California
Bar
Examination

Performance Tests
and
Selected Answers

July 2003

PERFORMANCE TESTS AND SELECTED ANSWERS

JULY 2003 CALIFORNIA BAR EXAMINATION

This publication contains two performance tests from the July 2003 California Bar Examination and two selected answers to each test.

The answers received good grades and were written by applicants who passed the examination. The answers were produced as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

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TUESDAY AFTERNOON
JULY 29, 2003

California Bar Examination

Performance Test A

INSTRUCTIONS AND FILE

IN RE MARRIAGE OF NITTARDI

IN RE MARRIAGE OF NITTARDI

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a **File** and a **Library**.
4. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The **Library** contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the **Library**, you may use abbreviations and omit page citations.
6. Your answer must be written in the answer book provided. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the **File** and **Library** provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin writing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

RYCHLY & KELLY, LLP
Attorneys At Law
220 McGEE AVENUE
BRADFIELD, COLUMBIA 09654

MEMORANDUM

TO: Applicant
FROM: Mary Rychly
DATE: July 29, 2003
SUBJECT: ***In re Marriage of Nittardi***

Yesterday, we were retained by Pier Nittardi, who has asked us to advise him in a custody matter involving his former wife, Jean Dillon Nittardi, and their daughter, Silvia Nittardi. Mrs. Nittardi has expressed intention to move with Silvia from Columbia to Dakota in little more than a week. I have told Pier that I will send him an opinion letter respecting his legal position.

The facts bearing on this matter can readily be gleaned from an interview that I conducted with Mr. Nittardi yesterday, a judgment of dissolution, two custody orders, a memorandum by one of our paralegals, and a letter that Mrs. Nittardi's attorney sent to Mr. Nittardi some days ago.

Please prepare, for my signature, an opinion letter to Mr. Nittardi in accordance with the firm's guidelines.

RYCHLY & KELLY, LLP
Attorneys At Law
220 McGEE AVENUE
BRADFIELD, COLUMBIA 09654

MEMORANDUM

TO: All Attorneys
FROM: Executive Committee
DATE: September 27, 2001
SUBJECT: ***Opinion Letter Guidelines***

Often the firm's attorneys must prepare an opinion letter to communicate its views to a client. An opinion letter should follow this format:

- State your understanding of the client's goal or goals.
- Indicate what action the client may take to achieve such goal or goals.
- Analyze the client's legal position objectively, in light of the applicable law and the relevant facts, and resolve each of the issues implicated, arriving at a conclusion, and identifying the degree of certainty, as to each.
- Remember that many opinion letters are written to lay clients. Although you must discuss the law, you should do so as clearly and straightforwardly as possible.

INTERVIEW OF PIER NITTARDI

MARY RYCHLY: Mr. Nittardi, with your permission, I'll be tape-recording our conversation today. Is that agreeable?

PIER NITTARDI: Yes, that is alright.

RYCHLY: Prior to turning on the tape recorder, we executed the standard written retainer agreement provided by the Columbia State Bar.

NITTARDI: Yes, we did. They are the same kinds of papers that I have signed for the lawyers who represent my restaurant in land use and other matters.

RYCHLY: That's correct. You gave me a copy of three documents: a "Judgment of Dissolution; Stipulated Custody Order"; a "Stipulated Temporary Custody Order"; and a letter to you from Lucien Zachary, of Zachary, Sidney & Rose, a law firm down the street here in Bradfield.

NITTARDI: Right.

RYCHLY: Mr. Nittardi, why don't we go over the facts? You've told me some. Let's get them all.

NITTARDI: Very well. My name is Pier Nittardi — P-I-E-R N-I-T-T-A-R-D-I. I am 39 years old. I was born in Pescara, in the Abruzzi, in Italy. I am a naturalized American citizen. My wife — my former wife — is Jean Nittardi. Her maiden name was Dillon. She is 37. We have a daughter, Silvia, who is 12. She was born in this country.

RYCHLY: Can you tell me something about how you and Jean met?

NITTARDI: Surely. It was in 1987. I owned a small *trattoria* in Rome, a restaurant, not at all fancy. Jean had graduated from the University of Columbia with a major in Italian, and was teaching English to earn some money before she started graduate school at the university. She often came to *La Bella Hadley* — that was the name of my *trattoria*, given by the first owner many years ago in honor of Ernest Hemingway's first wife. At first, we were what we call in Italian "convenient" friends. She practiced her Italian with me, and I practiced my English with her. Soon, however, we fell in love. She returned to the university for graduate school. As quickly as I could, I sold *La Bella Hadley*, and followed.

RYCHLY: And then?

NITTARDI: And then, in 1988, we married. She continued her studies — it was a long, slow process to earn a doctorate — and I started working in a local Italian restaurant here in

Bradfield. In time, I was made a partner. Not long after, I sold my interest and bought my own restaurant, *IL Pavone*.

RYCHLY: *IL Pavone* has been wildly successful since it opened. I have almost always had to beg to get a reservation.

NITTARDI: A thousand thanks. I have been very lucky.

RYCHLY: Continue.

NITTARDI: The next two years, we hardly saw each other. Jean was always at the university, and I was always at the restaurant. But we saw each other sometimes. In 1991, Silvia was born. What a beautiful baby. What a beautiful little girl.

RYCHLY: What happened next?

NITTARDI: In spite of her studies, Jean was an excellent mother. And, in spite of the restaurant, I tried to be a good father. I guess we forgot to be husband and wife. We, how do you say it, bicked —

RYCHLY: Bickered.

NITTARDI: — bickered, and grew apart, and in 1994, when Silvia was three, we divorced. It was Jean's idea, but I could not disagree. We were not so much angry, we were sad. We did the divorce ourselves, without lawyers; we agreed on practically everything. Silvia was three, as I said, and we agreed that Jean should take care of her most of the time, and that I should help when the restaurant was slow or closed. Jean remained in our house, and I bought a cottage nearby.

RYCHLY: And then?

NITTARDI: We continued on, I with the restaurant and Jean with her studies. It was hard for Jean to progress in her studies because, as I said, we had agreed that she should take care of Silvia most of the time. In 1997, when Silvia was six, we agreed to divide the care, but only for three years, which is what Jean thought that she would need to finish her written and oral comprehensives and to prepare and defend her dissertation.

RYCHLY: So, in 2000, when Silvia was nine, you went back to the original arrangement?

NITTARDI: No, we never did. We continued with the arrangement as modified, dividing the care of Silvia. It took Jean longer to complete her dissertation than she had expected. She finally got her doctorate in 2001. She then had to begin looking for a permanent position. Fortunately — or so it seemed at the time — the Italian department received funding for an additional tenure-track position beginning in 2002. Jean had been the department's best student in years. The department gave her a one-year job as a lecturer as it waited to

appoint her to the new position as an assistant professor. So, with all that was going on in Jean's life, we just continued with Silvia as we had.

RYCHLY: Could you tell me something more about the arrangement? What have you done?

NITTARDI: I have organized my schedule in order to be home with Silvia as much as possible, whenever she is not in school. I help her with her homework, accompany her to her extracurricular activities, that sort of thing.

RYCHLY: What about Jean?

NITTARDI: She has done likewise, fitting her schedule around Silvia.

RYCHLY: What's changed?

NITTARDI: This last year has been good for me, but not so good for Jean. I think that is the source of some of our present difficulties. The restaurant has become even more successful than it was. I am making more money, and have more leisure — not much, but more.

RYCHLY: And Silvia?

NITTARDI: Silvia is now 12. She is in middle school, and gets very good grades. She is keen to begin Bradfield High School next year with all of her friends — she has so many. She has spoken Italian and English since she was a toddler. Because she speaks so well, and is so charming, she has endeared herself to many of my friends in the large Italian expatriate community here and to their children.

RYCHLY: Your friends like her —

NITTARDI: And she likes them too, especially, of course, their children.

RYCHLY: Her activities, what are they?

NITTARDI: She is a member of an Italian-American youth group. She helps the exchange students who come from Italy, and hopes to go to Italy next summer as an exchange student herself. She is also a member of a volleyball team that competes across the country. Because I was not born here, I always travel with her, to learn about America, but especially to look out after her. I love her dearly, and am so happy that we have become so close.

RYCHLY: You travel with Silvia even during periods when she would have been in Jean's care had she been home?

NITTARDI: Yes. Jean does not grudge me the extra time — at least, she did not before now.

RYCHLY: That brings me to my next point: You said that things have not been so good for Jean?

NITTARDI: Yes. The Italian department got an unexpected opportunity to hire a prominent professor from the University of Rome, Yolanda Fata, and did so, awarding her tenure at the same time. It used the position that was supposed to be Jean's. Jean was devastated. It was too late in the year for her to look for a position elsewhere. So she came up with some idea to develop computer software for Italian-English and English-Italian translation.

RYCHLY: I didn't know she's a software developer.

NITTARDI: She's not. She'll have to find one to work with. How she will pay him, I do not know. She has little savings, and needs a job to earn money.

RYCHLY: So the hiring of Professor Fata hit her hard?

NITTARDI: Yes — and the fact that Yolanda and I met, and have become good friends. Very good friends.

RYCHLY: You mean that the two of you have a romantic relationship?

NITTARDI: Yes, and I believe that has caused trouble.

RYCHLY: Why don't you explain?

NITTARDI: Until this year, Jean and I always got along. Not only for Silvia's sake, but also because we have remained fond of each other. Perhaps each of us had some vague hope that we might someday reconcile. After Yolanda, I guess, we do not have any such hope. And so we have started bickering again, just as before the divorce, and, for the first time in all the years I have known her, she has begun to act spitefully. Not only towards me, but also toward Silvia. I know that adolescent girls sometimes have great difficulties with their mothers as they become more independent. My sister did with my mother. Much fireworks. But when it passed, it passed, and the relationship became stronger and deeper than before. But I am troubled by Jean and Silvia. Jean seems to punish Silvia to punish me — me and Yolanda. How else can you explain her sudden plan to move with Silvia to Dakota to develop her software there? The University of Columbia has a great Italian department, and a great computer-science department and engineering school. Dakota is more than a thousand miles away. It's a wonderful state, with much agriculture and livestock. But, as far as I know, it has no Italian expatriate community. I do not even know whether its university has any Italian or computer-science department. And how else can you explain her hiring a lawyer? We had always settled everything ourselves, in a friendly manner.

RYCHLY: Well, Mr. Nittardi, Jean has indeed hired a lawyer, and you have hired me. What would you like to have happen or not to happen?

NITTARDI: I do not want to stop Jean from moving if she wants to (I cannot believe that she really wants to), but I do not want her to take Silvia. I want to continue to care for Silvia and spend time with her before she becomes older and wishes to associate more with her friends and less with her father.

RYCHLY: Have you discussed this with Silvia?

NITTARDI: Yes; she says that she's caught in the middle between us, and she does not want to choose.

RYCHLY: Are you prepared to take care of Silvia full-time?

NITTARDI: Yes, I have thought much about it, I am. I will make whatever adjustments I must.

RYCHLY: Fine. Give me some time to research the issues. But we have to act quickly since Jean's lawyer says she intends to move in about two weeks. One thing is clear; you'll have to go to court.

NITTARDI: That is what I was afraid of.

RYCHLY: It's nothing to be afraid of. It just has to be done. I'll send you an opinion letter within the next few days to help you understand your legal position. Then we'll meet again to discuss matters.

NITTARDI: Fine. Thank you very much. Good-bye.

RYCHLY: Good-bye.

IN THE SUPERIOR COURT OF THE STATE OF COLUMBIA
COUNTY OF ALSTON

IN RE THE MARRIAGE OF JEAN DILLON NITTARDI AND PIER NITTARDI.	)	No. 101747
JEAN DILLON NITTARDI, Petitioner,	)	
v.	)	**JUDGMENT OF DISSOLUTION; STIPULATED CUSTODY ORDER**
PIER NITTARDI, Respondent.	)	

IT IS HEREBY ADJUDGED, DECLARED, AND DECREED that the marriage of Petitioner, Jean Dillon Nittardi, and Respondent, Pier Nittardi, is dissolved.

On stipulation of Petitioner and Respondent, it is hereby ordered as follows with respect to the custody of Petitioner and Respondent's Child, Silvia Nittardi:

1. Petitioner and Respondent shall share joint legal custody of Child.
2. As for physical custody of Child:
    a. Petitioner shall be Child's primary caretaker.
    b. Respondent shall be allowed to visit Child from 2 p.m. to 4 p.m. at Petitioner's residence on each Monday, Wednesday, and Friday, and shall be allowed to take Child to Respondent's residence each week from 2 p.m. on Saturday until 2 p.m. on Sunday.

Dated: October 3, 1994

/s/ Peter J. Belton
Judge of the Superior Court

IN THE SUPERIOR COURT OF THE STATE OF COLUMBIA

COUNTY OF ALSTON

IN RE THE MARRIAGE OF JEAN DILLON NITTARDI AND PIER NITTARDI.	)	No. 101747
JEAN DILLON NITTARDI, Petitioner,	)	
v.	)	**STIPULATED TEMPORARY CUSTODY ORDER**
PIER NITTARDI, Respondent.	)	

On stipulation of Petitioner, Jean Dillon Nittardi, and Respondent, Pier Nittardi, it is hereby ordered as follows with respect to the custody of Petitioner and Respondent's Child, Silvia Nittardi, effective from this date until and through June 30, 2000, and suspending the operation of the order herein dated October 3, 1994:

1. Petitioner and Respondent shall share joint legal custody of Child.
2. As for physical custody of Child:
    a. Petitioner shall be Child's primary caretaker.
    b. Respondent shall be Child's secondary caretaker, and shall be allowed to visit Child from 2 p.m. to 4 p.m. on each Friday and Saturday, and shall be allowed to take Child to Respondent's residence each week from 8 a.m. on Monday until 8 a.m. on Thursday.
3. On July 1, 2000, this order shall expire by its own terms, and the order herein dated October 3, 1994, shall automatically become operative.

Dated: June 26, 1997

/s/ Lilinda De La Cruz
Judge of the Superior Court

RYCHLY & KELLY, LLP

Attorneys At Law

220 McGEE AVENUE

BRADFIELD, COLUMBIA 09654

MEMORANDUM

TO: Mary Rychly

FROM: Brian Daley

DATE: July 28, 2003

SUBJECT: ***In re Marriage of Nittardi***

At your request, I have briefly researched the University of Dakota and the City of College Station, where the university is located. In doing so, I have visited websites maintained by the university and the city, and also websites maintained by other individuals and groups in the area.

The University of Dakota does not have an Italian department. It does, however, offer two Italian language courses each semester through its romance language department. By contrast, the university has a large and thriving computer-science department, which awards more than 100 undergraduate and graduate degrees each year. There is a burgeoning software industry in the area, employing graduates from the university and many others as well.

I understand that the above information is all that you desire at the present time. Should you want more, I will continue my research.

ZACHARY, SIDNEY & ROSE, LLP

Attorneys at Law and Counselors at Law

1710 BLAKE STREET

BRADFIELD, COLUMBIA 09654

July 24, 2003

BY CERTIFIED MAIL

Pier Nittardi

810 Mariposa Street

Bradfield, Columbia 09650

Re: *In re Marriage of Nittardi*, Alston County Superior Court No. 101747

Dear Mr. Nittardi:

We have been retained to represent Jean Dillon Nittardi in the above-referenced matter.

We are writing to inform you that Ms. Nittardi intends to move from the State of Columbia to the State of Dakota on or about August 12, 2003. Inasmuch as she has sole physical custody of her child, Silvia Nittardi, under the decision of the Columbia Supreme Court in *In re Marriage of Burgess* (Colum. Supreme Ct. 1996), she has a right to take Silvia with her when she moves. She intends to exercise her right.

We stand ready at any time to discuss your possible visitation with Silvia once she has taken up residence in Dakota with Ms. Nittardi.

Very truly yours,

Lucien Zachary

LZ:pc

TUESDAY AFTERNOON
JULY 29, 2003

California
Bar
Examination

Performance Test A

LIBRARY

IN RE MARRIAGE OF NITTARDI

LIBRARY

SELECTED PROVISIONS OF
THE COLUMBIA FAMILY CODE

Section 3002: "Custody" refers to the right, responsibility, and supervision that a parent may have over a child.

Section 3003: "Joint legal custody" means that both parents shall share the right and the responsibility to make the decisions relating to the health, education, and welfare of a child.

Section 3004: "Joint physical custody" means that each of the parents shall have significant periods of time in which the child resides with the parent and is under the parent's supervision.

* * *

Section 3006: "Sole legal custody" means that one parent shall have the right and the responsibility to make the decisions relating to the health, education, and welfare of a child.

Section 3007: "Sole physical custody" means that a child shall reside with and be under the supervision of one parent, subject to visitation by or with the other parent.

* * *

Section 3010: In making any order of custody, the court shall act in the best interest of the child. In determining what is in the best interest of the child, the court shall consider, among any other factors it finds relevant, the health, safety, and welfare of the child and the nature and amount of contact with both parents.

* * *

Section 3020: The Legislature declares that it is the public policy of this state: (1) to assure that the health, safety, and welfare of children shall be the court's primary concern in determining the best interest of children when making any orders regarding the custody of children; and (2) to assure that children have frequent and continuing contact with both parents after the parents have dissolved their marriage, and to encourage parents to share the rights and responsibilities of child rearing.

* * *

Section 3040: Custody may be granted according to the best interest of the child to both parents jointly or to either parent solely. In making an order of custody to either parent solely, the court shall consider, among other factors, which parent is more likely to allow the child frequent and continuing contact with the other parent, and shall not prefer a parent as

custodian because of that parent's sex. This section establishes neither a preference nor a presumption for or against joint or sole legal or physical custody, but allows the court and the family the widest discretion to choose a parenting plan that is in the best interest of the child.

IN RE MARRIAGE OF BURGESS

Columbia Supreme Court (1996)

Paul Burgess (the father) and Wendy Burgess (the mother) were married and had two children, Peter and Jessica. Both the father and the mother were employed by the State Department of Corrections at the State Prison in Tarrytown in Kings County and owned a home in a suburb. They separated in May 1992, when the children were four and three years old. The mother moved with the children to an apartment in Tarrytown; the father remained in their former home, pending sale of the property. The mother petitioned for dissolution shortly thereafter.

In July 1992, the trial court entered a "Stipulation and Order" dissolving the marriage and providing for temporary custody in accordance with an agreement between the father and the mother. The father and the mother agreed that they "shall share joint legal custody of the children. The mother shall have sole physical custody of the children." They agreed to a liberal schedule for weekly visitation by the father. They expressly identified as "at issue" the visitation schedule for the father "if the mother leaves Kings County."

In February 1993, the trial court entered a permanent custody order. At the hearing that preceded the entry of the order, the mother testified that she had accepted a job transfer to Linden and planned to relocate after her son's graduation from preschool in June; she explained that the move was "career advancing" and would permit greater access for the children to medical care, extracurricular activities, and private schools and day-care facilities; the travel time between Linden and her home in Tarrytown was approximately 40 minutes. The father testified that he would not be able to maintain his current visitation schedule if the children moved to Linden; he wanted to be their primary caretaker if the mother relocated. The trial court entered an order providing that the father and the mother would share joint legal custody, that the mother would have sole physical custody, that the father would have "liberal visitation" in accordance with the current schedule, and that, after June 1993, "the father will have overnight visitation with the children, assuming the mother moves to Linden, on alternate weekends."

In August 1993, the father moved for a change of custody, seeking a custody arrangement under which each parent would have the children for "about a month and a half." The trial court held a hearing on the motion. The father testified that if the children relocated with the mother he would not be able to maintain his current visitation schedule;

he admitted that he regularly traveled to Linden on alternate weekends, to shop and visit friends, characterizing the trip as "an easy commute." The mother testified that she had been working in Linden for four months and planned to move there; she again identified several advantages to the children in living there, including proximity to medical care and increased opportunities to participate in extracurricular activities; she also testified that the father objected to her move, at least in part, in order to retain control over her and the children, stating that he did not want to change his work shift "because it keeps me in Tarrytown"; she expressed her willingness to accommodate weekend visitation with the father as well as extended visitation in the summer. The trial court denied the father's motion for change of custody. It found that "it is in the best interest of the children that they be permitted to move to Linden with the mother and that the father be afforded liberal visitation." It also found that the mother did not seek to relocate in order to frustrate the father's contact with the children, but only for sound and good faith reasons.

The father appealed from the February 1993 custody order and the August 1993 order denying change of custody.

The Court of Appeal reversed. It formulated the following test for so-called move-away cases. The trial court initially must determine whether the move "will impact significantly the existing pattern of care and adversely affect the nature and quality of the contact that the nonmoving parent has with the child. The burden is on the nonmoving parent to show this adverse impact." If the impact is shown, the trial court must determine whether the move is "reasonably necessary," with "the burden of showing such necessity falling on the moving parent." If the trial court concludes that the move is "necessary" — either because not moving would impose an unreasonable hardship on the career or other interests of the moving parent or because moving will result in a discernible benefit that it would be unreasonable to expect that parent to forgo — it then "must resolve whether the benefit to the child in going with the moving parent outweighs the loss or diminution of contact with the nonmoving parent." On the facts before it, the Court of Appeal concluded that "no showing of necessity was made. The reality here is that in moving, the mother primarily gained convenience."

We granted review. We now reverse.

In entering a custody order, the trial court, under section 3040 of the Columbia Family Code, has the widest discretion to choose a custody arrangement that is in the best

interest of the child. Under section 3010 of the same code, it must look to all the circumstances bearing on the child's best interest.

In addition, in a matter involving relocation by one or both parents, the trial court must take into account the presumptive right of a parent with sole physical custody to change the residence of his or her child, so long as the change would not be prejudicial to the child's rights or welfare.

The standard of appellate review of custody orders is the deferential abuse of discretion test. We find no such abuse here.

In entering its February 1993 custody order and its August 1993 order denying change of custody, the trial court did not abuse its discretion. After extensive testimony from both the father and the mother, the trial court concluded, not unreasonably, that it was in the best interest of the children that the father and the mother retain joint legal custody and that the mother retain sole physical custody, even if she moved to Linden. First, and most important, although they had almost daily contact with both the father and the mother during the initial period after the separation, the children had been in the sole physical custody of the mother for over a year. Although they saw their father regularly, their mother was, by agreement and as a factual matter, their sole physical custodian. The paramount need for continuity and stability in custody arrangements — and the harm that may result from disruption of established patterns of care and emotional bonds — weigh heavily in favor of maintaining ongoing custody arrangements. From the outset, the mother had expressed her intention to relocate to Linden. The reason for the move was employment-related; the mother evinced no intention to frustrate the father's contact with the children. Moreover, despite the fact that the move was, as the Court of Appeal observed, primarily for the mother's "convenience," her proximity to her place of employment and to the children during the workday would clearly benefit the children as well. A reduced commute would permit increased and more leisurely daily contact between the children and their mother. It would also facilitate the children's participation, with their mother, in extracurricular activities. In the event of illness or emergency, the children could more promptly be picked up and treated, if appropriate, at their regular medical facility, which was also located in Linden. Although it would be more convenient for the father to maintain a visitation routine with the children if they remained in Tarrytown, even under his present work schedule he could still visit them regularly and often. The trial court's order of "liberal visitation" included overnight

visits on alternate weekends. The father conceded that he regularly traveled to Linden and that he considered it an "easy commute."

The Court of Appeal concluded that the trial court abused its discretion in ordering that the mother should retain sole physical custody, on the ground that her relocation to Linden was not "necessary." In effect, it concluded that because she failed to carry the burden of establishing that the relocation to Linden was "necessary," physical custody of the children might be transferred to the father. It erred thereby.

A parent with sole physical custody of a child who seeks to move with the child bears no burden of establishing that the move is necessary. Indeed, the general rule is that a parent with sole physical custody of a child is entitled to change the child's residence unless the move is detrimental to the child.

As this case demonstrates, ours is an increasingly mobile society. Economic necessity and remarriage account for the bulk of relocations. Because of the ordinary needs for *both* parents after a marital dissolution to secure or retain employment, pursue educational or career opportunities, or reside in the same location as a new spouse or other family or friends, it is unrealistic to assume that divorced parents will permanently remain in the same location after dissolution, and it is inappropriate to exert pressure on them to do so. It would also undermine the interest in minimizing costly litigation over custody and require the trial courts to "micromanage" family decision making by second-guessing reasons for everyday decisions about career and family. In this matter, the parties continue to dispute whether the mother's change of employment was merely a "lateral" move or was "career enhancing." The point is immaterial. Once the trial court found that the mother did not seek to relocate in order to frustrate the father's contact with the children, but only for sound and good faith reasons, it was not required to inquire further.

Ordinarily, what is commonly called the changed-circumstances rule applies: A parent seeking to change the custody arrangement resulting from a custody order can succeed only if he or she shows that there has been a substantial change of circumstances so affecting his or her child that change is essential or expedient to the child's welfare, taking into account, *inter alia*, the nature of the child's existing contact with both parents, the child's age, community ties, and health and educational needs, and the child's preference, if he or she is of sufficient age and maturity.

The changed-circumstances rule applies as well when, in the face of relocation by a parent with sole physical custody of a child, the other parent seeks to change the custody

arrangement: A child should not be removed from the prior sole physical 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 welfare of the child that there be a change. In a move-away case, a change of custody is not justified simply because the parent with sole physical custody has chosen, for any sound and good faith reason, to reside in a different location. The dispositive issue is, accordingly, *not* whether *relocating* is itself necessary for the parent with sole physical custody, but whether a *change of custody* is essential or expedient for the welfare of the child.

Of course, a different analysis may be required when both parents *share* joint physical custody of their child and one parent seeks to relocate with the child over the other parent's objection. In such a case, the trial court must determine *de novo* what arrangement for physical custody is in the child's best interest. But we need not consider the question further, since the father and the mother here did not share joint physical custody of their children.

Reversed.

IN RE MARRIAGE OF CASSADY

Columbia Court of Appeal (1996)

James Cassady (James) and Donna Signorelli (Donna) married in 1990, had a daughter whom they named Grace in 1992, and dissolved their marriage in 1994.

In 1994, together with the judgment of dissolution, the trial court entered a custody order, which provided that James and Donna were to have joint legal custody of Grace, and Donna was to be Grace's primary caretaker and James was to be allowed overnight visits each week from 6 p.m. on Wednesday until 8 a.m. on Thursday.

In 1995, on James's motion in response to Donna's stated intention to move away with Grace to Florida, the trial court entered a custody order that superseded the initial one. Like that of 1994, the 1995 custody order provided for joint legal custody for James and Donna, with Donna as primary caretaker and James allowed overnight visits each week from 6 p.m. on Wednesday until 8 a.m. on Thursday. Unlike that of 1994, however, the 1995 custody order was conditioned on James and Donna remaining in Columbia.

Donna has appealed from the trial court's 1995 custody order with its remain-in-Columbia condition. She attacks it as violative of what the Columbia Supreme Court in *In re Marriage of Burgess* (Colum. Supreme Ct. 1996) recently termed "the presumptive right of a parent with sole physical custody to change the residence of his or her child, so long as the change would not be prejudicial to the child's rights or welfare." We agree that Donna had sole physical custody of Grace, in fact if not in name. Under section 3007 of the Columbia Family Code, one parent — like Donna — has "[s]ole physical custody" of a child when the child "reside[s] with," and is "under the supervision" of, that parent, "subject to visitation by or with the other parent." The trial court recognized that Grace resided with Donna, and was under her supervision, and only visited James. We do not agree, however, that Donna's "presumptive right" to change Grace's residence was violated. As *Burgess* makes plain, a parent simply does not have any right to change a child's residence when the parent acts not "for sound and good faith reasons," but instead "in order to frustrate the [other parent's] contact with the child" or in any event illogically. The trial court effectively — and properly — concluded that Donna acted in such a manner. Donna claimed that she needed to move to Florida to begin a new career as a "parapsychologist." However, there are apparently almost no jobs available in that field anywhere in the world, and she had no job in that field in prospect in Florida. As the trial court aptly observed, she apparently was

not seriously seeking employment there, but simply wished to frustrate James's contact with Grace. But, even if her reasons to move were in good faith, they were not at all sound, being altogether illogical.

Affirmed.

IN RE MARRIAGE OF WHEALON

Columbia Court of Appeal (1997)

In *In re Marriage of Burgess* (Colum. Supreme Ct. 1996), the Columbia Supreme Court held that, in a move-away case, a parent with sole physical custody of a child seeking to move bears no burden of showing that the move is "necessary."

In the wake of *Burgess*, it is clear that the basic rules for change of custody apply just as much to move-away cases as they do to others: After the trial court has entered a custody order, the custody arrangement resulting therefrom should continue, says *Burgess*, "unless the material facts and circumstances occurring subsequently are of a kind to render it essential or expedient for the welfare of the child that there be a change." The fact that the parent with sole physical custody is moving away does not mean the court should examine the custody question anew. Rather, the burden is on the other parent seeking to change the custody arrangement to show that a different arrangement is warranted under the new circumstances of the move.

The *Burgess* court recognized, however, that a different rule necessarily applies in move-away cases where joint physical custody is the status quo prior to the move. By definition, the existing custody arrangement will be upset by one parent's move. Accordingly, the trial court must determine *de novo* what arrangement for physical custody would be in the child's best interest.

The present case involves a father who argues that his situation fits within the *Burgess* exception to the basic rule against redetermining custody anew in the wake of one parent's moving away. The basic facts are simple: Steven and Phyllis Whealon married and had a child, Ryan. Subsequently, on Steven's petition, the trial court dissolved the marriage. At the same time, it entered a stipulated custody order, arising from Steven's and Phyllis's agreement, awarding Steven and Phyllis joint legal custody of Ryan, who was 18 months old, with Phyllis designated the primary caretaker and Steven allowed visitation one hour each weekday from 6 p.m. to 7 p.m., and from noon to 5 p.m. on Saturday and Sunday. Soon thereafter, Phyllis lost her job in Columbia as a radar engineer, and found a new one in New York. She proposed to relocate with Ryan. Steven opposed the relocation, and argued that the trial court should determine custody *de novo*, rather than place on him the

burden of showing that the changed circumstances warranted a change of custody. The trial court disagreed. Steven now appeals.

The *Burgess* court made it clear that a move-away is not enough by itself to justify a reexamination of the basic custody arrangement between two parents. "In a move-away case, a change of custody is not justified simply because the parent with sole physical custody has chosen, for any sound and good faith reason, to reside in a different location."

Of course, as the *Burgess* court pointed out, there are circumstances when a move-away does justify a change of custody in favor of the nonmoving spouse. In our view, for example, a trial court could properly consider the preferences of a 13 year-old child for remaining where he was in a case in which the nonmoving spouse had assumed substantial parenting responsibilities relating to the child's academic, athletic, social, and religious activities, even though the moving parent had sole physical custody.

Even so, the basic structure of placing the initial burden on the parent seeking a change of custody, not a change of location, remains: Under the changed-circumstances rule, the parent seeking a change of custody must show a substantial change of circumstances so affecting his or her child that change is essential or expedient to the child's welfare. Such an initial burden is consistent with the presumptive right of a parent with sole physical custody to change residence unless the change prejudices the rights or welfare of his or her child.

As we have already mentioned, a different rule arises out of the disruption of the status quo that necessarily inheres in a move-away case where there is joint physical custody since, in such an instance, it is unavoidable that the existing custody arrangement will be disrupted. One parent or the other must be given sole physical custody. Accordingly, a *de novo* determination — in effect, a reexamination of the basic custody arrangement — makes sense.

Steven's attempt to fit himself into the joint physical custody exception fails. Ryan did not shuttle back and forth between Steven and Phyllis. Rather, Phyllis had, in substance, sole physical custody of Ryan, who spent the vast majority of his time with her, and Steven had visitation rights.

Steven then argues that the changed-circumstances rule does not apply when the custody arrangement in question results from a stipulated custody order. We cannot agree. The fact that a custody order is stipulated means that it arises from the agreement of the

parents. We accord dignity to a custody order determined by the trial court because we presume that the trial court acted in the best interest of the child. We cannot accord less dignity to a custody order arising from the agreement of the parents because we cannot presume that the parents acted in any other fashion.

Affirmed.

IN RE MARRIAGE OF BIALLAS

Columbia Court of Appeal (1998)

Mark Biallas (Father) and Hilary Gilmore Biallas (Mother) were married in 1988. Their only child, Charles (Son), was born in 1989. The trial court rendered a judgment dissolving their marriage in 1990. At the same time, it entered a custody order, awarding Father and Mother joint legal custody, and giving "primary physical custody" to Mother and visitation periods to Father extending from Sunday morning to Monday morning and from Wednesday evening until Thursday morning. As Son grew older, Father and Mother increased the amount of visitation for Father in accordance with an agreement between themselves without any new custody order. Ultimately, Father had visitation every Thursday evening until Friday morning and every other weekend from Friday evening until Monday morning.

In 1996, Mother became engaged to a man who lived in Nebraska, about a thousand miles away. Mother told Father that she intended to move to Nebraska and wanted Son to move with her, and proposed discussing a new visitation schedule. Some weeks later, Mother left for Nebraska, taking Son with her, and there married her new husband. On Father's motion, the trial court entered a custody order that, among other things, awarded sole physical custody to Father. It based its order solely on what it believed to be Son's best interest, without considering whether there had been a substantial change of circumstances so affecting him that change was essential or expedient to his welfare. Mother appealed. We now reverse.

In 1996, after the trial court entered its custody order, the Columbia Supreme Court issued its decision in *In re Marriage of Burgess* (Colum. Supreme Ct. 1996). There, the court held that a "parent with sole physical custody of a child who seeks to move with the child bears no burden of establishing that the move is necessary." It further held that the other parent, if he or she seeks a change of custody, must "show that there has been a substantial change of circumstances so affecting his or her child that change is essential or expedient to the child's welfare . . ."

The *Burgess* court stated an exception: "[A] different analysis may be required when both parents *share* joint physical custody of their child and one parent seeks to relocate with the child over the other parent's objection. In such a case, the trial court must determine

de novo what arrangement for physical custody is in the child's best interest." (Italics in original.)

We believe that the *Burgess* exception means that the trial court may make a *de novo* determination on the issue of physical custody only when the parent seeking to relocate shares joint physical custody with the other parent.

We also believe that the trial court must determine at the threshold whether the physical custody in question is sole or joint, and that it must do so by looking through any labels to the facts. Thus, the trial court must consider the existing *de facto* custody arrangement between the parents to decide whether physical custody is joint or whether one parent has sole physical custody with visitation rights accorded the other parent, and must ignore terms such as "primary physical custody" and "primary caretaker" and "second physical custody" and "secondary caretaker," which, although often used, have no legal meaning.

Here, the trial court determined that Father and Mother shared joint physical custody. It abused its discretion thereby. Joint physical custody exists, under Columbia Family Code section 3004, where the child spends significant time with both parents. That depends, as noted, on the existing *de facto* custody arrangement between the parents. The custody arrangement may result directly from a custody order. It may also result from a custody order *as effectively changed by the parents themselves*. The latter is of no lesser dignity than the former. We presume that the trial court that enters a custody order acts in the best interest of the child. We cannot presume otherwise of parents who change the custody arrangement resulting from such a custody order. The existing *de facto* custody arrangement between Father and Mother here, which resulted from the custody order as effectively changed by Father and Mother themselves, had visitation for Father every Thursday evening until Friday morning and every other weekend from Friday evening until Monday morning, and had Mother providing care at all other times. Such periods of visitation hardly amounted to significant time for Father in comparison with Mother. In our view, one parent enjoys significant time in relation to the other only when that parent enjoys time that is equal, or at least almost equal, to that which the other enjoys.

Because Father and Mother did not share joint physical custody, the trial court should have determined whether there had been a substantial change of circumstances so affecting Son that change of sole physical custody from Mother to Father was essential or

expedient to Son's welfare. It did not. Father argues that an out-of-state move constitutes such a change of circumstances as a matter of law. He is wrong. The *Burgess* court cautioned "the trial court must take into account the presumptive right of a parent with sole physical custody to change the residence of his or her child, so long as the change would not be prejudicial to the child's rights or welfare." Moving out of state is not necessarily prejudicial to a child. It is true that Son's move to Nebraska would have an effect on his relationship with Father. It is also true that Columbia Family Code section 3020 favors "frequent and continuing contact with both parents." But such contact may be effected in a variety of ways — for example, through telephone calls several times a week and visitations for the entire winter and spring holidays and the entire summer vacation, all paid for by the parent with sole physical custody. Father's contrary assumption is simply without basis.

Reversed.

ANSWER 1 TO PERFORMANCE TEST - A

OPINION LETTER

Dear Mr. Nittardi,

I am writing you this letter in response to your inquiry regarding custody over your child Silvia. I trust this will answer many of your questions.

A. STATEMENT OF CLIENT GOALS.

It is my understanding that you are strongly opposed to Jean moving to Dakota and taking Silvia with her. Your overarching goals are to continue your close level of contact with Silvia, to enable her to flourish as a growing young woman, and to further deepen your relationship with your daughter, to whom you are strongly attached. In order to make this possible, your immediate goals is [sic] to ensure that Silvia remains here in Columbia.

B. ACTIONS CLIENT MAY TAKE TO ACHIEVE GOALS.

In order to achieve your goals, Silvia must remain in Columbia. This can be achieved in several possible ways. First, Jean could stay in Columbia, which would mean that no change to current arrangements would be necessary. Second, Jean could move to Dakota but agree to leave Silvia in Columbia. This would require some sort of rearrangement of the current custody and visitation scheme, but would not involve court intervention. Third, and most likely, if Jean seeks to move to Dakota and take Silvia with her, you will have to take legal action to alter the legal custody regime between you and Jean. Depending on how the court construes the existing physical custody arrangement, you have either a very good or a good chance of getting the court to write a new custody order that would grant you sole physical custody of Silvia, which would mean that she would stay here in Columbia with you.

C. ANALYSIS OF LEGAL AND FACTUAL ISSUES.

1) Physical Custody: Sole or Joint?

Introduction.

In a divorce where there is a child or children involved, the divorce agreement typically states the type of custody arrangement. According to the Columbia Code, the term "custody" refers to the right, responsibility, and supervision that a parent may have over a child. Basically, there are two types of custody, legal custody and physical custody.

There are two documents that bear on the custody you and Jean have over Silvia. Both the stipulated custody order and the stipulated temporary custody order state that you and Jean will share joint legal custody of the child. This means that both parents – both you

and Jean – shall share the right and responsibility to make the decisions relating to the health, education, and welfare of the child. However, neither document specifically or precisely states what type of physical custody you or Jean may have over Silvia, Both documents merely state that Jean is Sylvia's primary caregiver, and that you have visitations rights during the times states [sic].

Your legal options regarding Silvia turn largely on the type of physical custody Jean has over Silvia. I will address this important point in more detail later on in this letter. For the moment, you should be aware that the State of Columbia recognizes two types of physical custody: (1) joint physical custody, in which each of the parents have significant periods of time in which the child resides with the parent and is under the parent's supervision, and (2) sole physical custody, in which the child resides with and is under the supervision of one parent, subject to visitation by or with the other parent. Again, neither custody order specifically states whether you and Jean share joint physical custody, or whether Jean has sole physical custody and you merely have visitation rights.

Because the custody orders do not specify whether physical custody is joint or sole, it is necessary to examine the law courts in Columbia use to make this determination in the absence of a specific statement. The next step is to apply that law to the facts of your situation with Jean and Silvia in order to determine whether a court would deem the physical custody joint or sole.

Legal and Factual Analysis.

Columbia courts have on several occasions considered the question of how to label physical custody – whether joint or sole – when the custody order does clearly specify the type of physical custody. The Biallas case confronted this issue head on in 1998 under facts that are in some ways similar to those involving you, Jean, and Silvia. In Biallas, the custody order provided for joint legal custody, much like you and Jean share. The Biallas court also gave the mother "primary physical custody" and gave the father certain visitation house. By comparison, the custody orders regarding Silvia do not give Jean "primary physical custody" as in Biallas, but do state that Jean is to be Silvia's "primary caretaker." In addition, the custody order in your case gives you visitation rights much like the father had in Biallas. The question the Biallas court had to decide was whether the language in the custody order, taken together with the terns of the father's visitation rights, created joint physical custody, or whether only sole physical custody in favor of the mother had been created. This is the important question that must be decided in your case as well.

The Biallas court stated how this question of whether custody is joint or legal should be decided, when, as in the situation you are facing, the custody order does not specifically state on[e] way or the other. First, the court said that it would look through any labels to the facts of the case. In other words, the court will consider the de facto custody arrangement – the arrangement that exists in fact, despite what the custody orders may state – in order to decide what type of physical custody exists. In your case, the stipulated custody order states that Jean is Silvia's "primary caregiver," and the stipulated temporary

custody order states once again that Jean is Silvia's "primary caregiver" and that you are Silvia's "secondary caregiver." It is of course true that the stipulated temporary custody order has since expired and the stipulated custody order is now in effect. However, the Biallas court directly stated that courts must ignore such terms as "primary caregiver" and "secondary caretaker," which although often used in custody orders, have no legal meaning. What this means for you is that the factual reality of the relationships Silvia has with you and Jean are what matter when it comes to determine what type of physical custody exists, and not the legal terminology that happens to have been used in the custody order.

Columbia statutes state that joint physical custody exists when the child spends significant time with both parents. The time the child spends with each parent results to some extent from the dictates of the custody orders, but it also may result from changes that the parents have effectively made themselves, and the realty of the arrangements the parents have among themselves regarding the time spent with the child are of equal importance as the written legal orders. In Biallas, the court concluded that the father and mother did not have joint physical custody. The court stated that joint physical custody would exist if the father spent an amount of time with the child that was equal or almost equal to the amount of time the mother spent with the child. There, the father was in fact visiting the child every Thursday evening until Friday morning and every other weekend from Friday evening until Monday morning, while the mother provided care at all other times. The court concluded that the father was not spending equal or nearly equal time as the mother and thus the mother had sole physical custody. Similarly, the court in the Whealon case stated that the mother had sole physical custody, and the father merely had visitation rights, when the child spent the vast majority of his time with the mother.

Therefore, in addition to examining the controlling custody order, we must compare the actual amount of contact the father in Biallas spent with his child to the amount of time you currently spend with Silvia in order to determine whether a court would say you have joint physical custody over Silvia, or whether Jean has sole physical custody and you merely have visitation rights.

As for the currently controlling stipulated custody order, you have visitation rights from 2 PM to 4 PM at Jean's residence on each Monday, Wednesday, and Friday, and you are allowed to take Silvia to your residence each week from 2 PM on Saturday to 2 PM on Sunday. Based on the custody order alone, it would be pretty clear that there is no joint custody arrangement, because you have visitation rights for only a small minority of the hours in each week.

However, in addition to looking at the custody order, the court will examine actual reality to determine how much time you really spend with Silvia. You told me in our interview that although you and Jean had earlier agreed to return to the stipulated custody order, with the visitation rights just mentioned, you in fact never did go to that original stipulated custody order. Instead, you continued with the stipulation custody order. That order was supposed to expire on July 1, 2000, but as you told me, you continued with the arrangements in that

order. That temporary stipulated custody order gave you substantially more visitation rights. You were allowed to visit Silvia from 2 PM to 4 PM each Friday and Saturday, and were also allowed to have Silvia stay at your residence each week from 8 AM on Monday until 8 AM on Thursday. In total, that order gave you visitation for 3 full days, plus an additional four hours. That amount of time is already fairly close to being equal to the time Jean had Silvia.

In addition to fact that you and Jean have continued with the temporary stipulated custody order even after it had technically expired, you told me that you have organized your schedule to be around Silvia as much as possible, whenever she is not in school. You have been helping her with homework and accompanying her to extracurricular activities, and you have more leisure time as a result of your restaurant's success. You even stated that you accompany Silvia on her volleyball trips across the company [sic], even though those travel periods are during times that Silvia would have been in Jean's care had she been home. Under the Biallas rule, since you and Jean are spending an equal or nearly equal amount of time with Silvia, you would have joint physical custody.

Conclusion.

Taking all the facts of the current situation together – both the fact that you and Jean are working under the [the] temporary stipulated custody order that expressly gives you 3 days and 4 hours per week with Silvia, and the fact that you are actually spending even more time with Silvia than allocated in that order, I would conclude that a Columbia court would determine that you and Jean have a joint physical custody arrangement over Silvia. If everything you have told me is accurate, I am fairly certain of this conclusion. However, you should be aware that Jean will seek to contradict what you have told me, saying that you in fact went back to the original stipulated custody order, and that Silvia actually spends most time with Jean. In fact, Jean's lawyer expressly, although wrongfully, I think, describes Jean's physical custody as "sole" in the letter written to you. Nevertheless, I think a court is very likely to conclude that you and Jean spend an equal or nearly equal amount of time with Silvia and that your physical custody arrangements is joint. Silvia may be able to add some information in your favor as well.

2) Effect of the existence of joint physical custody on Jean's right to move with Silvia.

In the letter he wrote to you, Jean's lawyer cites the Burgess case to support the contention that Jean has a right to take Silvia when she moves. However, that rule Jean's lawyer cites from Burgess applies only when the wife has sole physical custody. When a parent has sole physical custody, that parent has a presumptive right to change the residence of the child, so long as the change would not be prejudicial to the child's rights or welfare. The parent with sole physical custody has no burden of establishing that the move is necessary. However, a different rule, described as follows, applies when physical custody is joint, as it likely is in your case.

In a joint physical custody situation, Burgess states that when one parent seeks to relocate with the child over the other parent's objection, the court must determine de novo, or from the beginning, what arrangement is in the child's best interest. This is the rule that applies to the situation you face. As the court in Whealon stated, where there is joint physical custody and one parent seeks to move away with the child, it is unavoidable that the existing custody arrangement will be disrupted. This is exactly what is going on with you, Jean, and Silvia. Dakota is a long distance from Columbia, and there is simply no way that you would be able to have the kind of contact you currently enjoy with Silvia if the two move. Columbia case law clearly states that in this sort of circumstance, one parent or the other must be given sole physical custody. Consequently, the court must reexamine the basic custody arrangement to see what makes sense. The fundamental principle guiding the court in this determination is what meets the child's best interest.

The bottom line is that a court will have to draw up a new custody order. This requirement is certain and unavoidable if the current physical custody arrangement is indeed joint.

3) New custody order.

Because the current physical custody arrangement is joint, and because Jean's move to Dakota will disrupt the current arrangement, a new custody order is necessary.

Legal requirements.

The Columbia family code and cases interpreting it establish how a court goes about making a custody order. The court's overriding concern in this process is to effectuate the best interests of the child. The best interests of the child include both providing for the child's health, safety, and welfare, and assuring that the child has frequent and continuing contact with both parents (section 3020). Another provision of the code, section 3010, states that in determining what is in the best interest of the child, the court shall consider, among any other factors it finds relevant, the health, safety, and welfare of the child and the nature and amount of contact with both parents.

Cases decided under Columbia law and interpreting the code flesh out the meaning of achieving the child's best interests. In Burgess, for example, the court discussed the importance of providing continuity and stability in custody arrangements, which favors maintaining ongoing custody arrangements. The Burgess court also considered the proximity to medical care, extracurricular activities, and private schools. The Biallas court cited section 3020 of the Columbia Code, which favors frequent and continuing contact with both parents, but said such contact may be effectuated in a variety of ways, for example, through telephone calls several times a week and visitations for the entire winter and spring holidays and the entire summer vacation, all paid for by the parent with sole physical custody.

Application of the Law.

The Columbia Code and several cases indicate what things a court would consider in drawing up a new custody order. Now we must examine how a court would write a custody order in this specific case, governing your and Jean's custody over Silvia. Again, a court will not go so far as to bar Jean from moving, but if she does move, the current joint physical custody arrangement will be totally altered and therefore a new custody order is necessary.

In view of Silvia's best interests and welfare, there is a solid argument for granting you sole physical custody and making appropriate provisions for Jean to visit Silvia. One very important factor the court will consider is that Silvia is well-established here in Columbia, and a move to Dakota would likely cause severe distortion to her life pattern, and perhaps to her emotional well-being and happiness. Silvia is a middle school child, at the age when many children need the support of friends. In fact, you told me that Silvia has very many friends, and is eager to being Bradfield High School with them next year. Moving to Dakota would require giving up those friendships and starting anew at this tender age. In addition, Silvia speaks Italian well and is very charming, which has endeared her to my [sic] people in Columbia's Italian expatriate community, and also to their children. If Silvia has to move to Dakota, her Italian skills will probably not find any use, because Dakota has no Italian expatriate community. Furthermore, Silvia is a member of an Italian-American youth group here in Columbia, an activity she could not participate in Dakota. In connection with this youth group, Silvia helps the exchange students who come from Italy, and hopes to go to Italy next summer as an exchange student herself. This plans [sic] may be dashed if Silvia has to move. Taking all these factors together, and applying them to statements in the Columbia code and by Columbia courts, it seems that a court would conclude that Silvia's best interests in terms of education, happiness, and extracurricular activities would be better served by keeping her in Columbia.

Also, from what you have told me, it seems that you and Silvia enjoy a close relationship that is growing even closer. Dakota is 1,000 miles away, and a move could jeopardize this relationship. However, Jean may seek to impose some sort of seasonal visitation rights such as were discussed in Biallas, whereby you would get to visit Silvia during vacations and so forth. Such an arrangement would be better than nothing, but I believe we can make a strong argument that Silvia should stay here in Columbia with her friends, her school, her activities, and her father. Jean may also point out that Dakota has a burgeoning technology center, but there is no indication that Silvia has an interest in technology.

Another factor the court may take into account is what you described as Jean's spiteful behavior to both you and Silvia. You stated that Jean seems to punish Silvia in order to punish you, or even to punish your new girlfriend Yolanda. A court would not want to countenance an arrangement that is motivated by spite. If it is true that Jean is seeking to move to Dakota in large measure to punish Silvia, Yolanda, and you, the court would deem this a relevant factor in assessing Silvia's best interests.

The court will also consider the economic status of you and Jean. It appears that Jean will have a solid economic opportunity if she moves to Dakota; this works in her favor. However, your restaurant has been ver successful, and you even have more time now. In addition, while Jean has to work very hard these days, you are prepared to take care of Silvia full time.

Conclusion.

I believe that it is more likely than not that if Jean insists on moving to Dakota and thereby destroying the current joint physical custody arrangement, a court will order you sole physical custody and grant Jean visitation rights. Jean can raise some arguments in her favor, but based on the factors discussed above, I feel fairly confident that a court would rule in your favor.

4) Effect of a finding that Jean has sole physical custody.

As stated before, I am quite certain that a court would find that you and Jean currently have joint physical custody over Silvia. However, we need to at least consider the outcome if it is decided that Jean in fact has sole physical custody and you only have visitation rights. In this case, a different set of legal rules would apply and the outcome for you would be different. Again, I feel that this possibility is very small, but we must at least give it some attention.

First, and most importantly in this case, Columbia court decisions clearly state that a parent simply does not have any right to change a child's residence when the parent acts not for sound and good faith reasons, but instead in order to frustrate the other parent's contact with the child, or in any event illogically. You mentioned to me that you believe Jean is moving to Dakota simply to spite you, as well as Silvia and your girlfriend. If that is all that is at play, a court would probably not permit Jean to take Silvia to Dakota. However, Jean can argue that she does in fact have a sound and good faith reason to move to Dakota. Her hopes for tenure in the Italian department at Columbia University have been dashed by the hiring of Yolanda Fata, and it was too late for Jean to look for a position elsewhere, so she came up with the idea of developing Italian-English translation software. She needs to find a software developer to follow through with this business plan, and although Columbia University has a great computer science department, so does the University in Dakota. Thus there appear to be sound, good faith, and logical reasons for Jean to move to Dakota.

The next principle of law that would govern if Jean has sole physical custody is the Burgess rule. Under Burgess, a parent with sole physical custody of a child seeking to move bears no burden of showing that the move is necessary. However, there is an exception to the general Burgess rule known as the changed circumstances exception. In a move-away case, the existing custody order generally continues unless the material facts and circumstances occurring subsequently are of a kind to render it essential or expedient for

the welfare of the child that there be a change. What this means is that if Jean has sole physical custody, you would have the burden of showing that changed circumstances make a new custody order is [sic] essential or expedient for Silvia's welfare; otherwise, Jean can take Silvia with her. It would not be impossible for you to make this showing, though. For example, the Whealon court stated that a court could properly consider the preferences of a 13 year old child for remaining where he was in a case in which the nonmoving spouse had assumed substantial parenting responsibilities relating to the child's academic, athletic, social, and religious activities, even though the moving parent had sole physical custody. As I addressed earlier, you have been spending a lot of time with Silvia - about an equal amount of time as Jean. In addition, you have been heavily involved with her Italian-American and sports activities. However, you did state that Silvia is reluctant to state a preference. Another factor suggesting a sufficient change of circumstances is that you and Jean are apparently operating under the terminated custody order which gives you very liberal visitation rights, in spite of the fact that that order is technically no longer operative. Once again, the court will deem Silvia's best interest to be a paramount consideration. Therefore, you have a good change of showing that there has been a substantial change of circumstances (from the operative custody order) so affecting Silvia that a change to the legally operative custody order is essential or expedient to Sylvia's welfare.

In conclusion, even if the court determines that Sylvia has sole physical custody, you have a good chance of forcing a change to the custody order in your favor using the changed circumstances rule.

ANSWER 2 TO PERFORMANCE TEST - A

TO: Mary Rychly
FROM: Applicant
RE: In re Marriage of Nittardi

The following is an opinion letter I prepared for your signature. In it I analyze the goals and issues regarding Mr. Nittardi's custody of his daughter Silvia. If you need any additional information, please let me know and I will be happy to provide you with additional research and analysis.

TO: Pier Nittardi
FROM: Mary Rychly
RE: In re Marriage of Nittardi

CLIENT GOALS

From reading your file and interview, I believe that you have the following goals in regard to the custody arrangement with your daughter, Silvia (S). You, Pier Nittardi (N) would like to retain the current arrangement with your daughter whereby you enjoy joint custody with you[r] former wife Jean Nittardi (J). In the event that the current status quo cannot be arranged, you would like to have full and sole custody of S. In no event would you want S to move with J to Dakota (Dak), thereby significantly decreasing the amount of time you have to spend with S.

CLIENT ACTION NECESSARY TO ACHIEVE GOALS

There are several avenues of action that may be used in seeking to attain your goals. You have indicated that you would like to avoid going [to] court. That is an unlikely scenario, however there are non-court alternatives. In this letter I will present legal research which I believe supports your goals. One non-court alternative would be to share our research with J and her attorneys and impress upon them that they would lose in any court action. Hopefully with that information, and [sic] beneficial situation of joint custody could be worked out without having a trial or hearing. In addition, would could [sic] submit the issue to arbitration, if J is willing to go along with it. Also, you have informed us that your restaurant is doing well and J is financially in need. Possibly some "alimony" arrangement could be negotiated whereby J stays in Columbia (Col.) And the current custody arrangement continues.

Although the above options are available, it is most likely that a hearing will be necessary to resolve this issue. Therefore, the best course of action would be to file a motion with the court to receive a new custody order. The following analysis will walk you through the facts that would be at issue in such a hearing, as well as the applicable law and probable outcomes.

LEGAL AND FACTUAL ANALYSIS

Custody of a child between divorced parents in the State of Columbia is to be decided in the "best interest of the child." Col. Family Code (CFC) Section (Sec.) 3040. In deciding what would be in the best interests of the child, the court has discretion to order custody jointly or to one parent solely. Id. Once the parents enter into a custody order, that order is presumed to be in the best interests of the child, since it was made by parents themselves. In the current case, the issue is that one parents [sic] is seeking to move out of the state and thus disrupt the current custody scheme. This requires a specific analysis for move-away cases.

Current Custody Arrangement

The first issue would be to determine what the current custody arrangement between the parents is. There are two types of custody arrangements, joint and sole. As will be discussed further, each type of custody will have different analysis as to whether one parent may move away and take their child with them. In 1994 N and J entered into a custody agreement where they shared legal custody, but J had sole physical custody. Although both shared legal custody throughout the order between them, legal custody is not dispositive.

CFC Sec. 3003 defines legal custody as the right to make decision[s] regarding the health, education and welfare of the child. This does not however, affect the following analysis. Instead, what is critical in this case is physical custody. Physical custody as defined by CFC Sec. 3004 & 3007 states that physical custody is with the parent whom the child resides and is under the supervision of. CFC Sec. 3007 defines Sole Physical custody as the child reside[s] and [is] supervised by one parent, with the other allowed visitation. Starting in 1994, S lived with J, and N simply had visitation rights and was only allowed to take S home 1 day week. Under the 1994 arrangement, J had sole custody of S.

However, in 1997 the arrangement was changed by a subsequent custody order. Under the 1997 order, N had visitation rights two days a week as well as had S reside with N for 3 straight additional days each week. CFC Sec. 3004 defines Joint Physical custody as each parents having significant time in which the child resides and is under the supervision of each child [sic]. Under the 1994 agreement, S did not reside with N for significant periods. However, under the 1997 agreement, S spent 3 days a week with N. This would most likely be determined to be joint custody under the CFC. This is however a close issue. The Col. Court of Appeal has ruled that significant periods of time are those in which the parents enjoy time that is "equal, or at least almost equal, to that which the other enjoys." In re Marriage of Biallas. In Biallas, the court did not find joint custody where the father enjoyed visitation once a week and every other weekend. In contrast, in the current case, S spends 3 full days residing with N, almost half of the week. In addition, N enjoys visitation on 2 additional days each week. Although it is clear that J enjoys a greater degree of contact, it is most likely that a court would rule that N enjoys "almost equal" amounts of control and residence with S as does J.

The 1997 order expired in July 2000 at which time the 1994 order became effective again. This would have the effect of changing custody of S from joint to sole. However, after the expiration of the arrangement, N informed use [sic] that N and J did not revert back to the 1994 arrangement. Instead, N & J continued to abide by the same arrangement as written in the 1997 order. In order to determine the standard to apply to the move-away case, the court must determine what the current custody arrangement is. When doing so the court will look "through any labels to the facts." Biallas. Instead of simply looking at what the last order said, the court will look at the actual practice and arrangement employed by the parents. Also, any written custody order will be examined as changed when the facts of the current arrangement show a change by the parents themselves. Biallas. In such a situation, factual chances will be considered just as valid as if a changed order was issued. Biallas.

In 2000, when the 1997 arrangement expired, J & N did not revert back to the 1994 order. Instead, J & N continued to abide by the 1997 arrangement under which they each had joint custody. Given that J was still working on her degree and looking for a job, the 1997 order continued to be the best suit of the needs of J, S, and N. There, by continuing to use the 1997 arrangement, J & N effectively changed the order and ignored and canceled the 2000 end date of that order. Therefore, when analyzing the current arrangement, J & N have joint custody factually and that is what a court will most likely hold.

De Novo Review of Custody

When the status quo before a parent seeks to move is joint custody, the custody arrangement will be upset by the move of one parent. In these cases, the court will conduct a de novo review to determine what physical arrangement is in the best interests of the child. In re Marriage of Whealon. In these cases, since the status quo before the move is joint custody, the moving parent will change the circumstances. If the court rules as I previously stated under the review of the current custody situation (ruling that joint custody exists), then this is the standard it will imply.

In making a custody order, CFC Sec. 3010 directs a court to examine the health, safety and welfare of the child to determine what is in the the child's best interests. The issue would then be, what would be in the best interests of S if the court were to reexamine the custody situation starting from anew. In making this determination, CFC Sec. 3040 grants the court the widest discretion in choosing a custody arrangement that is in the best interests of the child.

Currently, S is 12. Given her age, her desire to reside with one parent or another would be taken into consideration by the court. However, N has expressed that S does not wish to take sides in the current fight between her parents. However, S is currently in middle school in Bradfield. In addition to having numerous friends, S is looking forward to attending Bradfield High School. If S stays in the same area she would not need to uproot her life and start over making all new friends. J is proposing to move to Dakota (Dak), which is over 1,000 miles away. This is a considerable distance from S's friends in Col. In addition to

school, S is involved in Italian-American youth group and activities. These Italian-American activities would not be available to S if S did move to Dak. In addition, the considerable distance would thwart contact between N & S. However, J would successfully argue that N can still contact S by phone and N has the ability, time, and financial abilities to fly to Dak to see S.

But even given the ability of N to fly to see S, the best interest of S would be not to uproot her and force her to move to Dak. S has lived for 12 years in Col and should continue, where she has friends, school, and extra-curricular activities. Thus, under de novo review, a court will award joint custody with [sic] to J & N with a clause that terminated joint custody if J moves away and awards it solely to N. Especially given the lack of financial prospect[s] of J and the relative success of N, coupled with N's ability to take time off to be with S for necessary and beneficial activities, sole custody if at all, should be awarded to N.

Even if J were successful in her new venture, the time it would take to get it running would significantl[y] impact the welfare of J. Especially considering that S would be in a new state with no friends, and alone with her mother whom S other [sic] argues with. In contract, N is able to take off many hours and days each week to be with and see to S. S has established friends and activities in Col. These factors all combine to show that custody should be awarded exclusively to N.

Substantial Change Analysis

If the court find[s], however unlikely, that the 1994 arrangement controls or that even under the 1997 order joint custody was lacking, then sole custody in favor of J will be found. In that case, J would have a presumptive right to change the residence of her child so long as the change is not prejudicial to S's rights or welfare. In re Marriage of Burgess. Instead of de novo review, N will have the burden to show that a different arrangement is warranted under the new circumstances of the move. Whealon. This is a high burden for N since N would have to overcome the presumptive right of J to change the residence of her child whom she has custody over.

Here again, the same factors would come into play as under the de novo burden. However, the difference is the amount of persuasion that N would have to make. Instead of an even playing field, N would have to prove that there is a "substantial" detriment to S in moving to Dak. N could argue that the change in schools is a burden, however, it is unlikely that the school in Dak are so lacking as to make the detriment to S substantial. N can further argue that S's involvement in Italian programs will be thwarted; this is a stronger argument, but S's involvement in choir and ability to get involved in other activities would thwart the "substantial" requirement here also.

The best hope of N in meeting this burden is that S expresses an interest in staying in Col. In Whealon, the court stated that the preference of a 13 year old would be properly considered where the non-custody parents assumed substantial responsibilities. Here, even if the court doesn't find joint custody, if may not deny that N has assumed substantial

responsibilities in raising S (traveling with S, residing 3 days a week, etc.). Therefore, if S expressed an interest in staying (even if just an interest in staying at the same school), this may be enough to carry the substantial burden that N has.

Otherwise, it is unlikely that N will meet his burden under the substantial change analysis for sole custody.

Change Made to Frustrate Parent's Contact

Even if the court finds that J has sole custody, and if N fails to meet the substantial change burden, the court may still set change [to] the custody arrangement. Although J would have a right to change residence with S is [sic] sole custody, that is not a presumptive right not [sic] and unlimited right. N can overcome that presumptive right by showing that J is making the change "not for sound and good faith reasons, but instead in order to frustrate the other parent's contact with the child or in any event illogically." In re Marriage of Cassady.

In Cassady, the court ruled that a mother's intended move was illogical when the mother claimed to be moving for a job, but where almost no such jobs existed and the mother had no prospect of one. In the present case, J claims that she is moving to Dak to work on an Italian transaction computer program. N would succeed in retaining custody if N can show that J either is not really moving to work on a computer program or is doing so illogically.

J claims that she wants to work on software in Dak. However, J does not have a job prospect in Dak. Instead, J claims that she will start her own operation. This is unlikely since J does not know anything about software development. Further, J lacks the capital necessary to start such an operation. Also, there is no evidence that J has any employees of investors that will help her realize this goal of developing software. Given that there are no actual plans for this development, it appears that J is not really moving to Dak for employment reasons. Instead, J is attempting to frustrate the contact rights of N and S. This would overcome J's presumptive rights to move with S. Thus it appears, J is not motivated by good faith reasons to move, therefore, the court may issue a custody ordering joint custody conditioned on J remaining in Col. A change to move designed to frustrate the contact between parent and child is not made in good faith and would be a reason for the court to not allow the move under the current custody scheme.

Furthermore, there is evidence that J has only pursued this course of action after N has entered into a new relationship. Retaliation for this new relationship may be J's motive for attempting to move and take S away from N. This purpose would be pure frustration and retribution and would not be good faith. Evidence of such intentions would go against allowed [sic] S to move with J to Dak, even if J did have sole physical custody.

J claims that she is moving to Dak to work with the University of Dak (UD). J is currently affiliated with the University of Col. (UC). UC has an extensive Italian department as well as a great computer science department. While UD does have a computer science department, there is no Italian department at UD. Therefore, the stated reason for J moving

is illogical, since there are more services for her Italian software development in Col than Dak. Thus, even if not made in bad faith, the attempt to move would be illogical, and again overcome the presumption that the sole custodial parent has a right to move with their child.

Therefore, even if J is successful in claiming sole custody and no significant change in custody, a court may declare J's purposes for moving not in good faith and condition joint custody on J staying in Col.

CONCLUSION

Given the facts of this case and the current state of Col. law, it is extremely likely that N will retain custody of S in at least a joint form. It is extremely likely that the court, if presented with these issues, will find that there is currently joint physical custody of S. In that case, the court will conduct de novo review of the custody arrangement and most likely award custody to N outright, or jointly if J stays in Col.

However, there is a slim possibility that the court will find there is sole custody in J. In that case, N will face a much tougher burden to show that a significant change would harm S's welfare and best interests. It is unlikely that a court will find that N meets this burden unless S declare[s] a preference with staying in Col with N.

But even if N fails to meet that burden, a court will award joint custody if it finds that the threatened move is not made in good faith, but is illogical and designed to frustrate N's contact with S. There is a slightly better than half chance that a court will find that the greater services available in Col make it illogical and in bad faith to move to Dak for some supposed development that has not been planned or prepared.

In summation, the facts and law indicate that N should retain some custody of S, but it is most likely going to need a court order.

THURSDAY AFTERNOON
JULY 31, 2003

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

IN RE RYAN COX

IN RE RYAN COX

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional States of Columbia and Franklin, two of the United States.
3. You will have two sets of materials with which to work, a **File** and a **Library**.
4. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The **Library** contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the **Library**, you may use abbreviations and omit page citations.
6. Your response must be written in the answer book provided. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the **File** and **Library** provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin writing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Dillard & Savim

Attorneys at Law
345 College Street
San Jose, Columbia

M E M O R A N D U M

To: Applicant

From: Logan Dillard

Re: In re Ryan Cox

Date: July 30, 2003

We have been retained by Ryan Cox to represent him in the sale of a piece of real property. The purchaser has backed out of the deal and is threatening to bring suit to recover the money that has already been paid. The property is in the name of Mr. Cox's son, Adam, as is the contract for sale. Adam has informed me that he considers his father the true owner of the property and will, therefore, do whatever he must to accomplish whatever his father desires.

I've conducted the initial client interview and have done some research. Before I speak to the opposing attorney I will need to speak to Mr. Cox again and counsel him concerning his options. Therefore, please do the following:

Write me a memorandum in which you (1) analyze the enforceability of the land installment contract, including what remedies are available to the seller if the contract is enforceable, and (2) assuming the contract is not enforceable, analyze what type of legal relationship the parties have, what remedies that relationship provides and what, if any, procedural steps are necessary to obtain these remedies.

EXCERPTS OF INTERVIEW WITH RYAN COX

* * * * *

LOGAN DILLARD (Q): Why don't you start at the beginning and tell me what happened?
RYAN COX (A): Well, I guess it started when my wife, Ruth, died two years ago. We had been living in our house in Columbia during the winter months, then going to Franklin during the summer to be near our older daughter, Sarah.
Q: Do you own a house in Franklin?
A: No. We would take our motor home and live in it.
Q: Okay, so what happened with the death of Ruth?
A: The kids started to talk to me about selling the place in Columbia. They were afraid I couldn't take care of myself; something might happen and I couldn't get help.
Q: Anything in particular?
A: Well, I've had a couple of heart attacks and I've got diabetes; so I guess they had a point.
Q: So, what happened?
A: My younger daughter, Emily, works with some people, Nicky and Marsha Belmont, who live in Columbia during the winter. They work a carnival, the county fair route during the summer. Well, anyway, my daughter, not Sarah, but Emily, who lives here in Columbia, says the Belmonts might be interested in buying the house, but they don't have the money up front and besides which, they can't get a bank to lend them the money because of the kind of work they do, you know, seasonal, self-employed. And besides which, I'm not sure I want to leave. I mean it's not just the house. I've got this big pole barn that has all of my tools in it. Where would I put them in Franklin, much less how much would it cost to ship them there? So I don't think anything about it.
Q: You must have a lot of tools.
A: Yes. I'm a carpenter. Used to build houses. Since I was 60, though, what with the heart disease and all I had to stop. But I kept the tools and do the odd repair jobs there at the house. You know, a merry-go-round needs a new floor, a popcorn wagon needs fixing, they bring it over and I do the work.
Q: Does that keep you busy?
A: Yes, and at my age, there aren't a lot of options.
Q: How old are you?
A: 75.
Q: So then what happens?

A: Couple of months later Emily comes back and says, “Hey Dad, this couple says they really like you and they don’t mind the idea that you could maybe sell them the house, but keep the motor home on the property and then use the pole barn for as long as you like.” Well, this sounds kind of interesting, I don’t really need that much space, but there’s still the problem that they don’t have the money. My daughter says, “Hey, why don’t you just take payments from them? You can use the income anyway. All you would do with the money is put it in the bank. You can be the bank.”

Q: So did you agree to do that?

A: Not right away. I wasn’t so sure, but I got to talking to this guy at the Showman’s Club, that’s where I go on Friday nights, a bunch of the carnival people go there. Well anyway he says he has lots of property and sometimes he sells it through what he called a land installment contract. He said if you get a big enough down payment there really is no risk. So I start thinking about it. This guy then says he would be happy to show me the contract he uses, even modify it to meet my house sale.

Q: Did he do that?

A: Yes. I’ve got it here.

Q: Good. Let me see it. I’ll read it in a minute. What happened then?

A: Well, I call Emily up and say let’s talk about price. I had it appraised for $100,000, but I figure I should get something for basically financing the sale, so I ask for $130,000. We agreed on $120,000. The other parts of the agreement are in that contract.

Q: Okay, let me read it. It says here that the seller is Adam. Who’s he?

A: That’s my younger son. When we bought the property we put it in his and my wife’s name. We figured I’d go first and it would make things easier.

Q: Did you include Adam in the negotiations to sell the property?

A: No. Emily handled all that. I don’t even think Adam knew he was on the deed at that point.

Q: You say Emily talked with the Belmonts, and they agreed to everything in the contract?

A: Yes.

Q: Then what happened?

A: Well, I had to tell my son, because he needed to sign the contract.

Q: I see that he did.

A: Yes, but that’s where things started to unravel.

Q: Okay, what happened?

A: Emily gets $40,000 from Nicky and Marsha and takes it to my son, Adam. Emily gives Adam the $40,000 and Adam gives Emily the contract to be signed by the Belmonts.

Q: Adam got the money before the Belmonts signed the contract?
A: That's right. Forty thousand, like it called for.
Q: Okay, then what happened?
A: Well this was in July, and Nicky was on the road until October, so not much for a while.
Q: Did you move out of the house?
A: Well actually, I had already done that. Nicky and his wife moved into the house in June.
Q: The month before the contract was agreed to?
A: Yes.
Q: Why?
A: Well, the deal was agreed to in May and it was only a matter of getting my son, Adam, to sign the contract and collect the down payment so I thought, what the heck.
Q: Did you ever get a copy of the contract signed by the Belmonts?
A: No.
Q: Why does the contract call for a $12,000 payment in November plus the 12 payments of $1,000 each?
A: It's just the nature of the carnival business. Nicky would get a bonus at the end of the season in October and he could use the bonus to make the payment.
Q: Why the three $1,000 payments then?
A: That was my son Adam's idea. I need to get some cash to live on and we knew we could rent the house for $1,000 per month, so it just made sense to have them pay something.
Q: How do you know you could get $1,000?
A: We had a real estate agent come in at one time. Ruth and I were thinking of moving back to Franklin and maybe renting the place out.
Q: What about the $40,000? Where is it?
A: Oh, we put that in a couple of mutual funds. I don't have a retirement plan, so we thought this would be a good investment and then I would live on Social Security and the $12,000 per year. When that ended, I would still have the $40,000 – if I'm still around.
Q: Did you get any payments?
A: Well, rather than mail checks to my son, on August 10, September 10, and October 10, Nicky gave my daughter $1,000 in cash for each of the monthly payments. Then in December there was nothing. And, of course, I didn't get the $12,000 payment in November.
Q: What did you do when the money stopped coming?
A: I called Emily and she said she'd check it out. She called Marsha, and Nicky and

Marsha said that they had changed their mind, that I was too much trouble and they wanted me off the property or to give them their $43,000 back and call the whole deal off.
Q: What do you mean by too much trouble?
A: Emily says Marsha thinks I'm too nosey, that I say things that are none of my business. They even said I've been going into the house without their permission.
Q: Is there any truth to these claims?
A: No. Nicky and I get along fine. I did go into the house once back in September, to get something out of a storage box and I will admit that I was shocked at the condition of the house and I guess I did say to Nicky that he was trashing the place.
Q: What did you do?
A: I tried to talk to Nicky, but he was never around.
Q: Have you been back in the house since then?
A: Heavens no. For one thing, they changed the locks on the house. For another, like I said, the place is trashed. They've got dogs that aren't house-trained, they never clean, the furniture is totally ruined, I don't want to go back.
Q: Is the furniture the same furniture that was in the house before you moved out?
A: Yes.
Q: Did they pay for it?
A: Not yet. They said they wanted to buy it, but they needed some time to get the money.
Q: How much did they agree to pay?
A: They haven't really agreed to buy it yet. I asked for $10,000, which is what I paid for it.
Q: Why do you think the Belmonts want out of the deal?
A: My guess is that Nicky can't make the payment so Marsha's got lots of pressure. But I figure too bad. A contract's a contract.
Q: Is that what you want, to enforce the contract as written?
A: Absolutely.
Q: Other than talking to Nicky, have you done anything to try and enforce the contract?
A: No. I've just been living on the property. I've been meaning to go to a lawyer, but you know how it is. Then my son gets this letter from Nicky and Marsha's lawyer and you can imagine he's not thrilled with the prospect of being sued. He then tries to deal with the lawyer and we get the second letter.
Q: Where are you living now?
A: I'm in the motor home on the property here in Columbia. I expect to be moving to Franklin in about four weeks to spend some time there.
Q: Are the Belmonts still in the house?

A: Sure.
Q: What does your son think of this?
A: He's not happy, but he said to go to a lawyer and he'd sign whatever the lawyer and I wanted signed.
Q: Okay, I think I have an idea about where we stand. Is there anything else you want to tell me?
A: No. That's about it. Where do I stand? A contract's a contract, right?
Q: Well, Mr. Cox, I can't say right off the top of my head what your rights are. There are some complicated legal issues that affect the ability to enforce the contract, most notably, the fact that apparently the Belmonts did not sign the contract. Here's what I would like to do. I'd like to call your son and daughter and talk to them. Then I want to do a little legal research. After I've had a chance to look at the law, I want to get back together with you and I'll be in a better position to tell you what options we have. Is that okay?
A: Sure.

Dillard & Savim

Attorneys at Law
345 College Street
San Jose, Columbia

M E M O R A N D U M

To: Cox File

From: Logan Dillard

Re: Phone Conversations with Emily and Adam Cox

Date: July 30, 2003

Spoke to both Emily Cox and Adam Cox today. Emily confirmed to me the substance of her father's story. Apparently Emily works with the Belmonts on occasion. This whole mess has hurt her business relationship, but says the Belmonts are the kind of people that if this didn't make them angry, something else would have at some point.

The Belmonts have a "noisy" relationship – lots of yelling. Emily thinks the second letter trying to cancel everything is Marsha saying "I told you so." She thinks Marsha believes Adam has taken advantage of the Belmonts. This according to Emily is a big joke, since Adam had nothing to do with it and wants nothing to do with the problem.

My conversation with Adam also confirmed the father's story. Adam said he was very surprised by the second letter from Vaughan, the Belmonts' lawyer. The big contention was his father's presence on the property. Marsha wants him off. He thought Vaughan would just come back and reiterate the demand to have complete title to the property. When I asked what was the reason his father was so adamant about not moving, Adam said he thought it was two things. First, "Dad's stubborn. I'm sure he gave you the 'contract is a contract' line." Second, the tools are not any handyman's collection. There are lots of them and they are valuable. The pole barn is a former fire substation, big enough to hold two fire trucks. His parents bought the property, then had the house constructed behind the barn. Adam figures it will take a good size semi-truck to haul the equipment to Columbia – it would probably cost $15,000.

INSTALLMENT CONTRACT

Agreement made July 9, 2002, between Adam F. Cox, of 876 Elm, Bradford, State of Franklin, Seller, and Nicholas and Marsha Belmont, San Jose, State of Columbia, Purchaser.

1. ***SALE***. Seller, in consideration of the deposit made by Purchaser hereunder, and of the covenants and agreements on the part of Purchaser herein contained, agrees to sell to Purchaser, and Purchaser agrees to buy, that real property located at 11 Lake Road, San Jose, State of Columbia, together with the tenements, hereditaments, and appurtenances belonging or appertaining thereto.

2. ***PURCHASE PRICE***. Purchaser agrees to pay to Seller the sum of $120,000, as follows:

The sum of $40,000 on execution of this agreement, receipt of which is acknowledged, and the balance of the purchase price, being the sum of $80,000, in 69 installments as follows:

The sum of $12,000, or more, on November 15, 2002, and

The sum of $1,000, or more, on the 10th day of each month, beginning August 10, 2002, and thereafter until the purchase price and interest are fully paid, provided that the purchase price shall be fully paid on or before March 10, 2008.

The unpaid balance of the purchase price shall bear interest at the rate of zero percent (0%) per year until paid. All payments of principal shall, until further notice, be made to Seller at the address set forth above.

3. ***IN LIEU OF INTEREST***. In lieu of interest on the outstanding balance as described in paragraph 2, Seller covenants that Ryan L. Cox, during his lifetime, shall:

A. have the right to use the pole barn located on the property (a former substation of the fire department currently being used for the storage and use of woodworking tools) for the continued storage and use of his woodworking tools, with the right to ingress and egress and the right to exclude Purchaser from the structure; and

B. have the right to maintain a motor home or trailer on the property as a residence, with the right to reasonable electricity, water and sewer connection at no cost.

4. ***TAXES AND ASSESSMENTS; INSURANCE***. Purchaser shall pay all taxes and assessments on the above-described property levied, assessed, or accruing after the date

of this contract, including the total of any payable in the 2003 calendar year and beyond.

5. ***HAZARD INSURANCE/RISK OF LOSS***. Upon the execution of this agreement, the Purchaser shall bear the risk of loss from all sources and shall keep the improvements on the property insured for an amount not less than the actual replacement costs of all buildings or the outstanding loan balance owing under this contract, whichever is greater.

6. ***ALTERATIONS TO THE PROPERTY***. Purchaser shall not make any major alteration or additions or improvements to the property without first obtaining permission of Seller, which permission shall not be unreasonably withheld. All expenses in making alterations, additions or improvements to the property shall be promptly paid by Purchaser and Purchaser shall furnish copies of said paid bills to Seller together with executed lien releases or lien waivers.

7. ***FAILURE TO PAY TAXES OR INSURANCE***. Should Purchaser fail to pay any taxes or assessments as herein provided, or fail to keep the property insured, Seller has the option to pay all or any of such taxes and assessments and to obtain such insurance. Purchaser shall repay to Seller, on demand, the amount of all moneys paid by Seller on account of such taxes, assessments, and/or insurance, together with interest thereon from the date of payment until repaid at the rate of 12 per cent per year.

8. ***FIXTURES***. Purchase price shall include permanently attached fixtures, but does not include personal property.

9. ***NO RECORDING***. Purchaser and Seller agree this contract shall not be recorded in public records, unless required by state statute. The recording of this agreement shall constitute a material breach of this agreement and Purchaser shall be liable to Seller for slander of title.

10. ***NO ASSIGNMENT***. This agreement is personal to Purchaser and no conveyance may be made by Purchaser of the premises, or any part, or any beneficial interest thereof without first obtaining the prior written consent of the Seller. Any conveyance of the property made by Purchaser of the premises, or any part, or any beneficial interest thereof without first obtaining the prior written consent of the Seller shall entitle Seller to accelerate payment of the balance due on this agreement and, at the option of the Seller, all sums of money secured by this agreement become due whether or not they are due and payable under other terms of this agreement. Nothing contained herein shall be construed to constitute a novation or release of Purchaser or any subsequent owner of liability or obligation under this agreement.

11. ***OCCUPANCY***. Purchaser shall occupy the premises as Purchaser's principal

residence. Purchaser shall not rent or lease the property, or any part, without the express written permission of the Seller.

12. ***INSPECTION***. Seller or his agent may make reasonable entries upon and inspections of the property. Seller shall give notice at the time of or prior to an inspection specifying reasonable cause for the inspection.

13. ***DELIVERY OF DEED***. When the purchase price and all other amounts to be paid to Seller are fully paid as herein provided, and when all covenants and agreements on the part of Purchaser to be performed have been satisfactorily performed, Seller will execute and deliver to Purchaser a good and sufficient general warranty deed conveying the property free of all encumbrances made, done, or suffered by Seller.

14. ***POSSESSION***. Purchaser shall be entitled to possession of the property from and after the date of this contract.

15. ***DEFAULT***. If Purchaser shall fail for a period of 30 days to (1) pay Seller any of the sums herein agreed to be paid after such sums are due, or (2) pay taxes or assessments on the property after the same become due, or (3) comply with any of the covenants on Purchaser's part to be kept and performed, then Seller shall be released from all obligation to convey the property, and Purchaser shall forfeit all right thereto.

16. ***TIME OF ESSENCE***. Time is of the essence of this agreement.

17. ***BINDING EFFECT***. The terms, conditions, and covenants of this agreement shall be binding on and shall inure to the benefit of the heirs, executors, administrators, and assigns of the respective parties, but no assignment or transfer by Purchaser of this contract, or of an interest in the property described herein, shall be valid, unless made with the written consent of Seller.

Executed at the date first above written.

Adam F. Cox _____

Seller Purchaser

_____

Purchaser

AFC ___

Initials

James C. Vaughan
Attorney at Law

25687 Truman Street
San Jose, Columbia

May 2, 2003

Mr. Adam F. Cox
876 Elm
Bradford, Franklin 39856

Re: 11 Lake Road, San Jose, Columbia

Dear Mr. Cox:

I have been retained by Marsha and Nicholas Belmont to finalize a sale of the above-referenced real property or, in the alternative, obtain the return of the money they have paid. Specifically, my clients negotiated for the purchase of the property with your sister, Emily. The Belmonts delivered a down payment in the amount of $40,000 which has been subsequently supplemented by three payments of $1,000 each, for a total of $43,000.

My clients are ready, willing, and able to pay the additional sum of $77,000 and, hereby offer such payment, at such time as you are prepared to deliver a recordable warranty deed free from any mortgage or other encumbrance other than current property taxes. In the alternative, please return my clients' payment of $43,000.

Please direct all communication directly to me. However, if I have not heard from you by June 1, 2003, I will assume you have rejected each alternative. In that event I have been authorized to file an appropriate court action to resolve this matter. I trust you will honor your obligation in this matter so we all can avoid the expense and inconvenience of litigation. Please govern yourself accordingly.

Respectfully yours,

James C. Vaughan

James C. Vaughan

James C. Vaughan
Attorney at Law

25687 Truman Street
San Jose, Columbia

July 1, 2003

Mr. Adam F. Cox
876 Elm
Bradford, Franklin 39856

Re: 11 Lake Road, San Jose, Columbia

Dear Mr. Cox:

I regret you have refused to see the mutually beneficial result from acceptance of either of the proposals contained in my letter of May 2, 2003. Your demand that your father be able to retain possession of the storage barn for life is completely unacceptable to my clients.

I have been instructed by the Belmonts to withdraw their offer to purchase the property. I hereby demand return of the $43,000 previously submitted. Please remit a cashier's check to me at the above address. If I do not receive such check by August 10, 2003, I have been authorized to file an appropriate court action to recover this money. Please govern yourself accordingly.

Respectfully yours,

James C. Vaughan

James C. Vaughan

THURSDAY AFTERNOON **24 POINT**
JULY 31, 2003

California
Bar
Examination

Performance Test B

LIBRARY

IN RE RYAN COX

LIBRARY

COLUMBIA LANDLORD AND TENANT ACT

Section 704. Definitions.

In this act, unless the context indicates otherwise:

(1) "Lease" means an agreement, whether oral or written, for transfer of possession of real property, or both real and personal property, for a definite period of time.
(2) "Periodic tenant" means a tenant who holds possession without a valid lease and pays rent on a periodic basis. It includes a tenant from day-to-day, week-to-week, month-to-month, year-to-year or other recurring interval of time, with the interval between rent-paying dates normally evidencing that intent.
(3) "Tenancy" includes a tenancy under a lease, a periodic tenancy or a tenancy at will.
(4) "Tenant at will" means any tenant holding with the permission of the tenant's landlord without a valid lease and under circumstances not involving periodic payment of rent.

* * *

Section 710. Notice necessary to terminate periodic tenancies and tenancies at will.

(1) A periodic tenancy or a tenancy at will can be terminated by either the landlord or the tenant only by giving to the other party written notice complying with this section, unless any of the following conditions is met:

(a) The parties have agreed expressly upon another method of termination and the parties' agreement is established by clear and convincing proof.

(b) Termination has been effected by a surrender of the premises.

(2) A periodic tenancy can be terminated by notice under this section only at the end of a rental period. In the case of a tenancy from year-to-year the end of the rental period is the end of the rental year even though rent is payable on a more frequent basis. Nothing in this section prevents termination of a tenancy for nonpayment of rent or breach of any other

condition of the tenancy.

(3) Length of notice. Except as provided in § 714 of this act at least 28 days notice must be given.

(4) Contents of notice. Notice must be in writing and substantially inform the other party to the landlord-tenant relation of the intent to terminate the tenancy and the date of termination.

* * *

Section 714. Notice terminating tenancies for failure to pay rent, commission of waste, etc.

(1) If a periodic tenant or a tenant at will fails to pay any installment of rent when due, the tenant's tenancy is terminated if the landlord gives the tenant notice requiring the tenant to pay rent or vacate on or before a date at least 5 days after the giving of the notice and if the tenant fails to pay accordingly.

(2) If a periodic tenant or a tenant at will commits waste or breaches any covenant or condition of the tenant's lease, other than for payment of rent, the tenant's tenancy is terminated if the landlord gives the tenant a notice requiring the tenant to remedy the default or vacate the premises on or before a date at least 5 days after the giving of the notice, and if the tenant fails to comply with such notice.

* * *

Section 720. Waste by tenant, action for.

If a tenant under a lease, a periodic tenant, or a tenant at will commits waste, any person injured thereby may maintain an action at law for damages against such tenant; in which action, if the plaintiff prevails, there shall be judgment for treble damages, or for fifty dollars, whichever is greater. The judgment, in any event, shall include as part of the costs of the prevailing party, a reasonable attorney's fee to be fixed by the court.

Cavallaro v. Stratford Homes, Inc.

Columbia Court of Appeal (2001)

The Cavallaros filed suit against Stratford Homes, Inc., seeking specific performance of an agreement for the purchase and sale of a lot and the construction of a home thereon, or, in the alternative, damages arising from Stratford's alleged breach of that agreement. The complaint alleged that the parties had executed a lot reservation agreement which reserved a particular lot and fixed the base price for the construction of one of Stratford's model homes until a sale and purchase agreement was executed. The lot reservation provided, among other things, that: "Should [a sale and purchase] agreement not be executed within 14 days of this date, purchaser and/or seller may, at either's option, void this lot reservation." In consideration for the lot reservation, the Cavallaros gave Stratford a $500 deposit. The complaint alleged that, although the parties had subsequently executed an enforceable sale and purchase agreement, Stratford breached the agreement by improperly refusing to construct their home.

The undisputed record evidence established that the Cavallaros entered into negotiations with Stratford for the construction of a home, but that a meeting of the minds was never reached as to the price and the terms of construction of the home which were essential terms to an enforceable contract. The Cavallaros requested several changes to Stratford's basic model over a period of several months. Plans were redone and new pricing was formulated on a number of occasions. Because no final agreement was reached as to those essential terms, the entry of judgment in favor of Stratford was correct.

Even if the parties had reached a meeting of the minds as to the essential terms, any such contract would have been unenforceable under Columbia's statute of frauds. Pursuant to the statute of frauds, no action can be brought to enforce a contract for the sale of land unless the contract is in writing and signed by the party to be charged. In order to be an enforceable land sales contract, the statute of frauds requires the contract to satisfy two threshold conditions. First, the contract must be embodied in a written memorandum signed

by the party against whom enforcement is sought. Second, the written memorandum must disclose all of the essential terms of the sale and these terms may not be explained by resort to parol evidence.

The Cavallaros contend there is evidence in the record demonstrating that the parties executed a written contract. More specifically, the Cavallaros maintain that the sale and purchase agreement and addendum which was signed by them, but not by Stratford, when read in conjunction with a price list which was signed by Stratford's agent four days later, satisfied the written memorandum requirement of the statute of frauds. We disagree. In order for documents to be read in conjunction with each other to constitute a sufficient memorandum for purposes of the statute of frauds, the law strictly requires some internal reference between the documents. To that end, there must be some reference to the unsigned writing in the signed writing. Here, the signed price list did not make reference to the unsigned sale and purchase agreement.

The Cavallaros next argue that the trial court improperly rejected their claim that the partial performance doctrine removed the parties' alleged oral agreement from the requirements of the statute of frauds. We disagree that partial performance would apply in this case even if an oral agreement had been reached by the parties. The established rule is that in order to constitute partial performance sufficient to take an oral agreement to devise real property out from under the statute of frauds, delivery of possession of the real property is required. But the possession must be permissive and, most importantly, acquiescence by the parties to the terms of the agreement must be apparent. Here, a finding of partial performance could not be sustained because the Cavallaros never took possession of the property.

Having rejected all of the Cavallaros' claims of error, we affirm the trial court’s judgment.

Binninger v. Hutchinson

Columbia Court of Appeal (1978)

Genise Tatum Binninger appeals a judgment granting specific performance to Ralph Hutchinson, the intended purchaser, based upon an oral agreement for the conveyance of real property. Binninger was the owner of improved property in Bay County, Columbia, which Hutchinson was interested in buying. Binninger was then living in Houston, Texas. There is a conflict of testimony, which the trial court resolved against Binninger, as to whether an agreement was reached between the parties. While Mrs. Binninger stated no bargain was struck, Hutchinson testified that during a long distance telephone conversation, she agreed to sell him the property for $15,000, provided he pay her $10,000 and give her an installment note for the remaining $5,000. Hutchinson stated Mrs. Binninger told him that upon his making the above payment, the property was his.

Following the conversation, Hutchinson forwarded a warranty deed, mortgage, note and a check in the amount of $2,000 payable to "Genise Tatum Bissonett." The named payee was an obvious error. Bissonett was the name of the street where Binninger resided. Upon receipt of the check she attempted to call Hutchinson to advise him she was not selling the property, but without success. When she later discovered Hutchinson had taken possession, and was making substantial improvements, she returned the check uncashed to her attorney, who also attempted to contact Hutchinson, but, being unable to, left a message for Hutchinson to call him. Hutchinson finally contacted Mrs. Binninger within one or two months after receipt of the papers by her.

When further negotiations between the parties failed, Hutchinson brought an action seeking specific performance of the oral contract. The court found the parties entered into an oral agreement for the sale of the property for a price of $15,000. The prayer for specific performance was granted and the property conveyed to Hutchinson upon payment of $15,000 together with accrued interest. We reverse.

Binninger argues (1) an oral agreement was never reached, and (2) the statute of frauds bars Hutchinson from relief. Hutchinson responds there was competent substantial evidence for the trial court to determine the contract had been formed between the parties and since proof of both possession and payment of some part of the consideration was made, partial performance of the agreement was made, thus bringing into operation the partial performance exception to the statute of frauds.

Before the partial performance exception may be applied, delivery of possession must be made pursuant to the terms of the contract and acquiesced to by the other party. Even construing the conflicting testimony in Hutchinson's favor, as we must, we find no evidence entitling him to possession of the property. His possession was known to Mrs. Binninger only after she received the deed, mortgage, note and check and after she was told by relatives Hutchinson was making improvements upon the property. Hutchinson's proof concerning Mrs. Binninger's acquiescence to his possession was hardly clear and positive. Before a plaintiff may be allowed to give evidence of a contract for the sale of land not in writing, it is essential that he establish, by clear and positive proof, acts which take the contract out of the statute. The statement attributed by him to Mrs. Binninger, that after he paid $10,000 down and gave her a note for $5,000 the property was his, cannot be reasonably relied upon by Hutchinson as acquiescence for him to move onto the property without title and begin extensive improvements. The oral agreement was within the statute of frauds and unenforceable.

Additionally we find Hutchinson's forwarding of a $2,000 check, rather than the $10,000 which even he said was agreed upon by the parties, was no more than a counteroffer. It is hornbook law requiring no citations of authority, except common sense, that a contract once entered into may not thereafter be unilaterally modified; subsequent modifications require consent and a meeting of the minds of all of the initial parties to the contract whose rights or responsibilities are sought to be affected by the modification.

REVERSED.

Tanner v. Fulk

Columbia Court of Appeal (1985)

Plaintiff, George Tanner, filed an action against defendant, Michael Fulk, requesting that a land installment contract be terminated, that possession of the premises be restored to him, and that an additional judgment of $55,000 for deterioration and destruction of the premises be awarded.

A land installment contract is a type of conditional sale as, generally, possession is transferred immediately while legal title is held by the vendor until full payment of the contract price. A land installment contract means an executory agreement which by its terms is not required to be fully performed by one or more of the parties to the agreement within one year of the date of the agreement and under which the vendor agrees to convey title in real property to the vendee and the vendee agrees to pay the purchase price in installment payments, while the vendor retains title to the property as security for the vendee's obligation.

The court rendered a judgment which included findings of fact and conclusions of law. That judgment held as follows: 1) Fulk owed Tanner the actual amount called for in the land contract from its execution to the judgment canceling the contract and returning possession to Tanner, less payments made to Tanner; 2) Tanner was not entitled to any monies for destruction and deterioration of the property; 3) Tanner was not entitled to any monies based upon the fair rental value of the property; and 4) Fulk was not entitled to any monies from Tanner, and specifically could not recover the sum of $7,200 he had paid under the land contract prior to termination.

The election of the vendor to terminate the land installment contract is an exclusive remedy that bars further action on the contract unless the vendee has paid an amount less than the fair rental value plus deterioration or destruction of the property occasioned by the vendee's use. In such case the vendor may recover the difference between the amount paid by the

vendee on the contract and the fair rental value of the property plus an amount for the deterioration or destruction of the property occasioned by the vendee's use. Where the vendor of the land installment contract brings an action for forfeiture for vendee's default under the contract, the vendor has elected an exclusive remedy which prohibits further action except to recover any amount paid by the vendee which is less than the fair rental value plus any deterioration or destruction of the property occasioned by the vendee's use. However, if the amount paid by the vendee exceeds fair rental value plus any deterioration or destruction, the vendor is permitted to retain the excess amount paid.

This measure of damages is also consistent with the general principle that specific performance is unavailable to the seller. In a typical case, where the buyer is in default of payment, monetary damages are adequate to compensate the seller since what the seller bargained for was money. As such, a monetary award is the equivalent of specific performance.

In the instant case, the trial court specifically placed a zero amount on the difference between the amount paid by Fulk on the land contract prior to termination and the fair rental value. The trial court also placed a zero amount on destruction and deterioration. Both of these determinations are supported by competent and credible evidence. Finally, the trial court found no reason to award Fulk any of the amount of $7,200 he had paid under the land contract prior to termination. Neither do we.

AFFIRMED.

Hansen v. Academy Corp.

Columbia Court of Appeal (2002)

In 1987, Academy Corporation leased from Hansen a 22,500 square foot building located on a three-acre tract in Rosenberg, Columbia. As part of the lease agreement, Academy had exclusive use of the parking lot surrounding the building. The building and the parking lot did not comprise the entire three-acre tract.

Hansen brought a claim for intentional trespass, claiming that Academy, without his consent, used a small building and a small sign located outside the parking lot, but within the three-acre tract.

The trial court interpreted the contract as a matter of law, deciding that the disputed property upon which the small building and sign were located was outside Academy's lease of the building and its right to use the parking area. Based on that interpretation, the trial court submitted the question of trespass to the jury.

The jury charge defined "trespass to real property" as:

> any unauthorized intrusion or invasion of private premises or land of another, committed when a person enters another's land without consent. For purposes of a trespass claim, entry need not be in person, but may be made by causing or permitting something to cross the boundary of the property.

The jury was asked, "Did Academy trespass on Dr. Hansen's property?" As a matter of law, Academy neither leased nor had a right to use the disputed property. Academy's use of the disputed property was, therefore, unauthorized. We hold that this evidence was legally and factually sufficient to support the jury's finding that Academy trespassed on Hansen's property.

Academy also contends that there was no evidence or insufficient evidence of damages for trespass. Hansen offered evidence of the rental value of the sign and the small building. In Columbia, the scope of recoverable damages associated with damage to property depends on whether the injury is temporary or permanent in nature. If an injury to property is temporary in nature, the proper measure of damages is the reasonable cost of the repairs necessary to restore the property to its condition immediately prior to the injury plus the loss occasioned by being deprived of the use of the property. It has been repeatedly held that loss of rentals is an appropriate measure of damages for the temporary loss of the use of land. Given the nature of the injury in this case, we conclude that the damages for trespass based on rental values were permissible.

Vogel v. Pardon

Columbia Supreme Court (1990)

Anton and Ruth Vogel appeal from a district court judgment awarding them damages for waste arising out of the lease of an apartment building. We affirm.

In 1981 the Vogels leased an apartment building in Bismarck to Richard Pardon, Paul Rasmussen, Ronald Klein and A. Gaylord Folden (the Partners). The Partners quit making payments in September 1985, and the Vogels subsequently canceled the lease pursuant to the lease provisions and state law. The cancellation was effective March 31, 1986.

The Vogels then commenced this action seeking damages for waste. The Vogels asserted that the property had been in good repair when the Partners took possession in 1981, and that the property was in an unrentable condition when returned in 1986, due to the Partners' failure to make necessary repairs. The Partners asserted that the building, which had been constructed in 1963, was in an advanced state of disrepair when they contracted with the Vogels in 1981, and that any damage was caused by ordinary wear and depreciation of the property, not by any waste on their part.

The case was tried to the court. The court found that the Partners had failed to properly repair the roof of the building, resulting in water damage to the building and contents, for which it awarded the Vogels $4,000 in damages. The court also awarded damages of $500 for furniture which was discarded, sold, or converted by the Partners. Judgment was entered accordingly and the Vogels appealed.

The Vogels argue that the court erred in failing to award damages for waste to various items, including appliances, carpeting and linoleum. Waste may be defined as an unreasonable or improper use, abuse, mismanagement, or omission of duty touching real estate by one rightfully in possession, which results in a substantial injury. Waste implies neglect or misconduct resulting in material damage to property, but does not include

ordinary depreciation of property due to age and normal use.

The evidence on whether there was waste to appliances, carpeting and linoleum was conflicting and the trial court found that these items were nearing the end of their useful lives when the building was leased and had simply worn out due to ordinary wear and age, rather than from any wrongful conduct of the Partners. We conclude that the trial court's findings in this regard are not clearly erroneous. The Vogels were not entitled to recover damages for items which had reached the end of their useful lives through ordinary wear.

The object of an award of damages in an action for waste is to compensate without unjust enrichment. If recovery of the replacement cost of the roof were allowed in this case, the Vogels would be unjustly enriched. The Vogels leased the Partners an eighteen-year-old building with an eighteen-year-old roof. There was testimony that the normal useful life of a roof of this type was approximately twenty years. During the period that the Partners were in possession, the roof reached the end of its useful life through ordinary depreciation, wear, and age. If the Vogels were allowed to now recover the replacement cost, they would enjoy the benefit of a brand new roof with another twenty-year life expectancy. Conversely, the Partners, through the happenstance of possessing a building with a roof nearing the end of its useful life, would be forced to bear the cost of its replacement, even though the roof required replacement through no fault of their own. Clearly, such a result would unjustly benefit the Vogels. We conclude that the trial court did not err in refusing to award damages for the replacement of the roof.

The Vogels assert that the trial court used an incorrect measure of damages. Their argument on this issue is intertwined with their assertion that the court should have awarded damages for the cost of replacing appliances, flooring, and other items of personal property in the building. The trial court, however, found, with sufficient evidentiary support, that replacement of those items was necessitated by ordinary wear and age, not by any act constituting waste by the Partners.

The Vogels' argument is, however, relevant to the award of damages for furnishings which were discarded, sold or converted. The trial court found that the parties intended that the furnishings be included in the lease and that the Partners were therefore liable for the value of any furniture lost or damaged. The trial court awarded $500 for the value of the furniture which was discarded or sold. The Vogels assert that the court should have assessed damages based upon replacement cost of the furniture, rather than its actual value.

The trial court's resolution of this issue is in accordance with the general rule that where the waste alleged to have been committed on the leased premises resulted from the destruction or removal of something from the premises, and the thing thus destroyed or removed, though a part of the realty, had a value which could be ascertained accurately without reference to the soil on which it was located, the measure of the damages recoverable by the landlord for the waste may be based on the value of the thing destroyed or removed, instead of on the diminished market value of the premises.

The object of an award of damages in a waste case is to compensate without unjust enrichment. If the Vogels were allowed to replace old, well-worn furnishings with new (or, at the least, newer) furnishings, they would be unjustly enriched. By allowing damages based upon the actual value of the items lost, the Vogels receive adequate compensation but not over compensation.

Judgment is affirmed.

ANSWER 1 TO PERFORMANCE TEST - B

MEMORANDUM

TO: Logan Dillard
FROM: Applicant
RE: In re Ryan Cox

This memorandum addresses the legal position and options of Ryan Cox regarding the sale of real property in Columbia.

Is there an enforceable land installment contract?

The first issue is whether the contract signed by Adam Cox as seller and dated July 9, 2002 is enforceable, or whether there is an oral agreement between the parties that satisfies the Statute of Frauds.

Agreement: Meeting of Minds

To have any type of enforceable contract there must first be an agreement. This means there must be a "meeting of the minds" regarding the essential terms, including price of the contract. If there is no such meeting of the minds, as was the case in Cavallaro, there is no agreement to serve as the basis of a contract.

The idea of selling the Columbia property to the Belmonts was first raised by Mr. Cox's daughter, Emily. She told Mr. Cox that the Belmonts "might be interested" in buying the house. However, at this point, there was no agreement. Neither party had evidenced a set desire to buy or sell.

The second exchange between the Belmonts and Emily came much closer to an agreement. As Mr. Cox described, he considered various options, including a land installment contract. This period resemble the negotiations in Cavallaro when plans were redefined and new pricing formulated. Mr. Cox and the Belmonts likewise negotiated price. Mr. Cox initially asked for $130,000, but settled on $120,000.

According to Mr. Cox and confirmed by Emily, the Belmonts and Mr. Cox reached a meeting of the minds. The price was set at $120,000. It seems that the Belmonts reviewed the written contract and agreed to its terms. The essential terms included Mr. Cox's continued use of the barn, residing there in his motor home, etc.

This agreement was made orally between the parties in May. Thus, the threshold issue of finding whether there was meeting of the minds is met. Further evidence is the recognition of the agreement's terms in the letters from the Belmonts' lawyers.

Statute of Frauds

The agreement described above was made orally. It was memorialized in a writing that was signed by Adam Cox. The Columbia statute of frauds requires that a contract for the sale of land is unenforceable unless the essential terms are in writing and the writing is signed by the party being charged. (See Cavallaro).

Here, only Adam Cox signed the written contract. The Belmonts, against whom Mr. Cox wants to enforce the contract, did not sign it. The contract cannot be enforced against them unless the Statute of Frauds is somehow satisfied.

One option would be satisfaction through another written document signed by the Belmonts read in conjunction with the failed contract. So far, we know of no other writings. The letter from the Belmonts' attorney seems to acknowledge the terms of the contract; however, there is no internal reference between the documents as required by Cavallaro. In addition, the Belmonts themselves did not sign it.

Partial Performance

The Statute of Frauds may also be satisfied by the partial performance doctrine. An oral agreement to sell real property is enforceable if there is partial performance, meaning 1) delivery of possession of the property and 2) acquiescence by the parties to the terms of the contract. See Cavallaro.

Mr. Cox's situation in this regard is favorable. He moved out of his house following the oral agreement and the Belmonts moved in. The agreement was made in May and possession was delivered in June. It is not clear whether the Belmonts actually lived at the house. From the interview, it seems that Marsha Belmont did but her husband Nicky was traveling with the carnival until October. Nicky was there at some times, as shown by the meeting of Mr. Cox and Nicky in the house in September.

Possession alone, though, is not enough. In Binninger, the purchaser took possession of the property but the seller was not found to have acquiesced in either the possession or the contract terms.

Mr. Cox clearly acquiesced in the possession. The issue is whether the Belmonts acquiesced to the essential terms. The fact that the Belmonts paid the requested $40,000 down payment supports acquiescence. Had they paid less, as the purchaser in Binninger did, it would be a counteroffer because unilateral subsequent modification requires consent.

In addition, the Belmonts did not object to Mr. Cox's staying on the property in his motor home. More information is needed on whether they left the pole barn in his exclusive possession. The terms of the contract provided for Mr. Cox's remaining on the property and retaining sole access to the barn. If the Belmonts took possession and allowed these things to continue, their acquiescence may be inferred. Mr. Cox must show this

acquiescence by clear and positive proof, as required by Binninger.

In sum, Mr. Cox has a strong case for proving an enforceable contract exists. Although there were preliminary negotiations, the parties reached a meeting of the minds on the essential terms in May. This contract was oral and thus potentially unenforceable under the Statute of Frauds. However, because both possession and acquiescence are provable, the doctrine of part performance satisfies the statute.

What are the seller's remedies?

Assuming (as presented above) that the land installment contract is enforceable, the seller is entitled to certain remedies.

The contract itself provides for forfeiture if the buyer fails to – for a period of 30 days – pay seller sums due, pay taxes or assessments, or comply with any covenants.

Mr. Cox reported that the monthly payments were received for August, September and October. However, the monthly payments since then have not been paid. In addition, the $12,000 due in November was not paid. The failure of the Belmonts to pay gives rise to seller's remedies.

As explained in Tanner, the seller in a land installment contract retains legal title to the property even though the buyer takes immediate possession. The property is a security for the buyer's obligation.

The seller's election to terminate the contract – "forfeiture" – is an exclusive remedy. This means that further action on the contract is barred. But the seller can still recover damages if the amount already paid by the buyer is less than the fair rental value of the property plus deterioration or destruction from buyer's use.

Mr. Cox can seek to terminate the contract. So far, the Belmonts have paid $43,000. The fair rental value of the property is $1,000 per month. The Belmonts have been in possession since June of 2002. It is now July of 2003, meaning the total rental value is $13,000. Given that the furniture – when purchased – was worth $10,000, it is impossible/unlikely that the damage or deterioration will reach $30,000. Mr. Cox can keep the full $43,000, even though it exceeds the rental value plus damages. See Tanner.

Tanner also makes it clear that specific performance is not available to the seller. Because Mr. Cox (Adam) bargained for money, damages are adequate compensation.

Thus, if the contract is enforceable, Mr. Cox can force forfeiture but cannot get specific performance, which was the option he wanted.

What if the Contract is not enforceable?

If there is no enforceable contract between the parties, then their legal relationship must be analyzed.

Legal Relationship

Columbia Landlord and Tenant Act provides the relevant definitions for this situation.

The parties do not have a lease. A lease is an oral or written agreement that transfers possession of real or personal property §704. As discussed above, if there is an agreement it does more than just transfer possession, it attempts to transfer title.

There are two types of tenancies without leases. A periodic tenant is a tenant with possession who pays rent by period. This could have described the relationship in August, September and October when the Belmonts made monthly payments of $1,000.

Because no payments have been made since October, the legal relationship between the parties is best described as a tenancy at will. The Belmonts are in possession of the property – at least the house and furniture, not the pole barn. However, no periodic payments have been made. The Belmonts' possession is with the permission of Mr. Cox.

If their possession were unauthorized, it would constitute a trespass. See Hansen. Because Mr. Cox gave consent for their occupation of the premises, a tenancy at will exists.

Remedies Available

Section 710 defines the notice required to terminate a leaseless tenancy.

If there is an express agreement between the parties regarding termination, it controls. If there is any such agreement it would need to be proved by clear and convincing evidence. The (failed) contract provided for forfeiture. See above.

Termination may also be effected by a surrender of the premises. The Belmonts have not vacated the property.

If a periodic tenancy were in effect, it could end at the end of a rental period. This would be the 9th of the month. However, a tenancy at will can be terminated at any time, as long as 28 days notice is given.

Section 714 provides specific termination procedures if failure to pay rent or commission of waste are the basis [sic]. A tenancy at will can be terminated if the landlord gives the tenant notice to pay rent (or remedy the default) or vacate within 5 days.

Mr. Cox can terminate the tenancy by giving just 5 days notice because it is based on the Belmonts' commission of waste. Mr. Cox described the house as "trashed" and the furniture as "ruined." The presence of untrained house pets and lack of cleaning constitute "waste."

Mr. Cox can also file an action for damages at law for waste under Section 720. Vogel defines waste as neglect or misconduct resulting in material damage to the property. The things Mr. Cox observed in September have probably gotten worse.

Mr. Cox can recover compensatory damages, but unjust environment must be avoided. Vogel. Although the furniture was purchased for $10,000, it was probably not worth that much when the Belmonts took possession.

Because there was no express agreement to buy or lease the furniture, the Belmonts' possession and use was authorized only by Mr. Cox's implied consent. In Vogel, the court limited damages for waste of real property (like furniture) to the value of the thing destroyed or removed. Paying Mr. Cox the purchase price would unjustly enrich him. The Belmonts' were entitled to ordinary use and wear. It was only misuse or abuse that constitute waste.

Procedures

As mentioned above, Mr. Cox should first terminate the tenancy. He should give at least five days notice in writing that substantially informs the Belmonts of the intent to terminate and date of termination.

Mr. Cox should also file suit for damages. Section 740 permits inclusion in the judgment the costs of the prevailing party and reasonable attorney's fees.

ANSWER 2 TO PERFORMANCE TEST - B

Memo

To: Logan Dillard
From: Applicant
Re: In re Ryan Cox

You have asked me [to] write you a memo concerning Mr. Cox's case before you counsel him as to his options. Mr. Cox entered into a land sale installment contract, which the purchaser backed out of before signing but after moving in. The Belmonts (purchasers) now want reimbursed for the $43,000 they have already paid to Mr. Cox.

1. Enforceability of the land sale contract

The issue is whether the written contract is enforceable, and if so, what remedies Mr. Cox is entitled to for the Belmonts' breach of it.

a.) Enforceability

An installment land sale contract is enforceable if there is a meeting of the minds on the essential terms and if the contract satisfies the statute of frauds. (Cavallaro).

i.) Meeting of the Minds on Essential terms

A contract must demonstrate a meeting of the minds on its essential terms to be enforceable. The essential terms include the price and terms of construction in a tot agreement to construct a house (Cavallaro.). In this case, the essential terms of the contract are the price, the installment payment schedule, and Mr. Cox's remaining on the property in a mobile or trailer home and exclusively using the pole barn.

These terms are very clearly spelled out in the contract; however, the Bettons [sic] apparently never signed the contract. The Bettons [sic] did practically admit to these terms, however, by saying they changed their mind and didn't want Mr. Cox there. (Cox interview). This is tantamount to saying they agreed to it at first, when the agreement was made. Also, the Bettons' [sic] attorney Vaughan's first letter to Adam demanded finalizing the sale and offering to pay the remaining $77,000. This is evidence the price of $120,000 was agreed to, because the Bettons [sic] had already paid $43,000, in the installment method provided under the contract.

ii.) Statute of Frauds

Even if the essential terms of the contract are agreed upon, the contract will not be enforceable if it violates Columbia's statute of frauds. (Cavallaro). The statute of frauds has two requirements: writing signed by the party against whom enforcement is sought,

and that the essential terms of sale are disclosed in the writing. (Hard evidence is not admissible to explain terms).

In this case, the written contract lays out all the essential terms – the price, the property, Mr. Cox's presence, the forfeiture clause. It is very complete, and parol evidence is not necessary to explain any terms.

However, the Belmonts apparently never signed this contract. Mr. Cox signed (his son Adam, in whose name the property is formally titled), but Mr. Cox is seeking enforcement of the contract against the Belmonts. Adam gave Mr. Cox's daughter Emily the contract to have the Belmonts sign. The Belmonts had already moved into the house, and Mr. Cox never got a copy of the contract singed by the Belmonts.

Because the Belmonts are the party against whom enforcement is sought, and they did not sign the contract, the contract appears to violate the Columbian Statute of Frauds ("SOF") and would be unenforceable if there were no applicable exception.

iii.) Part performance exception to SOF

The part performance doctrine can remove and oral contract from the statute of frauds requirement. In order for part performance to apply, delivery of possession pursuant to the contract and seller's acquiescence to purchaser's possession must be shown. (Binninger).

In this case, the Belmonts took possession in June, and continued to possess the property until the current time. Mr. Cox acquiesced in their possession, as he gave them permission to move in June, before they had even paid the down payment, because he had already moved out in May. He continued to live in a different structure on the same parcel of land, so he was aware of their continued presence. He also accepted their $1,000 monthly payments from August until October.

Therefore, Mr. Cox's chances of bringing this contract under the part performance exception to the SOF are good, since the Belmonts took possession pursuant to the contract, and he acquiesced in their possession. In this case, the installment contract will be enforceable, even though there is no signed contract by the Belmonts.

b.) Remedies if the contract is enforceable

The issue is, if the contract is enforceable, what Mr. Cox is entitled to order [sic] the contract.

i.) Election to terminate the contract

A seller can elect to terminate an installment land sale contract if the buyer misses a payment and the contract provides for forfeiture. If the seller elects this, it is the seller's exclusive remedy and bars any further action on the contract unless the vendee has paid

an amount less than the fair rental value of plus [sic] deterioration or destruction of property. (Tanner).

In this case, the contract specifically provides for forfeiture in case of purchaser default by paragraph 15. Thus, Mr. Cox has a right to terminate the contract. However, this would be his exclusive remedy if he chooses to do so, because he has already received $43,000. Although there is evidence of deterioration and destruction (Mr. Cox said the Belmonts "trashed" the house and ruined the furniture inside), he cannot recover damages for this unless they exceed $43,000.

It may be a good remedy for Mr. Cox, though, because he could end the contract and keep $43,000. Under the Tanner case, if the amount paid by the vendee exceeds fair rental valve plus any deterioration or destruction, the vendor is permitted to retain the excess amount paid. Mr. Cox said his house was appraised at $100,000 and that a real estate agent had said $1,000 a month was a fair rental value. For a price of nearly half of what his house is worth, he could probably fix any damage done by the Belmonts and even improve on it.

If Mr. Cox elects to terminate the land sale contract, he is entitled to have the Belmonts leave and keep the $43,000 the Belmonts already paid to him.

ii.) Specific Performance

Specific performance is typically unavailable to the seller in an installment land sale contract, because money damages are generally adequate to compensate the seller's injury. (Tanner).

Mr. Cox had indicated (in his interview) that he would like the contract enforced. An argument could be made that this was not a typical land sale contract, so money damages would not be adequate to compensate Mr. Cox. Mr. Cox did not just contract to sell his real property – he also contracted to live on a different part of the property, receive monthly payments from the Belmonts for his income, and continue to store his tools and use the pole barn. He has many very expensive tools, and it would cost approximately $15,000 to move them somewhere else, not to mention that he doesn't have another place to move them to. Mr. Cox would therefore not be compensated by just receiving the money due to him under the contract.

2.) If the contract is not enforceable

The issue if the K is not enforceable is what type of legal relationship the parties have, what remedies the relationship provides, and what procedural steps are necessary to obtain the remedies.

a.) Legal relationship

If the contract is not enforceable, Mr. Cox is still the owner of the real property. The Belmonts, however, are staying in a house on his land and have given him money. The issue is whether a lease or tenancy arrangement has arisen.

A periodic tenant holds possession without a valid lease and pays rent on a monthly basis. (Col. LL Act §704). A lease is an agreement for transfer of possession of property for a definite period of time. Here, if there is no contract, there is no express agreement as to the transfer of Mr. Cox's real property and its terms, so there is no lease. The Belmonts paid rent at a rate of $1,000 on August 10, September 10, and October 10. It could be argued that this monthly payment arrangement constituted a periodic tenancy.

A tenant at will is a tenant holding with the permission of the tenant's landlord without a valid lease and under circumstances not involving periodic payment of rent. (§704). In this case, there is no valid lease, as discussed above. The Belmonts have at least until this point probably stayed on the property with Mr. Cox's permission. He invited them to move in, thought they had a contract, and he accepted payments from them. He has not previously brought any actions or made any requests for them to leave. Although there were periodic payments, as discussed above, there were only three. There was also the initial $40,000 payment. Then a $12,000 payment was due in November and a $1,000 payment in December that were not paid. Without a valid contract, it is possible to argue these did not constitute a periodic payment arrangement, and thus a tenancy at will was created.

If the Belmonts are on the property without Mr. Cox's permission, if for example – the contract is a condition for permission to remain on the property, then the Belmonts are trespassers.

b.) Possible remedies and procedural steps necessary for remedies

The issue is, without an enforceable contract, what Mr. Cox's remedies are are [sic] what is necessary to achieve them.

i.) Termination of periodic tenancy

If the relationship between the parties is a periodic tenancy, it can be terminated by giving notice at the end of the rental period, provided it is at least 28 days away (§710).

In this case, the Belmonts are still living in the house. To terminate the periodic tenancy and force them to leave, procedurally, Mr. Cox must give notice to the Belmonts that the tenancy is terminated on the next 10th of the month that is at least 28 days away, because if there is a periodic tenancy, it is month-to-month with payment due on the 10th of each month. Thus, the rental period is monthly from the 10th.

ii.) Terminate based on failure to pay rent

If the relationship is either a periodic tenancy or tenancy at will, it can be terminated by giving tenant notice that the tenant must pay rent or leave within 5 days. (§714).

In this case, the Belmonts did not make payment in November and December. Procedurally, Mr. Cox can give immediate notice that the Belmonts must pay rent or vacate his property in 5 days.

iii.) Terminate based on committing waste

If the relationship is either a periodic tenancy or tenancy at will, it can be terminated by the landlord giving notice that the tenant must remedy the default or vacate the premises within 5 days of the notice. (§714).

In this case, Mr. Cox alleges that the Belmonts have "trashed" his house and ruined his furniture. This is more than ordinary wear and tear and constitutes waste by tenants. Procedurally, Mr. Cox must give the Belmonts the notice required by §714.

Additionally, the Belmonts will be liable for damages based on the commission of waste. Any person injured by waste can recover treble damages (or $50 if greater), including costs and attorney's fees, in a lawsuit. (§720). Mr. Cox can sue for the damage done to his house and his furniture. He will not, however, be able to recover the full $10,000 he paid for his furniture, because it was not new when the Belmonts moved in. It was not worth $10,000 them and under Vogel, Mr. Cox would be unjustly enriched if allowed to recover its full purchase price. He will, however, be able to recover more than the decrease in rental value to his home, because the furniture has a value that could be ascertained accurately without reference to the soil on which it is located (See Vogel). It is clear than [sic] the rental amount was not intended to include the furniture, because the written agreement (though unenforceable) includes fixtures but not personal property in the price.

iv.) Trespass

Because Mr. Cox is the owner, if the Belmonts were on his property without permission he can recover in trespass. Trespass to real property is any unauthorized intrusion or invasion of private premises or land of another, committed when a person enters another's land without consent. (Hansen). Recovery is permitted for the loss of rental value for intentional trespass. (Hansen). Procedurally, he must be bring [sic] a trespass action.

If Belmonts did not have Mr. Cox's permission, because they failed to make payments, they may be liable in trespass. Mr. Cox can recover $1,000 a month, even without the contract, because it is likely the reasonable rental value of the land (as the real estate agent determined). Thus, the loss of rental income is what he could have gotten from the property if the Belmonts had not been trespassing.