does not err or abuse its discretion in denying custody modification without taking the further step of holding an evidentiary hearing with live testimony" or ordering a custody evaluation. *Marriage of Brown & Yana, supra*.

A judgment or order "allowing, or eliminating restrictions against, removal of the minor child from the state are stayed by operation of law . . . for a period of 30 calendar days from the entry of judgment or order . . . ." CCP §917.7. There no exemption to CCP §917.7 because the move-away order is denominated "temporary" or "interim." *Andrew V. v Superior Court, supra,* 234 CA4th at 108–109.

3. [§200.144] Conditions in a Move-Away Order

The statutory policy encouraging frequent and continuing contact with both parents (Fam C §3020(b)) should be considered by the court in all move-away cases. In leaving custody with the move-away parent, the court may accommodate Fam C §3020(b) as illustrated by the following examples:

- Ordering more liberal visitation, including expanding school-vacation visitation (*Marriage of Burgess* (1996) 13 C4th 25, 40, 51 CR2d 444);
- Ordering the moving parent to bring the child back to California on a monthly basis (*Marriage of Whealon* (1997) 53 CA4th 132, 139, 61 CR2d 559);
- Ordering four blocks of time-share in California, totaling 78 days, to coincide with the children's school holidays in Australia (*Marriage of Condon* (1998) 62 CA4th 533, 552, 73 CR2d 33);
- Awarding 10-weeks-per-year visitation in California, plus a right to visit the children in New Mexico for as many weekends as the noncustodial parent desires, in addition to visiting the children for their birthdays (*Marriage of Bryant* (2001) 91 CA4th 789, 793,

794, 110 CR2d 791, rejected on other grounds in 32 C4th 1072, 1099–1100);

- Ordering custodial mother moving to Spain to pay for the children's visits to California 3 times a year, to finance father's 2-week visitation in Spain, and to provide for computer equipment to encourage internet communications and video-conferencing between the father and children (*Marriage of Lasich* (2002) 99 CA4th 702, 711, 121 CR2d 356, rejected on other grounds in 32 C4th 1072, 1097);
- Allocating visitation transportation expense to the custodial parent (*Marriage of Burgess, supra*); and
- Requiring custodial parent to provide transportation of the children to the noncustodial parent's home (*Marriage of Burgess, supra*).

☛ JUDICIAL TIP: Determining the primary custody of the child when the parents have moved away from each other is not the end of the court's obligation. Cases beginning from *Burgess* through its progeny challenge the attorney/litigants and the courts to fashion post-move-away custody orders that maintain the parent-child relationship with the noncustodial parent.

R. [§200.145] Calendar Preference

If custody is the sole contested issue in a case, the case must be given preference over other civil cases (except for matters to which special precedence may be given by law), for assigning a trial date, and the case must be given an early hearing. Fam C §3023(a). If there are other contested issues in addition to custody, the court must order a separate trial on the custody issue. The separate trial must be given preference for assigning a trial date as described under Fam C §3023(a). Fam C §3023(b).

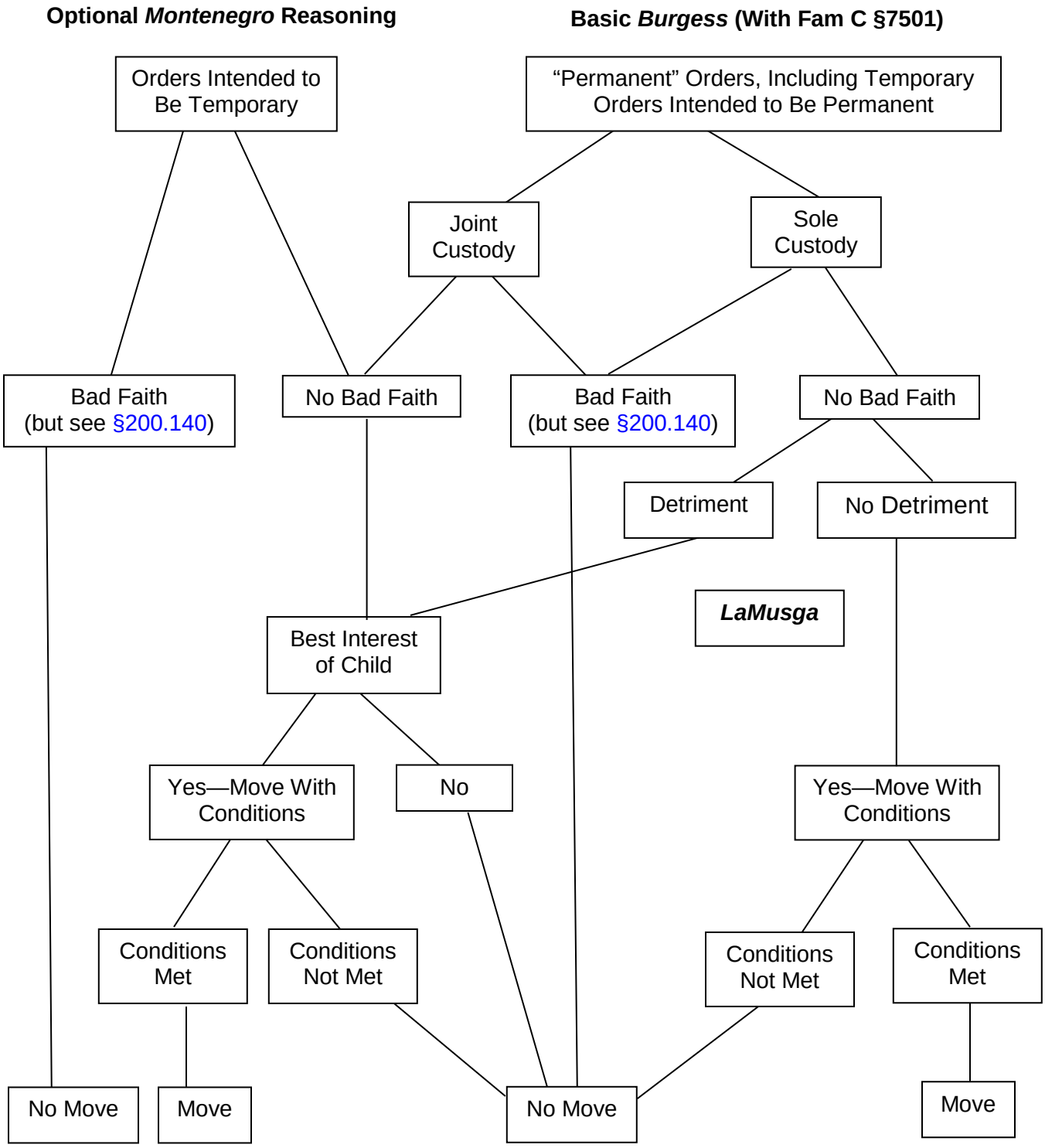
S. [§200.146] Termination of Custody Order

A custody order terminates when:

- The child reaches 18 years of age (Fam C §3022);
- The child becomes emancipated by entering into a valid marriage, is on active duty with the United States armed forces, or has received a declaration of emancipation under Fam C §7122 (Fam C §§7002, 7050(b)); or
- The child or custodial parent dies. See *Guardianship of Donaldson* (1986) 178 CA3d 477, 485–486, 223 CR 707 (when father died, mother entitled to sole custody of children whose custody had been granted to father in marital dissolution action). Fam C §3010(b).

Appendix A: Move-Away Flow Chart

Prepared by Hon. James M. Mize, County of Sacramento



Adapted from diagram by Sasha Sellers
Woodruff, O'Hair & Posner, Inc.

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Appendix B: International Custody Enforcement: Hague Convention

The Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention) is a treaty providing a civil mechanism for seeking return of children under age 16 wrongfully removed from or retained outside their country of "habitual residence." The Hague Convention has been adopted by the United States through the federal International Child Abduction Remedies Act (ICARA), 22 USC §9001 et seq. The Hague Convention remedies are only available when both the country to which the child was taken or retained and the country of "habitual residence" are signatories. A current listing of signatory countries can be found at www.hcch.net/en/states/hcch-members.

"The only function of a proceeding under the [Hague] Convention is to decide whether a child should be returned to the country of the complaining parent; it does not govern the merits of parental custody disputes, but leaves those issues to be determined by appropriate proceedings in the child's country of habitual residence." *Marriage of Eaddy* (2006) 144 CA4th 1202, 1210, 51 CR3d 172.

1. Basic Requirements

The remedies of the Hague Convention are available to a parent seeking return of a child under 16 when the child has been wrongfully removed or retained from the child's habitual residence. "If the petitioner demonstrates that the child was wrongfully removed, the court must order the child's return to the country of habitual residence unless the respondent demonstrates that one of four narrow exceptions applies." *Marriage of Witherspoon* (2007) 155 CA4th 963, 971, 66 CR3d 586 (quoting *Whallon v Lynn* (1st Cir 2000) 230 F3d 450, 454); see 22 USC §9001(a)(4).

a. Habitual Residence

There is no statutory definition of habitual residence, "although the cases interpreting it have concluded that the term refers to the child's customary residence prior to the wrongful removal or retention." *Marriage of Eaddy* (2006) 144 CA4th 1202, 1213, 51 CR3d 172. Case law in the Ninth Circuit also provides that habitual residence is a matter of subjective intent of the parents or other persons entitled to determine where the children live. *Holder v Holder* (9th Cir 2004) 392 F3d 1009, 1015–1017. A habitual residence is determined by the "settled intent" of the parents or other custodians. Generally the habitual residence would result from the shared intent of the parents. If the parents do not share an intention, the court is to look to whether the child has become "acclimatized" to life in a particular location. In other words, would a court order "returning the children [to a particular country] be tantamount to sending them home[.]"

Holder v Holder, *supra*, 392 F3d at 1019; see also *Mozes v Mozes* (9th Cir 2001) 239 F3d 1067, 1073–1075.

b. Wrongful Removal or Retention

Wrongful removal is shown when the child was removed or retained from the place of his or her "habitual residence" and the party seeking to recover the child was exercising lawful custody rights under the law of the child's habitual residence at the time of removal or retention, or would have exercised such custody rights but for the removal or retention. 22 USC §9003(e)(1)(A): *Marriage of Eaddy* (2006) 144 CA4th 1202, 1211, 51 CR3d 172. "Under the Convention, one parent's removal or retention of a child may breach the second parent's custodial rights under the law of the children's habitual residence, even if such acts do not breach the law itself." Wrongfulness arises from interference with the normal exercise of custodial rights by the complaining parent, even if the removing parent is exercising his or her own rights. *Marriage of Witherspoon* (2007) 155 CA4th 963, 972, 66 CR3d 586.

c. Lawful Custody Rights

Custody rights are determined by the law of the child's habitual residence. The Convention creates an explicit distinction between rights of custody and rights of access. Specifically, article 5 provides:

> For the purposes of this Convention—
> a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
> b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

The U.S. Supreme Court resolved the split in decisions amongst U.S. Courts of Appeal as to whether a ne exeat right is a "right of custody" or a "right of access" under the Hague Convention in *Abbott v Abbott* (2010) 560 US 1, 130 S Ct 1983, 176 L Ed 2d 789 by holding that a parent with a ne exeat right under the Hague Convention had a "right of custody" and could petition a court for an order of return as provided in article 12, and as implemented in American law by ICARA. Hague Convention, art 12; 22 USC §9003(b).

A petitioner cannot invoke the remedy of the Hague Convention if he or she has moved permanently to the country to which the child has been removed or retained. In those circumstances, the complaining parent must pursue whatever remedies are available under the laws of the country where the child and the parties are now domiciled. *Von Kennel Gaudin v Remis* (9th Cir 2002) 282 F3d 1178, 1183.

2. Affirmative Defenses

The wrongful removal or retention of a child may be overcome by proof of the following defenses:

a. One-Year "Well Settled"

This defense is established by showing by a preponderance of the evidence that the Hague Convention proceeding was brought more than 1 year after the child's wrongful removal and the child has become well settled in the new environment to which he or she was removed or retained. Hague Convention, art 12; 22 USC §9003(e)(2)(B). The determination whether a child is well settled is a multi-factor analysis, the most important being the length and stability of the child's residence in the new environment. *In re B. Del C.S.B.* (9th Cir 2009) 559 F3d 999, 1009. This 1-year period is not subject to equitable tolling even when the abducting parent conceals the child's location from the other parent. *Lozano v Montoya Alvarez* (2014) ___ US ___, 134 S Ct 1224, 188 L Ed 2d 200.

b. "Grave Risk"

This is one of the most commonly asserted defenses and is shown by clear and convincing evidence that the child's return would expose the child to a grave risk of physical or psychological harm or otherwise place the child in an intolerable situation. Hague Convention, art 13b; 22 USC §9003(e)(2)(A). This is a narrow exception. *Gaudin v Remis* (9th Cir 2005) 415 F3d 1028, 1036–1037; *Marriage of Witherspoon* (2007) 155 CA4th 963, 974, 66 CR3d 586. "Absent extreme circumstances in the country of habitual residence (such as war or famine), the grave risk of harm exception is established only if there is clear and convincing evidence that the child would suffer 'serious abuse' as a result of being returned." *Marriage of Eaddy* (2006) 144 CA4th 1202, 1211, 51 CR3d 172.

Note: The trial court violated due process by granting the father's request to return the children to Denmark without an evidentiary hearing regarding mother's allegations of death threats and abuse (evidence of "grave risk"). *Noergaard v Noergaard* (2015) 244 CA4th 76, 197 CR3d 546.

c. Mature Child Exception

"The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of majority at which it is appropriate to take account of its views." Hague Convention, art 13. "The importance of this exception is explained in the [official report] on the Convention:

'[T]he Convention also provides that the child's views concerning the essential question of its return or retention may be conclusive, provided it has, according to the competent authorities, attained an age and degree of maturity sufficient for its views to be taken into account. In this way, the Convention gives children the possibility of interpreting their own interests.'" *Marriage of Witherspoon* (2007) 155 CA4th 963, 975–976, 66 CR3d 586 (citation omitted).

Note: The Convention does not apply to children 16 or older. Hague Convention, art 4; *Holder v Holder* (9th Cir 2004) 392 F3d 1009, 1017.

d. Consent

There is another exception where "the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention . . . ." Hague Convention, art 13a. This exception must be proved by a preponderance of the evidence. 22 USC §9003(e)(2)(B).

e. Fundamental Principles of Host Country

This defense is shown by clear and convincing evidence that return "would not be permitted by the fundamental principles" of the country to which the child was removed or retained which relate "to the protection of human rights and fundamental freedoms." Hague Convention, art 20; 22 USC §9003(e)(2)(A).

3. Procedure

"The Hague Convention provides two methods to secure the remedy of the return of a child from a country that is a treaty signatory. The first method to seek the return of a child is in the courts. A Hague Convention judicial proceeding is commenced by the filing of petition in state or federal court. . . . The second method to seek the return of a child is administrative in nature. Title 42 United States Code section 11606 [now 22 USC §9006] establishes a United States 'Central Authority.' . . . The Central Authority is authorized to seek the return of children from other signatory countries." *Guardianship of Ariana K.* (2004) 120 CA4th 690, 705, 15 CR3d 817 (citations omitted).

The California Attorney General's Office with the assistance of county district attorneys act as the Central Authority in this state. See *Gonzalez v Gutierrez* (9th Cir 2002) 311 F3d 942, abrogated on other grounds in 560 US 1.

Both state and federal courts have jurisdiction to hear Hague Convention cases. 22 USC §9003(a).

Hague Convention orders for the return of a child may be enforced in California as if it were a child custody determination. Fam C §3442. Moreover, a district attorney may seek to find and retrieve a missing child utilizing the procedures of Fam C §3130 in a Hague Convention case.

4. Hearing

Hague Convention proceedings are to be resolved expeditiously. "As one court explained: 'There is no requirement under the Hague Convention or under the ICARA that discovery be allowed or that an evidentiary hearing be conducted. Thus, under the guidance of the [Hague] Convention and the statutory scheme, the court is given the authority to resolve these cases without resorting to a full trial on the merits or a plenary evidentiary hearing.' (*March v Levine* (6th Cir 2001) 249 F3d 462, 474.)" *Marriage of Witherspoon* (2007) 155 CA4th 963, 975, 66 CR3d 586.

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