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Administrative Presiding Justice Judith McConnell  
Associate Justice David M. Rubin  
Associate Justice Joan K. Irion  
Court of Appeal of California  
Fourth Appellate District, Division One

**Re: Publication of *Richardson v. Keogh* (D083801)**

Dear Justices:

The Association of Certified Family Law Specialists requests publication of *Richardson v. Keogh* (D083801) because it clarifies the parameters of joint physical custody under Family Code §3004<sup>1</sup>. As the opinion itself appears to recognize from its recitation of the existing case law, we do not have precedent clearly construing §3004.<sup>2</sup>

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<sup>1</sup> Statutory references are to the Family Code unless otherwise specified.

<sup>2</sup> The Rutter Group's family law treatise illustrates the dearth of guidance over what plans are joint physical custody,

Equal division of child's time not required: A joint custody order does not mean the child must equally split all of their time between the parents. Such an arrangement would leave the child no time to spend with friends and would also elevate the parents' rights over the child's, virtually treating the child as the parents' "possession." [*Marriage of Birnbaum* (1989) 211 CA3d 1508, 1515, 260 CR 210, 214-215; see *Marriage of Condon* (1998) 62 CA4th 533, 552, 73 CR2d 33, 46 & fn. 13—father's custody 78 days in Calif. plus up to 15 days/month in Australia amounted to "joint physical custody"]

Essentially, a successful joint physical custody plan turns on the quality of the parenting relationship—i.e., the parents' ability to share parenting responsibilities and cooperate for the child's benefit—rather than on a particular allocation of the child's time. [*Marriage of Birnbaum*, *supra*, 211 CA3d at 1515-1516, 260 CR at 215; see *Marriage of Battenburg* (1994) 28 CA4th 1338, 1344, 33 CR2d 871, 874-875—joint custody arrangement unsuccessful due to (among other things) parents' lack of cooperation in effecting transfer of child between them]

(2) [7:358.1] “Liberal visitation” not enough: On the other hand, at least in the context of move-away disputes, the “significant period” of custodial time contemplated by “joint physical custody” means more than “liberal” or “generous” visitation rights.

Hogoboom & King, et al. Cal. Prac. Guide Family Law (The Rutter Group 2025) ¶ 7:358

The treatise also summarizes the existing case law—showing the large gaps in this jurisprudence (Id, at ¶7:574.1),

What constitutes “significant period” of shared custody: The Family Code does not define or quantify what amounts to a “significant period” distinguishing actual joint physical custody from sole custody with liberal visitation. Some parameters, however, have emerged from the cases:

- [7:574.1a] Nearly equal timesharing: Where the children are effectively “shuttled back and forth” between the parents or where the parent with whom the children do not reside sees them four or five times a week, this amounts to joint physical custody. [See *Marriage of Lasich* (2002) 99 CA4th 702, 715, 121 CR2d 356, 366 (collecting cases) (disapproved on other grounds in *Marriage of LaMusga*, supra, 32 CA4th at 1097, 12 CR3d at 374)]

- [7:574.1b] 20% timeshare (alternate weekends, two weekday evenings) not enough: On the other hand, where (despite a judgment awarding “joint physical custody”), Nonmoving Father had the child only 20% of the time, on alternate weekends and two nights a week for dinner (plus 2-3 weeks in the summer), the de facto arrangement amounted to “sole physical custody for the mother with ‘liberal visitation rights’ for the father.” [*Marriage of Lasich*, supra, 99 CA4th at 715, 121 CR2d at 366]

- [7:574.1c] 30% timeshare (one weekday and alternating weekends) not enough: Similarly, Nonmoving Father's approximate 30% timeshare of every Wednesday from 6 p.m. through Thursday at 9 a.m. and alternate weekends (plus miscellaneous holidays) amounted in substance to primary physical custody for Mother with “generous visitation rights” for Father. [*Marriage of Whealon*, supra, 53 CA4th at 142, 61 CR2d at 565—“This is not a case of a child who shuttles back and forth between two parents”]

- [7:574.1d] Compare: Father was deemed to have joint physical custody (physical custody for “significant periods” per Fam.C. § 3004) under an order placing the children with him in California in four blocks totaling 78 days per year, plus up to 15 days per month in Australia if he was there for business or holiday. [*Marriage of Condon* (1998) 62 CA4th 533, 552, 73 CR2d 33, 46]



Publication of the nuanced holding in *Richardson v. Keogh* will reduce litigation (and appeals) over whether a particular parenting time schedule constitutes sole custody with visitation or joint physical custody in a variety of contexts,

The difference between joint physical custody and visitation is particularly salient in matters where a court finds a parent has engaged in abuse because of the §3044 presumption against awarding joint custody to a parent who has committed abuse. Section 3044 requires a specific set of findings to support an award of joint custody where a parent has committed abuse in the past five years. Litigants, lawyers and bench officers need to know which parenting plan schedules trigger the need for findings, and are impermissible in the absence of those findings.

Section §3004 identifies the components of joint physical custody as a significant amount of parenting time, the frequency of parenting time, and the continuity of parenting time,

“Joint physical custody” means that each of the parents shall have significant periods of physical custody. Joint physical custody shall be shared by the parents in such a way so as to assure a child of frequent and continuing contact with both parents, subject to Sections 3011 and 3020.

The opinion considers those three components in the context of both a long-distance parenting plan and a same-community parenting plan. It annualizes parenting time when calculating timeshare. To our knowledge, this is the only case finding that “25 percent of monthly parenting time plus four consecutive weeks in the summer, amounted to de facto joint custody.” (Opinion at p.2) Annualized, that is a 30% timeshare in which parenting time occurs monthly, with an extended summer block of time. The components of timeshare, frequency, and continuity are all present.

The distinction between joint physical custody and visitation also controls the legal standard in relocation cases (See *Niko v. Foreman* (2006) 144 Cal.App.4th 344, and *In re the Marriage of Brown and Yana* (2006) 37 Cal.4th 947) and the applicability of §7501(custodial parent’s presumptive right to move).

The distinction matters in modification proceedings. Where parents’ custody is governed by temporary orders or where they share post-judgment joint physical custody, there is no changed circumstances burden in modification or adjustment of schedule proceedings. The issue of custody is tried de novo. (*Montenegro v. Diaz* (2001) 26 Cal.4th 249; *In re Marriage of Rose & Richardson* (2002) 102 Cal.App.4th 941; *Niko v. Foreman*, *supra*; *In re Marriage of Seagondollar* (2006) 139 Cal.App.4th 1116; *Andrew V. v. Super. Ct. (Jessica V.)* (2015) 234 Cal.App.4th 103; *Jacob A. v. C.H.* (2011) 196 Cal.App.4th 1591; *In re Marriage of Birnbaum* (1989) 211 Cal.App.3d 1508; *In re Marriage of Lucio* (2008) 161 Cal.App.4th 1068.

The opinion meets the Cal. Rules of Court, rule 8.1105 publication criteria as it applies an existing rule of law to a set of facts significantly different from those stated in published opinions; explains, an existing rule of law; advances a clarification and construction of a provision of a statute, and involves a legal issue of continuing public interest.



The Association of Certified Family Law Specialists is a nonprofit bar association whose 500+ members are certified as family law specialists by the State Bar of California, Board of Specialization. The 24 members of the ACFLS amicus committee are all volunteers, ten of whom are also certified as appellate specialists. Family law leaders including Hon. Thomas Trent Lewis (ret.) and Garrett C. Dailey are active members of the amicus committee. Recommendations of the committee must be adopted by the ACFLS board before action is taken. In this case none of the committee and board members have any involvement in the underlying case.

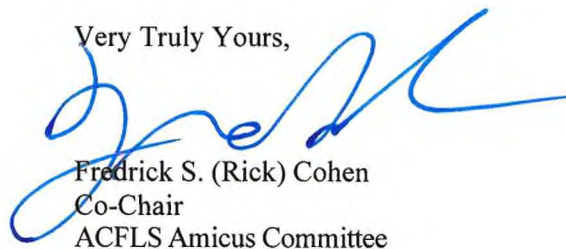
ACFLS members have a unique opportunity to see the impact of precedent from multiple perspectives. In addition to representing adult parties ranging from the indigent to the top 1%, ACFLS members mediate, participate in collaborative family law processes, serve as volunteer settlement officers, sit pro tem as family court bench officers; are retained and appointed as experts in family law matters; and serve as privately compensated temporary judges.

The 24 amicus committee members take turns reviewing unpublished opinions as they are issued, looking for cases that fill in gaps or address recurring problems in family law practice. The committee chairs review cases suggested by the members, post the best ones to an ongoing email conversation and invite discussion. Discussion is followed by a SurveyMonkey vote and a recommendation to the ACFLS Board of Directors.

Over the years ACFLS has submitted amicus briefs in both intermediate courts of appeal and the California Supreme Court, including the following cases where the opinions cited the ACFLS brief: *In re Marriage of Buzzanca* (1998) 61 Cal.App.4th 1410, fn 18; *Montenegro v. Diaz* (2001) 26 Cal.4th 249, 259; *Elkins v. Super. Ct. (Elkins)* (2007) 41 Cal.4th 1337, fn 19; *Lammers v. Super. Ct. (Lammers)* (2000) 83 Cal.App.4th 1309, 1317 (by invitation of the court); *In re Marriage of Margulis* (2011) 198 Cal.App.4th 1252, 1276; *Rand v. Board of Psychology* (2012) 205 Cal.App.4th 1209, FN 10; *In re Marriage of Scheppers* (2001) 86 Cal.App.4th 646, FN 2; and *In re Marriage of Valli* (2014) 58 Cal.4th 1396, Chin, concurring at pp. 1407, 1409.

ACFLS requests that this Court publish *Richardson v. Keogh*, so that family law litigants, counsel and bench officers have a clearer idea about which parenting plans are true joint physical custody and which are sole physical custody and visitation.

Very Truly Yours,



Fredrick S. (Rick) Cohen  
Co-Chair  
ACFLS Amicus Committee