

Case Addresses Effect of Stipulation on Child Custody

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In *In re Marriage of Abrams*, 2003 DJDAR 1123 (Cal. App. 3rd Dist. Jan. 28, 2003), the court held that a stipulation and order providing that neither parent could remove the minor children from the county without the written consent of the other parent or order of the court did not affect the ability of the custodial parent to move away from the county with the minor children and did not change the burden of proof imposed on the noncustodial parent to show that a change of custody was in the best interests of the children in the event of a move away.

Joseph and Michelle Abrams' marriage was terminated by a judgment of dissolution on Dec. 30, 1999. The trial court awarded them joint legal custody of their three children, with Michelle Abrams having primary physical custody and Joseph Abrams having specified visitation. On March 7, 2001, a stipulation and order was entered that modified the cus-

be with her.

The mediator recommended that custody remain with the mother as long as she stayed in Sacramento because of the children's wishes and because the children were doing well under her care.

In August 2001, Michelle Abrams notified the court that she was renewing her request to move to San Francisco. The court set a date for an evidentiary hearing on her request. Pending the hearing, the court adopted the recommendations of the mediator, allowing the children to be enrolled in the new Sacramento school district but ordering that custody would be changed if Michelle Abrams moved to San Francisco before the evidentiary hearing.

The evidentiary hearing was held in January 2002. Joseph Abrams argued that as a result of the move-away restriction in the stipulation, there existed a presumption that it was in the children's best interests not to have their residence changed from Sacramento and that Michelle Abrams had the burden of overcoming that presumption.

eral theories. First, the court noted that Joseph Abrams' argument regarding the March 7, 2001, stipulation placed too much emphasis on the place of custody instead of the person to whom custody was given.

The *Abrams* court noted that if the stipulation had provided that custody would change to Joseph Abrams if Michelle Abrams moved from the Sacramento area, then this would have reflected a judicial determination that it was in the best interests of the children to be in the Sacramento area. However, the stipulation and order awarded custody to Michelle Abrams reflecting a judicial determination that it was in the best interests of the children to be with Michelle Abrams, only requiring her to obtain Joseph Abrams' consent or a court order should she want to move.

Second, the court found that nothing in the stipulation expressly or implicitly affected the *Burgess* holding. The *Abrams* court noted that there was nothing in the stipulation that stated that the burden of proof under *Burgess* was switched from Joseph Abrams to Michelle Abrams. Rather, the stipulation merely stated that she had to get his or the court's permission to move.

Further, citing *Miracle Asto Center v Superior Court*, 68 Cal.App.4th 818 (1998), the *Abrams* court found that all laws in existence at the time of a stipulated agreement are deemed incorporated into an agreement and that the parties are deemed to know and have in mind these laws when the agreement is made. Therefore, the *Abrams* court concluded, the move-away provision in the stipulation and order had to be construed as incorporating the *Burgess* move-away standard.

The *Abrams* court concluded that the effect of the stipulation was a mechanism to ensure that Joseph Abrams had the opportunity to contest a move away before it occurred. The court rejected his arguments that by requiring Michelle Abrams to be the moving party, the stipulation did more than merely provide notice and an opportunity for him to contest the move away.

The court noted that because Michelle Abrams had to obtain judicial review before to moving, she had to meet the burden of showing that the move was for good-faith reasons, pursuant to *Burgess*. This differed from a mere notice provision, which would have required Joseph Abrams to file a court action to prevent the move away. A mere notice provision, the court noted, would not have required Michelle Abrams to meet any burden of showing good-faith motives for the move away, absent his filing a petition to prevent the move away.

In conclusion, the *Abrams* court's ruling makes clear that courts will not alter the established *Burgess* move-away presumption unless specific language is used in a court order to alter the presumption. However, the *Abrams* court alluded to several methods in which the *Burgess* presumption might be removed or changed.

First, the *Abrams* court intimated that the *Burgess* presumption might be removed by an express provision in a stipulation and order stating that the burden of proof regarding the best interests of the children in the event of a move away was changed from the noncustodial to the custodial parent.

Second, the court intimated that the presumption might be removed by a court order awarding custody to one parent but providing that custody change to the other parent should the custodial parent move from the children's county of residence. The court reasoned that such a custody order would reflect a judicial determination that it was in the best interests of the children that they remain in their county of residence, not a judicial determination that it was in their best interests to remain with the custodial parent.



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tody provisions of the judgment.

The stipulation provided Joseph Abrams with substantial visitation and contained the following restriction: "Neither parent shall remove the children from the County of Sacramento, or the State of California, for the purposes of changing the children's residence, without the written consent of both parties or until further order of the Court."

On July 7, 2001, Michelle Abrams filed a petition to allow her to move out of Sacramento to an area near San Francisco. The basis of the petition was that she wanted to be closer to her fiancé and her father, who had health problems, and that her job required her to move. The matter was referred to mediation.

The mediator issued a report based upon the mediator's interviews with the parents and the children, stating that custody should be changed to Joseph Abrams if Michelle Abrams were to relocate. The mediator reported that it was the children's strong preference to stay in Sacramento and that their wishes should be given weight because they were of sufficient maturity and capacity to reason. The mediator further stated that it would be detrimental to the children to be uprooted from their familiar environment, loved ones and friends.

In July 2001, the mother abandoned her request to move to San Francisco but applied to move within Sacramento to an area outside the children's current school district because she had an opportunity for a job promotion and was selling her current home. The court again ordered mediation, at which the children stated that they did not wish to leave their school but wished to stay with their mother and that as long as she stayed within the Sacramento area, they preferred to

The trial court ruled against Joseph Abrams, finding that nothing in the stipulation changed the law as set forth by *In Re Marriage of Burgess*, 13 Cal.4th 25 (1996), where the court ruled that the only burden that a custodial parent who wishes to move away with a child has is the burden of showing that the decision to move away was made in good faith and not motivated by a desire to frustrate the father's time with the children. The trial court ruled that it was Joseph Abrams' burden to show that a change in custody was in the best interests of the children in the event of a relocation by Michelle Abrams.

After hearing the evidence, the trial court found that Michelle Abrams' decision to move was made for good-faith reasons and that Joseph Abrams failed to carry his burden of proof of showing that a change in custody because of the move was in the children's best interests.

The trial court discounted the importance of the mediator's initial recommendation regarding the children's preference to stay in the Sacramento area by stating that it should not be given great weight because it was based upon their desire to stay in the same school with their same friends, but that subsequently they had changed schools, adapted well and made new friends.

Joseph Abrams appealed, contending that the trial court improperly relied upon *Burgess* by imposing a burden of proof on him to show that it was in the best interests of the children for there to be a change of custody to Joseph Abrams in the event of a move away. Joseph Abrams argued that *Burgess* was based upon the custodial parent's presumptive right to relocate, pursuant to Family Code Section 7501, but that such a presumption was inapplicable because of the March 7, 2001, stipulation, which Joseph Abrams argued removed the presumption.

Joseph Abrams further argued that because Michelle Abrams was the moving party and because existing custody orders are presumed to be in the best interests of the children, she had the burden of showing that it was in the best interests of the children to relocate.

The Court of Appeal affirmed the trial court's ruling, basing its decision on sev-

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