1-1-1967

Supersedeas and Child Custody: A Re-Appraisal

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COMMENTS
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INTRODUCTION

One of the more complex problems facing the courts and legislatures today is, what can we do to care for children and adequately protect their rights when parents seek divorce, become separated, or die. The diverse problems resulting from the increasing incidence of divorce and separation will increase, not decrease or vanish, if we ignore them. The objective of the law in this area should be to advance the child's smooth progress toward social, emotional, psychological, and physical maturity. Once one of the parents, another relative, or even a stranger has been awarded custody of minor children in any of the numerous proceedings in which these orders are made, another party may seek to have that custody order modified. The historical requirement for seeking such modification has been a change of circumstances, such as the wife's second husband being harsh on the children, mother being neglectful, or father being away on frequent trips.

Recent articles have accurately described the types and

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1 The material on this subject is plentiful and the quantity is multiplying rapidly. Excellent samples are: Despert, Children of Divorce (1962); Maas & Engler, Children in Need of Parents (1959); Jensen, The Child Without a Family: Problems in the Custody and Adoption of Children, 1962 U. Ill. L.F. 633; Plant, The Psychiatrist Views Children of Divorced Parents, 10 Law & Contemp. Prob. 807 (1944).


3 The proceedings include: divorce, separation, annulment, and separate maintenance actions; guardianship and adoption actions; neglect and abuse actions; and delinquency cases.

4 "It is of the inherent nature of custody decrees, whether entered in divorce proceedings or independently thereof, that they are not final and conclusive, but subject to modification . . . . as circumstances change." Titcomb v. Superior Court, 220 Cal. 34, 39, 29 P.2d 206, 209 (1934).

5 This is not an absolute rule. "It is perhaps possible to conceive of a case in which, despite the fact that there was apparently no change of circumstances, nevertheless, the welfare of the child might require that the previous order of custody be changed." Foster v. Foster, 8 Cal. 2d 719, 728, 68 P.2d 719, 723 (1936). The requirement seems to be largely discredited. See Loudermilk v. Loudermilk, 208 Cal. App. 2d 705, 25 Cal. Rptr. 434 (1962); Coil v. Coil, 211 Cal. App. 2d 411, 27 Cal. Rptr. 378 (1962).


9 Note, Supersedeas in Child Custody Proceedings, 15 Hastings L.J. 199 (1963);
amounts of confusion that attend an order awarding a change of custody in California, and especially confusion as to what should happen to the child during appeal of that order. Likewise there has been considerable litigation over the considerations the trial court uses in modifying a custody award and in granting or denying a stay of the change order, and what considerations or criteria the appellate court should use to reverse or sustain these actions. This comment will attempt to show some of the reasons for that confusion, what is being done and has been done to eliminate it, the success of these endeavors, and some possible solutions.

CUSTODY APPEALS PRIOR TO 1955

Until 1955 the controlling legislation provided in essence that the perfecting of an appeal stayed proceedings in the lower court. This process was rarely in the best interest of the child since:

The very reason for the modification [of custody] in nearly every case will be that the trial judge has determined that the welfare of the child demands a change. Yet the mere perfecting of an appeal by the losing party will delay execution of the order, sometimes for very substantial periods. As a result the child is subjected to a continuance of the same conditions which brought about the change ordered.

Dedicated trial judges tended to ignore this procedural stay of their order where they thought that the best interests of the child were at stake. Thus parents who rightfully disregarded the court's custody order after having perfected an appeal were, nonetheless, found in contempt and jailed. These parents then sought writs of habeas corpus on the basis of the trial court's lack of jurisdiction under section 949. The writ of habeas corpus not only released the parent from jail, but also returned the children to the losing parent,


10 Some litigation in this field becomes extremely complicated and can be drawn out over several years. See Foster v. Foster, 8 Cal. 2d 719, 68 P.2d 719 (1937); Foster v. Foster, 5 Cal. 2d 669, 55 P.2d 1175 (1936); Foster v. Superior Court, 4 Cal. 2d 125, 47 P.2d 701 (1935); Foster v. Superior Court, 4 Cal. App. 2d 466, 41 P.2d 187 (1935).

11 CAL. CODE CIV. PROC. § 949 (automatic stay if appeal perfected); CAL. CIV. CODE § 138 (gives the court power to award custody and modify and vacate an order of custody, being guided by what appears to be the best interests of the child).

12 3RD PROGRESS REPORT TO THE LEGISLATURE BY THE SENATE INTERIM JUDICIARY COMMITTEE 34 (March 1955).

13 Ex parte Queirolo, 119 Cal. 635, 51 Pac. 956 (1898). Cf. Schwartz v. Superior Court, 111 Cal. 106, 43 Pac. 580 (1896); Foster v. Superior Court, 115 Cal. 279, 47 Pac. 58 (1896) (losing party adjudged guilty of contempt for failure to obey court order issued after perfected appeal in actions other than child custody where the trial court also lost jurisdiction upon a perfected appeal).

14 Ex parte Queirolo, 119 Cal. 635, 51 Pac. 956 (1898).
since after the appeal was perfected, any further orders of the court had no legal significance. This in most cases returned the child to the environment the trial judge had found unsuitable.

More frequently, the trial courts simply required the appealing party to give up custody in spite of the fact that the appeal had been perfected. The trial judge was taking action he thought was in the best interests of the child, since this is supposed to be the overriding consideration in these matters, regardless of a technicality in procedural law which provided that the trial court lost all jurisdiction upon a perfected appeal. However, the trial judge could not so disregard this law requiring a stay even though he knew the interests of the child were far superior. The basic conflict between the child's best interests and the law requiring stay was the basis of much of the confusion in the law at this stage.

Harsh and unfortunate consequences often followed where there was compliance with the trial court order notwithstanding appeal (such as where the losing parent gave up custody without knowing such was not required) and the change order was reversed on appeal. The custody of the child was transferred to the parent and environment the trial court thought best for the child. Many months, or several years later when the appeal was heard, the appellate court was placed in a very peculiar position. If the trial court was wrong in its original order, a reversal was the appropriate remedy. But this required the custody of the child to be changed once again. Depending on the age of the child, this periodic switching of environments could have confusing and harmful, or even dangerous results. The inherent weakness of this approach was its failure to insure either that the trial court's determination would be binding on appeal or that an immediate review would be available, both of which would

15 See decisions in cases, infra note 16.
17 "The effect of the appeal is to remove the subject matter of the order from the jurisdiction of the lower court, and that court is without power to proceed further as to any matter embraced therein until the appeal is determined." In re Lukasik, 108 Cal. App. 2d 438, 444, 239 P.2d 492, 495 (1951).
18 For cases where a parent relinquished custody in compliance with the trial court ruling before the appeal was perfected or before the parent became aware that such was not required, see DeLemos v. Siddall, 143 Cal. 313, 76 Pac. 1115 (1904); Vosburg v. Vosburg, 137 Cal. 493, 70 Pac. 473 (1902); In re McKean, 82 Cal App. 580, 256 Pac. 226 (1927). The illogical result in these cases was that the losing parent who tried to obey the court and relinquished custody on court order could not get custody back pending appeal, whereas the parent who defied the court, even though lawfully, retained custody pending appeal or had custody returned by habeas corpus.
have eliminated the two or three year appeal period and the "football effect" that disturbed appellate judges.\(^{19}\)

A writ of prohibition against the trial court was sought in many cases where the losing parent had perfected an appeal and the trial judge had nevertheless ordered the child surrendered pending appeal.\(^{20}\) The writs were granted since once an appeal was perfected, the trial court lost jurisdiction over the matters appealed and any further orders or proceedings violated section 949 of the California Code of Civil Procedure, and thus were void.\(^{21}\) This was true even where the trial court had found that the mother was unfit.\(^{22}\) The results here were just as perplexing as in those cases where custody was awarded to the mother after the court found she had deserted her husband,\(^{23}\) or that she had committed perjury and adultery.\(^{24}\)

The confusing and unsettled state of the law prior to 1955 pointed to the conclusion that the best interests of the child were receiving secondary consideration. It would be realistic also to conclude that some appeals were merely delaying tactics. Undeniably something else was necessary, for not only were standards as to what constituted grounds for modification of a custody award vague,\(^{25}\)

\(^{19}\) The child would be "in the category of a human football whose possession by either parent depends upon the agility, activity and determination of each." In re Browning, 108 Cal. App. 503, 507, 291 Pac. 650, 651 (1930). For an instance where there were four shifts of custody pursuant to legal actions by both lower and appellate courts, see In re Lukasik, 108 Cal. App. 2d 438, 239 P.2d 492 (1951).


\(^{22}\) In In re Dupes, 31 Cal. App. 698, 161 Pac. 276 (1916), the trial judge found the mother an "unfit mother," but was still unable to get the children out of her custody since by appealing, the trial court lost all jurisdiction. In Dupes v. Superior Court, 176 Cal. 440, 168 Pac. 888 (1917), the supreme court allowed the superior court to sit as a "Juvenile Court" to inquire into the unfitness of the mother after the superior court had been denied power by the automatic stay to enforce the change of custody in In re Dupes, supra. See dictum to the same effect in Ritter v. Superior Court, 99 Cal. App. 121, 278 Pac. 240 (1929), where the court said if the welfare of the child requires change pending appeal, the juvenile court could entertain the action.

\(^{23}\) Lampson v. Lampson, 171 Cal. 332, 153 Pac. 238 (1915).


but more important, the time between trial and appellate review allowed the losing parent to retain the child for a few more years, with the inevitable relinquishment and its attending bitterness and grief that much more difficult. Finally, the perfection of an appeal as a device for mere harassment of the other parent was unjust in itself, as well as being detrimental to the child since he was the ultimate sufferer. Either a trial decision that was conclusive or binding on appeal, or immediate review of the decision seemed to be the appropriate remedy. Neither remedy was provided.

**Attempted Solution in 1955**

In an attempt to eliminate this confusion and attending abuses, the legislature in 1955 passed California Code of Civil Procedure section 949a, which provided that a perfected appeal *does not stay* that portion of any lower court order which affects child custody.\(^{28}\) The appellate court however was given power to issue writs of supersedeas,\(^{27}\) injunction, or other writs in the proper aid of its jurisdiction.\(^{28}\) When the trial court ordered a change of custody, it was effected immediately, notwithstanding perfection of an appeal, and the child was not allowed to remain in an environment the court determined unsatisfactory. The legislature had thereby expressed its belief that the trial court would in most cases issue change orders necessary in the best interests of the child. A further purpose was to prevent the situation where the trial court was not authorized to act in the best interests of the child during the interim period while an appeal was being prosecuted from an order changing custody.\(^{29}\) There is no language restricting the trial court from issuing other change orders or even proceeding in contempt if its orders are not obeyed while the appeal is pending.\(^{30}\)

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\(^{27}\) For an analysis of supersedeas and its operation, see generally 3 *Witkin, California Procedure Appeal §§ 59-68 (1954); Comment, California Stay Law—Supersedeas and Statutory*, 40 *Calif. L. Rev.* 249 (1952). "The writ of supersedeas will issue to prevent actions on a judgement only where the appeal from the judge- ment operates as a stay of proceedings." Reed Orchard Co. v. Superior Court, 19 Cal. App. 648, 652, 128 Pac. 9, 12 (1912).

\(^{28}\) As to the uselessness of this provision, see note 58 *infra* and accompanying text.


\(^{30}\) In *Mancini v. Superior Court*, 230 Cal. App. 2d 547, 41 Cal. Rptr. 213 (1964), the trial court after appeal from the first change of custody award did in fact change that decree while the first appeal was pending. The losing parent in the second modification sought mandamus, but the trial court's ability to make subsequent changes pending appeal was upheld.
The California Bar Association Committee in making the proposal for this legislation said:

The committee recognizes that trial court findings are not always infallible and that the right of appeal in these cases is a substantial one. Nevertheless, it is our considered opinion that the present rule favors the minority of cases and should be changed, in the interests of the welfare of the child.  

The practical consequences were that the child changed environments immediately, notwithstanding appeal, unless the trial court granted a stay of its own order. If the appeal proved to be successful, the child was returned to the original custodian. This approach requires at least two shifts of custody, and realizing that some appeals are successful, it is difficult to see how reduction of that number could be consummated within the context of present court thinking if due consideration is given to the value of any appeal at all. In proposing this legislation the interests of the child were the paramount concern. Thus it becomes necessary to determine whether the child's interests were in fact protected, or if perhaps, a further and more radical departure was required.

CUSTODY APPEALS AFTER THE 1955 STATUTE

The 1955 legislation adding section 949a solved the pressing problem; no longer did an appeal automatically stay the lower court decision. Thereafter, if the losing parent felt the court had unfairly or illegally deprived him of the custody of the child, he could seek a writ of supersedeas to stay the order. The courts have not issued the writs in about half the cases decided since 1955 because some appellate courts are reluctant to replace their own discretion for that of the trial judge. A critical look at the cases where the writ has issued would be beneficial not only in analyzing the present state of the law, but also, in pointing the way to any reevaluations or recommendations aimed at a more equitable disposition of supersedeas actions in child custody cases.

In *Faulkner v. Faulkner*, where the father was awarded a change of custody, the appellate court refused to find abuse of discretion sufficient to warrant the issuing of the writ. The trial court had denied a rehearing to the mother. Even though the appel-

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late court stated that a rehearing would have been in the interests of
the welfare of the child, it still refused to issue a writ, saying:
"Appellate courts should not nullify the plain statutory purpose [of
effectuating the custody order immediately] by issuing a writ of
supersedeas." Yet, subsequently, the same court reversed the cus-
tody award when it came up on appeal. The ground for reversal
was prejudicial error in refusing to reopen for further evidence.
This was one of the grounds on which supersedeas had been sought
and denied. Thus the same court, acting with reference to the same
question of law, overruled the order it had previously refused to
stay. In the interim, the custody of the children had been transferred
to the father in conformance with the change of custody order. Now,
upon reversal, it became necessary to return the custody to the
mother. Such switching of custody just cannot be considered to be
in the best interests of the child. Why could not the appellate court
have disposed of the appeal at the supersedeas hearing since the
issues for each were essentially the same? It appears that insuring
proper protection of these children should warrant such immediate
appeal.

In Saltonstall v. Saltonstall, the trial court had ordered the
mother, on recommendation of a commissioner, to give the father
custody pending trial, at which time the court awarded custody to
the father. The trial court later modified its order giving custody
back to the mother. The father appealed and sought supersedeas,
which the appellate court denied, finding no abuse of discretion.
The court reasoned that the father must show probable error and
where there is conflicting evidence the presumption is that the trial
court exercised proper discretion. The court said the father’s ob-
jections went to the merits which are not in issue in the supersedeas
action, but instead, must await the appeal.

This sterile approach failed to assess adequately the conse-
quences of denial of the writ. One consequence was that the trial

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84 Faulkner v. Faulkner, 148 Cal. App. 2d 102, 107, 306 P.2d 585, 588 (1957). Another point stressed was the mother’s failure to apply to the trial court for a stay
of its own order as provided by § 949a. This was later held not to be mandatory where
the trial court’s actions clearly showed such a motion would have been useless.
Denham v. Martina, 206 Cal. App. 2d 30, 23 Cal. Rptr. 757 (1962). This is the more
usual case since if the trial court feels custody should change, it is not likely to
stay its own order, for it was concern for the welfare of the child which imposed the
order originally.

85 On appeal the court reviewing the facts and the evidence the mother wanted
admitted found both parents deeply loved the children; that the mother cared for
her home dutifully, belonged to the PTA, and kept the children well groomed; and
that the trial court had made no finding that she was unfit. It amounted to an abuse
of discretion under these facts to change custody to the father. Faulkner v. Faulkner,

court order was effectuated, thereby resulting in a second shift of custody back to the mother. With an appeal by the father pending, the court might well have asked itself what were the probabilities of success of that appeal, and what consequences would flow from a reversal. Had the father won a reversal on appeal (a not unlikely possibility from a reading of the facts), the child would have been returned to him as a third shift of custody. A strong dissent pointed out that the factual background surrounding the litigation pointed to abuse of the trial court in not granting a stay of its own order.37 The dissent reasoned that the shifts of custody and possibilities of shifts resulting from court actions were a major concern and should be properly evaluated in any examination by appellate courts. From this case it does not appear therefore that the enactment of section 949a has eliminated the cruelty associated with the constant switching of environments. Indeed, the opposite conclusion would be appropriate.

The California Supreme Court refuted the majority reasoning of Saltonstall in Adoption of Cox,38 where it granted the writ and said, quoting the dissent in Saltonstall, “the further and continued judicial ‘bouncing around’ like a rubber ball of the child involved should cease.”39 The facts of Cox40 justified an expectation of reversal on appeal of the custody order; more significantly, the facts presented no evidence of any serious evil threatening the welfare of the child if allowed to remain with the adopting parents pending appeal. The court, by evaluating whether continuation of existing custody was in the best interests of the child, implied that the trial judge has a duty to grant a stay of his order when no serious evils threaten the child if it remains with the losing party pending appeal. By merely alluding to this duty, the court refused to make it mandatory or in any way delineate its boundaries or its significance in future decisions. By failing to explore the consequences of a breach of this illusive duty, the court quite interestingly leaves it open to

37 The facts showed the mother had moved so often that the child was illiterate, that the mother had lived indiscreetly with other men, that the father during the interim custody had placed the child in a private school where she was making good progress, and that the father and his second wife showed great affection for the child.
39 Id. at 442, 374 P.2d at 838, 24 Cal. Rptr. at 870.
40 The Coxes, who were the natural parents, were both heavy drinkers, and were both sexually promiscuous throughout their stormy marital career. Mr. Cox had been sterilized prior to the birth of the child with Mrs. Cox having told friends the child’s father was some soldier. Mr. Cox had a criminal record, a violent temper, and used profanity in front of his own children whom he physically abused. The baby was therefore at birth placed for adoption in petitioners’ clean and orderly home where there were three teenage boys who loved the child as much as petitioners. The Coxes now contend Mr. Cox is the real father and they want the eighteen month old baby back. The trial court refused adoption and ordered the child returned to the Coxes.
the trial courts to once again resort to their own ingenuity in this area. The court returned to more familiar ground by phrasing its decision in terms of abuse of discretion with a somewhat new addition, saying: "Arbitrary action or abuse of discretion of the trial court in the interim custody case are weighed in a more delicate and sensitive scale [than they are weighed in other than custody cases]."

The court was far more concerned with the switching of custody than with maintaining permanency of the trial court decree; thus it chose the arena of abuse of discretion cast in the context of best interests of the child as the basis for granting the writ. It is conceivable that the court also contemplated a reversal of the custody order by emphasizing the "bouncing around of custody," rather than presuming the correctness of the trial court's order. By granting the writ the court failed to see, or at least failed to consider properly, that the sooner the order was effectuated, the better for all concerned, especially the child who would have been left in the wrong environment if the trial court decision had been upheld. The court points out quite unconvincingly that it found probable error only in the award of interim custody and was not passing on the correctness of the order of adoption. There is no contention here that such review is inappropriate. On the contrary, it is difficult to see how a court can ignore ramifications of the case that are so intertwined with the points being reviewed.

This approach in Cox very strongly points to the conclusion that the appellate court, whether consciously or subconsciously, is evaluating and considering all the elements of the case on supersedeas and is deciding in effect whether the pending appeal has merit. If an appeal has been taken (which is usually the case, else why supersedeas?), the appellate court cannot in fairness to the child ignore the consequences of its own action and also the action which is likely to occur on the custody appeal. Any other alternative would be to ignore the best interests of the child. If the writ is granted, is this not a finding of abuse of discretion sufficient to warrant a reversal on appeal? If a writ is not granted, is this not strong evidence that the award was correct and will not be reversed? Is the court then actually evaluating the appeal through the back door?

The approach of the court in Cox significantly undercuts the relevance of two actions and could be used by the losing party to determine if the appeal had any chance of success. This would serve two purposes: 1) get the issue of abuse before the appellate court immediately much as an immediate appeal would, and 2) at the same time evaluate the probability of a successful appeal.

SUPERSEDEAS AND CHILD CUSTODY

If the courts follow what appears to be the proper reading of Cox, are they not then reaching the merits in the supersedeas action? If they are reaching the merits, then the issue of custody should have been decided at that time, rather than keeping it open until the later appeal. To keep the issue open for two or three years only harms everyone involved and serves no useful purpose. If the supersedeas review does in fact reach the merits, why not simplify the whole process and finalize the issue of custody when the supersedeas is heard; this is manifestly the proper approach. If the courts do not follow such a reading of Cox, then we are back to Saltonstall, where no one wishes to go, for that is a backward step requiring the court to ignore the child's best interests. Such a regression would demand serious outcry for immediate appeal. Regardless, then, of the construction placed on Cox, an immediate appeal seems to be the acceptable approach warranting serious consideration by the courts and legislature.

A writ issued in Sanchez v. Sanchez where the trial court ordered a change of custody from the mother to the father. The purpose of section 949a is to effectuate the lower court order as soon as possible since the trial court is most accessible to the child and the parents, and is presumably best able to evaluate the best interests of the children. Issuing the writ therefore, seems on one hand to invalidate that purpose by allowing the child to remain in the custody the trial judge found unsuitable, supersedeas thereby performing the same function as the automatic stay performed prior to section 949a. This seems to encourage the appellate court to replace its own discretion for that of the trial judge. If the writ had not issued, the custody of the children would have gone to the parent according to the change order, and in case of a reversal of that order, be transferred back to the other parent. On the other hand, when the trial court has in fact abused its discretion, or has not made a determination in the best interests of the child, then to ignore the extraordinary relief of supersedeas is to permit the child's transfer to an unsuitable surrounding. This is the context of the present dilemma and the source of the irritation and confusion.

As anticipated by its issuance of the writ of supersedeas in Sanchez, the district court of appeal (with the same three justices sitting) reversed the custody order. However, the supreme court

43 See note 29 supra and accompanying text, and materials cited in notes 31 and 9 supra.
45 Sanchez v. Sanchez, 7 Cal. Rptr. 404 (Dist. Ct. App. 1960). Since this case was reversed, see note 46 infra, it does not appear in the official reporter.
vacated both these decisions and reinstated the trial judge's award of custody. The district court of appeal, in reversing, based its decision on the welfare of the children, the lack of a finding of unfitness of the mother, and the non-conduciveness of the father's situation to the best interests of the children. The supreme court also based its decision on the children's best interests, but said, "The trial court is given a wide discretion in such matters, and its determination will not be disturbed upon appeal in the absence of a manifest showing of abuse. . . . Every presumption supports the reasonableness of the decree."

It is not readily apparent that this will eliminate what to now has seemed certain: if the trial court's decision is not acceptable to some reviewing courts, based on their concept of best interests of the child, those courts will not hesitate to displace the lower court's discretion with their own. Four hearings of Sanchez show the intermediate appellate court twice finding abuse of the trial court's discretion, and the California Supreme Court reversing and finding no abuse of discretion by the trial judge. Playing the game on the field of abuse of discretion, then, seems unsatisfactory as too subjective and therefore subject to constant instability. The California Supreme Court in Sanchez concludes that the function of appellate review of custody awards is not to reweigh conflicting evidence or re-determine findings, but is instead, to find in the trial court record substantial evidence supporting its essential findings.

In Donen v. Donen, the courts states:

The issuance of a writ of supersedeas is a matter of discretion to be exercised by the court whenever it appears necessary and proper to preserve appellate jurisdiction. Being discretionary, the writ will not be granted to maintain a status quo of the litigation unless the appeal presents substantial questions for decision, and unless there is a probability that error has been committed.

Unfortunately this merely perpetuates the "substantial question"
and "probable error" thinking which appears misdirected. The focus perhaps should be more in the direction of "necessary and proper to preserve appellate jurisdiction," as applied to the cases next discussed where the change order would allow the children to leave the state.

A quite different situation appears in Milne v. Goldstein, where the trial court modified a custody award by ruling that the mother had to allow the children to visit the father in South Africa six weeks each summer. Here supersedeas was properly granted. The court pointed out that if the writ were not issued and the children left the country, conceivably the appeal, if won by the mother, would be valueless as the father could be beyond the jurisdiction of the California courts. There can be no quarrel with supersedeas in such situations for this is a case where the constitutional provision that an appellate court may issue supersedeas in the proper aid of its jurisdiction was properly applied.

The preceding review of court decisions applying section 949a points to the conclusion that allowing the appellate court to review the trial decision in a supersedeas action gains nothing. Therefore, an elimination or curtailment of such review appears to be a worthwhile objective. Emergency situations as in Milne and Donen could still be reviewed under the constitutional provision.

The very pertinent question that should be asked at this point is, can any review at all in a supersedeas action ever benefit the final decision of a case? Seemingly, there is no case where a review of custody in a supersedeas action has been beneficial, other than the cases where the child would have left the state. But, as can be shown by Sanchez, Faulkner, and Saltonstall, material detriment to the child and the litigants followed from such review in a supersedeas action. When the appeal in Cox is heard, the child having lived with the losing party for two or three years will have to be a strong factor in favor of reversal. This is the essence of the cruelty involved. As manifested by the cases just discussed, a different approach or shifting of focus was sorely needed.

1965 Amendment

An amendment in 1965 deleted that portion of section 949a which read: "the appellate court shall have power to issue a writ of

52 See note 58, infra.
54 A similar fact situation was presented in Denham v. Martina, 206 Cal. App. 2d 30, 23 Cal. Rptr. 757 (1962), except that the mother who had been awarded a change of custody lived in Illinois. Again the writ was issued.
55 CAL. CONST., art. VI § 4b. See note 58, infra.
supersedeas, injunction, or other appropriate writ or order in such proceedings as may be proper in aid of its jurisdiction." The statute with this revision appears to give the trial court almost unlimited discretion over the custody case; this is manifestly the proper approach. However, if one of the intended effects of this revision is to eliminate the use of supersedeas in child custody, it will probably be totally ineffective for that purpose. The use of supersedeas does not depend upon statutory authority; it is constitutionally grounded, and can be utilized whenever the appellate court rules it necessary or proper to the complete exercise of its appellate jurisdiction.

The statute as now worded affords a basis for concluding that the ability of the court to issue supersedeas in custody cases has been severely restricted. However, the only case decided since the 1965 revision does not support this hypothesis.

In *Superior Court v. District Court of Appeal*, the trial court denied an adoption on the basis that the adopting parents were both deaf-mutes, and ordered the child returned to the Bureau of Adoptions. The parents appealed and then acquired from the district court not only a writ staying the trial court order but also, under guise of a stay, an order that the child be returned to the parents pending appeal. The district court stayed its own order upon petition from the trial court pending review in the supreme court. The child was once

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57 This does not appear to be the reason; rather the amendment was used to eliminate surplusage. Rather than tear up the bill after the Judicial Council had assured Assemblymen Wilson and Young that the other proposed changes would be accomplished easier by amendment of the Rules of Court, they used the bill to eliminate words totally without significance in the light of present case law. Letter from Judicial Council explaining the proposed change in Rule 49 (supersedeas), Rules on Appeal.

58 "The said court shall also have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction." Cal. Const., art. VI, § 4. Art VI, § 4b grants like power to the district courts of appeal. "The power to issue the writs specified, or any other . . . to secure the complete exercise of the appellate jurisdiction of the court, would exist had the constitution been silent on the subject. . . . But when a certain jurisdiction has been conferred on this or any court, it is the duty of the court to exercise it; a duty of which it is not relieved by the failure of the legislature to provide a mode for its exercise." People v. Jordan, 65 Cal. 644, 645-46, 4 Pac. 683, 684 (1884); People ex rel. Stevenot v. Associated Oil Co., 211 Cal. 93, 294 Pac. 717 (1930).

59 The giving of the power to issue injunction in these cases likewise seemed to have been ill-considered, since in light of case law it was of doubtful constitutionality. The courts need not have so strictly construed the language of the constitution, but a reversal of the court's position in the face of the precedents seems unlikely. McCann v. Union Bank & Trust Co., 4 Cal. 2d 24, 47 P.2d 283 (1935); Hicks v. Michael, 15 Cal. 107 (1860). The Judicial Council pointed this out to the authors of AB 339 (1965 amendment to § 949a). Letter from Judicial Council explaining the proposed change in Rule 49, Rules on Appeal.

60 65 A.C. 293, 54 Cal. Rptr. 119 (1966).
again returned to the bureau. Within a period of two months the child had been subjected to three changes of custody, with no assurance that the custody order by the trial court would not be reversed, requiring a fourth change. The supreme court held that the district court was without jurisdiction to issue a stay since the change of custody had already occurred, and without jurisdiction to issue a mandate to the bureau which had not received notice.

The supreme court refused to prohibit the district court from issuing further orders pending appeal as prayed for by the trial court. It said instead that the trial court under section 949a had original jurisdiction to modify the custody provisions, but that the district court might be requested to take action necessary to protect the welfare of the child. The posture of this case precluded the supreme court from interpreting the amended section 949a as denying to the district courts the broad power of review in supersedeas actions they had been exercising, and instead, restricting them to a limited review in the "proper aid of its appellate jurisdiction." The case did not meet these issues squarely; the court failed to mention the 1965 revision, and the language of the opinion leaves supersedeas as it existed prior to the revision. Consistent with Cox, the court concerns itself with constant changes of custody, but regrettably, does not emphasize the importance of maintaining the permanency of the trial court decree, even though the reversal reinstated the order.

PROPOSALS

The preceding chronological analysis of the case and statutory law emphasized the weaknesses of the focus or approach relied on to reach a particular decision. Hypothetical solutions were also posed which seemingly would allow the courts not only to deal more equitably with a specific case, but also to allow reorientation of the total approach to custody cases as those cases seem to be grasping for a re-evaluation of the scope of the appellate court's probe and function.

Three problem areas were highlighted throughout the preceding analysis; they are not meant to be exclusive and are somewhat overlapping: 1) the slowness of the judicial process in custody cases is extremely harmful to children and parents alike, 2) the welfare and best interests of the child are not really being guarded by present court process and statutory requirements, and 3) supersedeas is neither needed nor in any way helpful in eliminating the psychological confusion surrounding a change of environment.

Consistent with the analysis of the cases and viewing them as a
unit, problem area one seems to dictate that appellate courts either
be precluded from reviewing a modification of custody award, or that
immediate review of that order be provided. A realistic appraisal of
the first alternative strongly suggests that it is neither theoretically
advisable nor practically available. Even though appeals had no
existence at common law, and therefore had to be based upon some
provision of the constitution or statute, appeals in custody cases at
present seem not only worthwhile, but in some cases mandatory. The
second alternative, however, appears not only practically available,
but both advisable and necessary. At present a court hears the
extraordinary supersedeas action almost immediately, then some
months or years later, hears the substantive custody appeal. Arguing
the total case at the time when supersedeas is normally argued seems
imminently practicable, would eliminate duplication as many of the
points argued at supersedeas have to be re-argued at the appeal, and
would eliminate one stage in litigation which the cases show totally
unnecessary. Correction of this harmful delay in the judicial process,
however, is a problem which rightly rests with the legislature and
seems to be a worthwhile task for their deliberation.

The second problem area highlighted in the cases discussed is
that the opinions of the courts lead one to believe that the welfare
of the child or its best interest is everyone's main concern; yet any
analysis of the consequences and effects of lower court orders and
appellate review contradicts such hypothesis, as shown in Sanchez,
Faulkner, and the adoption cases previously discussed. It is difficult
to see how the constant switching of custody in those cases is in the
child's best interest. If the courts are to adhere to their avowed belief
in the welfare of the child, a re-evaluation from the ground up seems
necessary.

At the trial level, there should be greater reliance on professional
staffs of behavioral scientists. Preferably the criteria used by the
trial courts would force them to evaluate properly the factual, social,
medical, and psychological information which could be available
through domestic relations investigators or special commissioners.
Deciding changes of custody in a trial court requires expert advice,
and while dedication of the trial judge and common sense cannot be

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61 Pacific Gas Radiator Co. v. Superior Court, 70 Cal. App. 200, 232 Pac. 995
(1924).
62 "When one reviews a number of recent cases involving custody awards, the
conclusion becomes inescapable that as a group they are marked by question begging,
rigid rules, and platitudes which unfortunately tend to inhibit careful inquiry and
thorough evaluation. It is a matter of grave concern that in an area of such great
human and social importance courts are failing to lay down rules sufficiently precise
for meaningful guidance and often insulating themselves from relevant expert advice
eliminated, they are unstable as the sole basis for a custody award. Attitudes and personal idiosyncrasies of the competing parents, economic conditions of competing environments, and spiritual and psychological advantages are important criteria when deciding custody. A panel of experts trained to a high degree of expertise could provide valuable assistance along with advice from psychologists and psychiatrists who were familiar with the case.

The lower court needs this kind of help from a competent staff or panel of well-trained specialists in the behavioral sciences if its decrees are to be free from displacement and criticism. It is not at all clear that such would be an undue burden on either the court or society. For example, in *Tapscott v. Tapscott*, the trial judge considered the probation officer's report and recommendation and the testimony and opinion of the staff psychologist of the probation department. It ordered the officer and his staff to make an investigation of the home and surroundings, to interview the children and parents, and to report the present ability of the parents to care for the children. Both parents and their attorneys approved the need for such a report, and after receiving a copy, cross-examined the author of the report concerning its statements. The appellate court merely recited these facts and concluded that the evidence supported the trial court's findings and its award of custody to the father. This appears to place the focus of the appellate court's review on a documented, multifaceted report from a competent staff or skilled professionals.

Such an advisory system would, as in *Tapscott*, shift the court's function to that of reviewing the package presented by the professionals to determine if the recommendations were sufficiently well documented and extensive. Lower courts are not yet relying extensively upon such expert help and therefore the appellate courts continue to review in terms of abuse of discretion. If the custody decree itself were more stable, the appellate court in the supersedeas action then would shift its emphasis away from the probable error and substantial question inquiry, and turn instead to an evaluation of what the real interests of the child in the particular case demand.


64 This approach and all the present arguments against it are presented in Foster & Freed, *Child Custody*, 39 N.Y.U.L. Rev. 423 (1964).

65 "On the one hand, there is the fundamental principle of Anglo-Saxon law that the decision of a court must be based on evidence produced in open court at a fair trial. . . . On the other hand, there is the growing conviction that persons with specialized training and experience, such as social workers, are better qualified to determine what is in the best interests of the child than even the best intentioned judge." Foster, *The Family in the Courts*, 17 U. Prrr. L. Rev. 206, 251 (1956).

66 The necessity for this shift in emphasis is most interestingly illustrated by
To act in the best interests of the child, appellate courts must restrain the exercise of their discretion in the supersedeas action, and avoid invalidating the change of custody ordered by the trial judge. When the trial judge discovered that his order would not be easily upset by supersedeas, he would be more inclined to grant a stay of his own order where the child would not be harmed by remaining in his present status pending appeal. Furthermore, desiring to strengthen the correctness of his decision, the trial judge would be inclined to utilize fully any agency or staff professional who would make the decree more credible. At present these practices are not widespread; the resulting pitting of one court's discretion against that of another is not in the child's best interests. "Abuse of discretion" by the trial judge as a criterion for issuance of a writ of supersedeas therefore seems totally inadequate, as discussed in the Sanchez analysis.67

The third problem area recognizes that since the legislature is constitutionally prohibited from eliminating supersedeas in custody cases, the courts must begin their own process of introspection and re-evaluation if the psychological confusion surrounding a change of environment is to be curtailed, as was indicated in the Superior Court analysis. Supersedeas is constitutionally protected, so courts can always reach for it when they need it. The real issue the courts must face is, in what circumstances is supersedeas needed? As shown in the Milne discussion, courts could voluntarily restrict their own use

Justice Duniway: "This case illustrates the almost impossible position in which an appellate court is placed when it is called upon to review an order of the superior court transferring the custody of a child from one of two divorced parents to the other. . . . It may be that the court's order has worked out well; it may have been detrimental to the child and the parents. We have no way of knowing. Each decision dealing with this question starts with the primary object to be achieved, which is the welfare of the child. How can an appellate court, 16 months or more after the order is made, take any intelligent action? If we were to reverse, we would change a 'status quo' of 16 months duration without any knowledge as to what the current situation is. Had a stay been granted, the same problem would arise upon affirmance." Stack v. Stack, 189 Cal. App. 2d 357, 358-59, 11 Cal. Rptr. 177, 179-80 (1961). Could the staff of the appellate court investigate and report on these matters so as to allow the court to more effectively rule in the best interests of the child?

67 "A careful reading of the cases leaves us with the feeling that there are no real legal guide lines to assist the appellate court in deciding such a case as this. Guide lines there are, but they are addressed to the trial court in exercising its almost unlimited discretion. . . . Who is to say that 'other things' are 'equal'? . . . When are 'advantages' equal? How does one weigh a better home against a mother's love or, for that matter, San Francisco with the father and relatives against Kansas plus a mother's love? We confess that we do not know; no doubt that is why the books are so full of language about the broad discretion given the trial court. Except in rare cases, the appellate courts abdicate in favor of the trial court's order, because they do not know what else to do. . . . We suggest that the foregoing opinion demonstrates that some authority can be found on both sides of nearly any contention that can be made as to reasons for changing or not changing the custody of a child." Stack v. Stack, 189 Cal. App. 2d 357, 363-72, 11 Cal. Rptr. 177, 182-88 (1961).
of the writ to those cases where in fact jurisdiction would be jeopardized were it not used. This is the wording of the constitution and to have expanded its use in child custody cases seems ill-considered. Nothing should hinder the court from redrawing the perimeters of supersedeas to serve the equitable and sociological purpose of eliminating the child's psychological confusion associated with numerous changes of environment pursuant to court order.

CONCLUSION

A detailed review of past attempts to deal with child custody pending appeal of lower court orders inevitably leads one to the disquieting conclusion that the best interests of the child—the object of the litigation—are not being properly protected. The constant and periodic switching of environments leads to harmful psychological results, particularly with the very young child. A different focus or approach by the courts and legislature is not only recommended, but seemingly required, if the sociological impact of disturbed and delinquent children is to be reduced, and the best interests of the child in other respects are to be protected.

The approach recommended here would be multi-pronged. First the legislature should and could provide for an immediate appeal which would not prove burdensome on those who are going to appeal a custody award as they are at present not inhibited by the long delay, but instead, are seeking supersedeas, but which by its nature fails to afford the complete review required. The resulting partial review of abuse of discretion seems less than adequate. Second, the courts must re-evaluate their ideas of what abuse of discretion means so that permanency of the trial court award becomes a more dominate factor. This of course depends heavily upon the initiative the lower court assumes in enhancing the creditability of its order by methods earlier discussed. Third, appellate courts should severely restrict the use of supersedeas by redrawing its perimeters to include only those cases where jurisdiction is in fact jeopardized. These recommendations seem crucial as children are our nation's number one resource and can and should require as much of our time, money, and inquiry as it takes to insure they are given all the protection needed to guarantee their smooth progress toward social, physical, emotional, and psychological maturity. Nothing less will suffice.

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