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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION TWO

In re RILEY W., a Person Coming Under  
the Juvenile Court Law.

B235139

(Los Angeles County  
Super. Ct. No. CK82340)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

Plaintiff and Respondent.

v.

BEVERLY B.,

Defendant and Appellant;

JOHN W.,

Defendant and Respondent.

APPEAL an order of the Superior Court of Los Angeles County. Donna Levin,  
Judge. Affirmed.

Suzanne M. Davidson, under appointment by the Court of Appeal, for Defendant  
and Appellant.

No appearance for Plaintiff and Respondent.

Roni Keller, under appointment by the Court of Appeal, for Defendant and Respondent.

Lori A. Fields, under appointment by the Court of Appeal, for Minor.

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Beverly B. (mother) appeals from the custody order made May 19, 2011, pursuant to Welfare & Institutions Code section 362.4.<sup>1</sup> The order was made at the conclusion of a contested review hearing conducted pursuant to section 364. The court granted mother and respondent John W. (father) joint legal and physical custody of their daughter Riley W., born in August 2000, who is the subject of this appeal.<sup>2</sup> The court specified that Riley should continue to alternate spending one week with mother and one week with father, as she had been doing for the past eight months.

### **CONTENTIONS**

Mother contends that she should have been awarded primary physical custody of Riley. Specifically, mother contends that the trial court applied the wrong standard when it considered father's qualifications as a father as a main factor in giving the parents joint physical custody, rather than employing a standard that considered the best interest of Riley. Under the best interest standard, mother argues, mother should have been given primary physical custody.<sup>3</sup>

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<sup>1</sup> All further statutory references are to the Welfare & Institutions Code unless otherwise indicated.

<sup>2</sup> Riley W. has two half-sisters, Ra. R., born in April 1994, and R. R., born in October 1997, who were subjects of the dependency proceeding below but are not parties to this appeal. Ra. and R.'s father, Edgar R., is also not a party to this appeal.

<sup>3</sup> The Los Angeles County Department of Children and Family Services (DCFS) has not filed a responsive brief in this matter. At the contested section 364 hearing, DCFS was aligned with mother, recommending that she be granted primary physical custody of the child. Riley and father have each filed responsive briefs and are the respondents in this appeal.

## **COMBINED STATEMENT OF THE CASE AND FACTS**

Mother has three children: Ra., who was 16 at the time this proceeding began; R., who was 12 at the time; and Riley, who was nine. Mother was living with her boyfriend, Oscar, and the three children. Mother and father had never been married, and had not been in a relationship for more than eight years. However, they had a family law order granting mother primary physical custody of Riley. Father visited during the week and had overnight weekend visits with Riley twice a month.

Mother had been married to Oscar in 2000, but they divorced in 2003. They remained in a dating relationship, and were co-parenting the children for the past year and a half. They had plans to remarry on May 9, 2010.

### **1. Initial referral**

On April 19, 2010, DCFS received an emergency referral alleging physical abuse of Ra. by mother and Oscar. Mother told the investigating social worker that Oscar spanked Ra. with a belt while mother watched. The punishment was inflicted because Ra. lied to them and said she was going to a movie with friends and her sister, when she really went with two boys. Mother stated that Ra. had a problem with “lying and stealing” and she was tired of disciplining her, so she asked Oscar to punish her.

Ra. sustained injuries and bruises to her thighs and wrists. Ra. stated that she was hit about 16 times. Mother stated that Ra. was hit about seven times. R. stated that it was about seven times, but that mother usually hit them the same number of times as their age.

Oscar was arrested for child abuse and charged with willful child cruelty. Ra. indicated that in the past, Oscar hit her with a belt. Oscar also physically abused mother, resulting in injuries which included bleeding. Mother also disciplined them by making them kneel on rice and whipping them.

R. witnessed Oscar hitting Ra. However, she felt safe in the home and never saw Oscar hit mother. They only argued. Riley also felt safe in the home. She did not witness the incident but she overheard it. Both R. and Riley wished that Ra. would make

better decisions. R. believed Ra. deserved to be punished because she did not follow the rules.

Mother admitted past domestic violence with Oscar. The most recent incident was on December 25, 2009. Ra. reported she heard mother screaming from the bedroom and heard sounds of a whip. Mother had a bruise on her leg. Mother denied that Oscar hit her with a belt and stated that the bruise was the result of bumping into the bedpost. When mother exited the bedroom, she told Ra. "Look what can happen to you."

The day after Oscar's arrest, a Team Decision Making meeting was conducted at the DCFS office in Santa Clarita with mother and the three children. Mother and the children reported that mother and Oscar had a long history of domestic violence that had not been addressed. Mother did not appear to grasp the gravity of the abuse her daughter was subjected to, and despite Oscar's violence, she intended to reconcile with him and remarry him in the future. Mother disclosed that she relied on Oscar heavily to help her financially while she pursued additional schooling to become a nurse. Even though the family was assessed as being at "high risk for future neglect," DCFS left the girls in mother's care because Oscar was now residing in a separate residence.

## **2. Petition and detention hearing**

On May 20, 2010, DCFS filed a petition pursuant to subdivisions (a), (b), (g), and (j). The petition alleged that mother and Oscar engaged in domestic violence; that Oscar physically abused Ra.; and that mother failed to protect her. The petition also initially alleged that father failed to provide Riley with the necessities of life; however, this allegation was subsequently dismissed.

Mother was present at a detention hearing on May 20, 2010. One attorney was appointed for all three children. The court found that father was Riley's presumed father. Riley's attorney informed the court that Riley was visiting father every Wednesday and every other weekend. The court confirmed with mother that father had been supporting and providing for Riley.

The court found a prima facie case that the children were described by section 300. Ra. and R. were released to mother's custody, and Riley was released to the custody

of mother and father under the existing family law custody arrangement. The court ordered no contact between Oscar and Ra., and his visits with R. and Riley monitored by a social worker. Mother was offered family maintenance services, and the case was continued for a pretrial resolution conference.

### **3. Jurisdiction/disposition report**

DCFS filed its jurisdiction/disposition report on June 24, 2010, and recommended that the children be declared dependents of the court but remain in mother's custody.

Mother confirmed that father had always provided for Riley and that they had a good relationship. Father and mother resided together from 1999 to 2002, but then separated. Father reported that he always paid child support directly to mother, but he was not aware he was supposed to make payments through the child support division. Therefore, they were working to resolve the arrears that the division claimed was in existence. Father and mother had arranged a custody agreement in court in 2002, which provided father with visitation every other weekend and one day during the week. Mother had not always complied with the custody orders and father had to take legal action to ensure his contact with Riley.

Father wanted full custody of Riley because he believed he could provide her with a safer, healthier, and more beneficial home to live in with "zero physical or mental abuse." Riley was very bonded to her father. Riley also had a beneficial relationship with her paternal grandfather, who resided in the Chicago area, with whom she had enjoyed frequent visitation and contact over the years. Father had been employed fulltime as a salesman since 2008, and he had stable housing. He lived alone but was in a committed relationship with another woman for two and a half years. He had no criminal history other than one instance of driving with a suspended license.

The jurisdiction/disposition report stated that there had been past referrals alleging physical abuse of Ra. and R. by their father, Edgar. The referral was deemed inconclusive. Edgar had a criminal history including burglary and theft. Oscar had a lengthy criminal history including theft, failure to appear, driving with a suspended license, and burglary. Mother had a criminal history as a minor. Mother was also

arrested and detained for one night in 2002 after punching father in the face while they were driving.

Both Riley and R. stated that they wanted Oscar to return home. Ra. was unwilling to remain in mother's home if Oscar returned.

DCFS concluded that the children had been exposed to a detrimental home environment due to Oscar's serious physical abuse of Ra. and mother's failure to protect her. Mother had also been responsible for causing emotional harm to R. by permitting her to observe the serious abuse of her sister.<sup>4</sup> The social worker was concerned that mother remained vulnerable to the influence of Oscar. Mother had a history of explosive outbursts of anger, was limited in her knowledge of effective parenting techniques, and had unrealistic expectations related to age appropriate behavior of minors. DCFS concluded that the children were safe in mother's care as long as she did not permit Oscar unmonitored access to the children.

#### **4. Pretrial resolution conference**

The pretrial resolution conference was held on June 29, 2010. Father made his first appearance. DCFS informed the court that it intended to detain Ra. because the social worker concluded it was not safe for Ra. to return home after the hearing. Ra. was emotionally distraught and needed a period of separation from mother. Ra. felt responsible for causing the separation of the family and there had been a lot of discussion about the case at home.

Father requested "one week on, one week off" visitation while the adjudication was pending. Riley's attorney concurred. The court left all orders in effect and deferred a decision on father's request, but approved father's request to take Riley to Chicago for a pre-planned vacation. A contested adjudication was set for September 16, 2010.

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<sup>4</sup> Mother had also caused further damage to R. and Ra. by failing to arrange for visits with their father, Edgar, and by telling them that he had given up his parental rights when in fact he shared physical custody.

## **5. Ra.'s detention from mother**

On July 2, 2010, DCFS filed a section 385 petition seeking detention of Ra. from mother. Ra. was in protective custody. Ra. reported that mother had been pressuring her to recant the physical abuse allegations against Oscar so that he could return to the family. Ra. also reported that mother was turning her sisters against her and they would not talk to her. She preferred to be in foster care rather than return to mother. Mother had accused Ra. of causing the family's problems and breaking up the family. Ra. stated that all mother cared about was getting Oscar back in the home. If Oscar returned, Ra. did not want to live there.

Ra. was detained and released to the care of her maternal grandparents. Mother was granted monitored visits and reunification services were ordered.

## **6. Adjudication and disposition**

The adjudication hearing was conducted on September 16, 2010. Both mother and father were present.

DCFS had filed a supplemental report on September 8, 2010, which recommended joint physical and legal custody of Riley by both parents. Riley had continued to enjoy her contact and visits with her father, who was described as a supportive, loving and stable parent.

On the other hand, DCFS was concerned that mother had been denying her children contact with each other. Specifically, mother was trying to alienate Riley and R. from Ra., making her the scapegoat of the family. Mother appeared to have emotionally abandoned Ra., and Riley was in a difficult situation where she could not contact Ra. without fear of getting in trouble. Maternal grandmother reported that R. and Riley would not speak to her, and mother was telling them not to like her anymore because she was helping Ra.

In addition, DCFS was concerned about mother's attitude towards Oscar. Mother asked the social worker on July 27, 2010, if Oscar could return to the home now that Ra. was out of the house. Mother explained that it was Ra.'s fault that she got hit because she lied, and it was her fault that Oscar was not in the home. DCFS reported that the criminal

court had issued an order precluding Oscar from returning to the home pending resolution of the criminal case.

Mother executed a waiver of rights and pleaded no-contest to an amended version of the petition. The court found that count b-1 was true as amended and the children were described by section 300, subdivision (b). All of the remaining counts of the petition were dismissed, and father submitted to the jurisdiction of the court. The three children were declared dependents of the court and placed under court supervision. Riley was left in the custody of mother and father, and the court ordered them to share custody on a 50/50 basis, on alternating weeks. Family maintenance and prevention services were ordered.

Ra. was removed from mother's physical custody, and R. was left in mother's care. Mother was given family reunification services for Ra., and was ordered to complete parenting and individual counseling to address parental alienation and anger management. The court gave DCFS discretion to permit Oscar to move back into the family home once he was enrolled in programs and once they could obtain a progress report, but only if Ra. was not in the home. A progress report and six-month review hearing were scheduled.

## **7. Interim review report**

The court received an interim review report on December 16, 2010. Mother was enrolled in parenting courses and seeing a therapist. She was also attending a domestic violence program. Edgar was trying to have his child support payments made directly to the maternal grandparents, since mother was not turning the money over to maternal grandmother.

At the interim review hearing, the court left all prior orders in full force and effect except, at father's request, it signed an attorney order confirming that its custody order for Riley was alternating weeks with each parent. The court also specified how Riley's Christmas holiday would be shared.



## **8. March 17, 2011 (six-month review)**

On March 17, 2011, DCFS submitted a status review report for the scheduled six-month review hearing pursuant to section 364 for Riley and R., and pursuant to section 366.21, subdivision (e), for Ra. DCFS recommended six additional months of court supervision for Riley and R., and urged the court to set a section 366.26 hearing to implement legal guardianship for Ra.

DCFS continued to have concerns about mother. There was a concern that once the case was closed, Oscar would move back in with the family and create a safety risk. Mother continued to tell the social worker that she wanted Oscar to return home. She was struggling financially and still refused to give Ra.'s child support payments to maternal grandparents.

Riley had recently informed the social worker that she wanted to try living with father for a couple of months, and visiting mother on the weekends. She reported that she got to see her maternal family more when she was with father. Father had a positive relationship with the maternal family, and he would allow her to see Ra. and the maternal grandparents on the weekends. Riley appeared safe and comfortable with father.

Riley had been alternating spending one week with mother and one week with father. Father had arranged with his employer to be assigned to a service area in the Santa Clarita Valley and he was planning to move to a residence closer to Riley's school, so he could be closer to her and hopefully obtain full-time custody. Mother asserted that Riley's school performance was hampered by the alternating custody arrangement, but Riley reported that this was not true. Riley finished most of her homework in an after school "homework club," and finished the remainder when she got home. Riley's school principal reported that there were no concerns with her school performance, she interacted appropriately with her peers, she was performing at grade level, and she had no behavior problems.

Mother and father were present at the review hearing on March 17, 2011. The children's attorney declared an actual conflict and requested appointment of new and separate counsel for each child, which the court ordered. Mother and father set a

contested review hearing on Riley's case. Mother sought termination of jurisdiction, and both parents wanted physical custody of Riley. The matter was continued to May 19, 2011.

#### **9. May 19, 2011 (contested six-month review hearing)**

##### ***Reports***

DCFS submitted a supplemental report for the May 19, 2011 contested hearing. DCFS recommended that jurisdiction be terminated, with Riley to continue in the alternating physical custody arrangement that had been in place. DCFS believed that the remaining issues between the parents could be addressed by the family law court.

The social worker had visited Riley at father's home and found it clean and appropriate, although Riley and father shared a bedroom. Riley reported that she wanted to keep the custody arrangement as it was, a week with each parent. Riley revealed that mother had called her to tell her that R. cried about the possibility that Riley might live with father, which made Riley feel bad.

The social worker's primary concern was that mother would permit Oscar to return to the home once the case was terminated, which could present a safety risk. Oscar had been visiting mother's home and was seen at a school event.

In a "last minute information for the court," DCFS reported that on May 12, 2011, Riley had revealed that she wanted to stay with mother during the week, and visit with father on the weekends. Riley claimed that she had made this decision on her own, and that mother had not spoken to her about it. Riley stated that she had this change of mind because maternal grandmother had "grounded" her as a form of discipline, and father had defended the grandmother. Riley stated that things were now fine with her grandmother and her father. DCFS recommended that the custody order be modified in accordance with Riley's wishes.

##### ***Testimony***

Mother, father, and Riley were all present for the contested hearing. The court entered into evidence DCFS's reports dated March 17 and May 19, 2011. Mother wanted

sole physical custody of Riley. Father wanted the existing joint 50/50 arrangement to continue.

Mother called Riley as a witness. When questioned by mother's counsel, Riley stated that she wanted to live with mother, and see father every other weekend. However, when cross-examined by father's counsel, Riley stated that she had enjoyed spending alternating weeks with each parent for the past eight months. Riley denied that her mother had told her what to say at the hearing.

Riley was also questioned by her own attorney. She confirmed that the last time she was in court she told her attorney that she wanted to spend most of her time with her father and only spend weekends with mother. Two weeks before the hearing, she changed her mind and told the social worker. However, right before the contested hearing, she told her lawyer that "half and half" was okay. After the lunch break, she told her attorney she wanted to be with her mom more and with her dad on the weekends. When asked directly by her attorney, Riley stated that she wanted "50 percent, same-same."

On redirect examination, mother's attorney asked Riley what she meant by 50/50. Riley responded, "If my dad spends more time with me, then I want like to do half and half again." When mother's attorney asked Riley if she meant in the future, Riley responded affirmatively, and agreed when asked if she wanted to stay with her mom now and see her dad every other weekend.

Father testified that Riley had never told him before that she wanted to spend more time with him, but now that he understood that, he "absolutely" would. Father explained that he sometimes needed to spend time on the computer after work, because he didn't have a nine-to-five job.

On cross-examination, father explained that he was a sales representative for Anheuser Busch, and worked "throughout the Valley," but he had a very convenient route with stores within about 23 blocks of Riley's school so he could drop her off, do his route, and pick her up. When Riley was with him, he worked about 40 hours per week.

Riley's attorney argued to the court that Riley was only 10 years old and that she had vacillated back and forth about what she wanted. It was a very difficult decision for her to make. Riley's attorney submitted on mother's request for primary custody, but asked that the parents have joint custody, with flexibility for Riley to spend more time with her father during vacations. DCFS submitted on the recommendations in the reports.

***The court's orders and findings***

The court noted that Riley had been sharing equal time with each parent for the past eight months, with no detriment. The court also noted that Riley seemed confused and that her parents had put her in the middle. Riley seemed conflicted when she testified. The court also noted that father was a "nonoffending parent" who had never been shown to be a risk to the child.

The court concluded that there was no reason not to grant father 50 percent custody. The court ordered the existing arrangement to continue with 50/50 joint physical custody, alternating weeks between the two parents. The court specified, "If we didn't have a track record here, I would be less likely to order this, but we do have a track record." The court noted that the parties could always go to a family law court if the arrangement wasn't working out. The court ordered the parties to prepare a custody order and further ordered that Oscar was not permitted to live in mother's home, visit in mother's home, or have any contact with the children.

On May 26, 2011, a final custody order was signed and filed, reflecting the court's May 19, 2011 ruling. The custody order reflects that the court terminated jurisdiction over Riley as of that date.

On July 15, 2011, mother appealed the May 19, 2011 order granting joint physical custody of Riley to both parents.

## DISCUSSION

Mother argues that in issuing its exit order, the court focused on father's qualifications as a father, rather than focusing on Riley's best interests, as it should.<sup>5</sup> Mother argues that the court's improper consideration of John's qualifications as a father was prejudicial error requiring reversal of its exit order.

### I. Relevant law and standard of review

"When the juvenile court terminates its jurisdiction over a minor who has been adjudged a dependent child . . . the juvenile court . . . may issue . . . an order determining the custody of, or visitation with, the child. [¶] Any order issued pursuant to this section shall continue until modified or terminated by a subsequent order of the superior court." (§ 362.4; see also Cal. Rules of Court, rule 5.700.) "[I]n making [termination and custody] orders, the juvenile court must look at the best interests of the child." (*In re John W.* (1996) 41 Cal.App.4th 961, 973 (*John W.*)). A court must evaluate these interests "in the context of the peculiar facts of the case before the court." (*Id.* at p. 965.)

In the context of dependency court, the "issue of the parents' ability to protect and care for the child is the central issue. The presumption of parental fitness that underlies custody law in the family court just does not apply to dependency cases." (*In re Jennifer R.* (1993) 14 Cal.App.4th 704, 712.) Therefore, when a juvenile court makes a custody determination under section 362.4, it must do so based on "the best interests of the child without any preferences or presumptions" as a family law court would be obliged to consider. (*Jennifer R., supra*, at p. 712.)

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<sup>5</sup> Father argues that mother is precluded from raising this argument on appeal because she never argued to the trial court that a best interest standard was applicable. (*In re Aaron B.* (1996) 46 Cal.App.4th 843, 846.) However, mother did object to an order giving joint custody to both parties. She further argued that an arrangement giving her primary custody was the most desirable arrangement. We find that under the circumstances, mother has sufficiently preserved this argument for appeal. Therefore, we will address her argument on the merits.

A juvenile court's exit order is appealable under section 395. On appeal, a termination and custody order made under section 362.4 is generally reviewed for abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

## **II. The trial court properly considered Riley's best interests**

The record reveals that the court carefully considered its decision to leave Riley in her current arrangement, sharing physical custody evenly between the two parents. The court began by explaining that this court "is not a family law court. This is a court about where the child is safe." The court noted that Riley had successfully been sharing the same amount of time with each parent for the past eight months. The court observed that Riley seemed confused and conflicted. The court did note that father was a nonoffending parent who had never shown a risk to his child. However, the court's focus was on the "track record" before it. Riley had been alternating weeks with each parent. She was not having any problems, and she was doing well in school. Under the circumstances, it is apparent that the court felt that maintaining this arrangement served Riley's best interests.

Mother argues that the court improperly considered the fact that father was a nonoffending parent. Citing *John W.*, mother argues that a strict best interest standard should have been applied. However, mother fails to cite any authority indicating that consideration of father's non-offending parent status was improper under the best interest standard. It was not the only factor that the court considered. As set forth above, the court's main focus was the successful track record before it.

Mother contends that *John W.* supports her position. In *John W.*, the trial court failed to employ a strict best interest standard in making its exit order, and instead applied a rule that the child's time with each parent should be split in half as long as neither parent posed an active threat. (*John W.*, *supra*, 41 Cal.App.4th at p. 965.) On appeal, the *John W.* court held that just because the court had no evidence that either parent posed any danger to the child did not mean that both parents were entitled to half custody. (*Id.* at p. 974.) Instead, the court should have considered the best interests of the child. In *John W.*, the custody order requiring the child to be shuttled between northern Los Angeles County and southern Orange County every two weeks was unworkable and

did not serve the best interests of the child. (*Ibid.*) The Court of Appeal reversed and remanded to the family court for a hearing on custody and visitation. (*Id.* at pp. 974, 977.)

The present case is distinguishable. First, the court in *John W.* set the alternating plan as a default because it could not make a decision as to which parent would be the better parent to have physical custody. (*John W.*, *supra*, 41 Cal.App.4th at p. 968.) Thus, the decision in *John W.* was implemented because there was no reason to give one parent greater rights than the other. Here, in contrast, the court made an affirmative decision that maintaining Riley’s current schedule of alternate weeks was the most desirable plan, based on the track record before it. In addition, in *John W.*, the parents lived in different counties, and there was a “lengthy distance” between their homes. (*Ibid.*) The court noted that an arrangement requiring a child to be shuttled between two homes does not “necessarily” serve the best interests of the child, “particularly during the school year and particularly when the parents live in different counties.” (*Id.* at p. 974.) Here, father lives only approximately six miles away from mother, a driving distance of only about 14 minutes. Both parents lived close enough to Riley’s school that the alternate week arrangement is workable for Riley. In contrast to *John W.*, Riley would not need to be shuttled between different counties. In sum, *John W.* does not suggest that the trial court erred under the circumstances of this case.

The court’s order maintained the status quo, which kept a predictable and stable schedule for Riley. A change in schedule could potentially disrupt Riley’s interactions with her parents and would require a new adjustment period for everyone. The “preference of a minor child is not determinative of his or her best interests. [Citation.]” (*In re Richard H.* (1991) 234 Cal.App.3d 1351, 1368.)

We find that the trial court properly considered Riley’s best interests in making its custody order. No error occurred.<sup>6</sup>

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<sup>6</sup> Mother also argues that the court’s error in failing to apply a strict best interest standard was prejudicial. Specifically, mother argues that, had the court applied the best interest standard, it was reasonably probable that mother would have been given primary

## DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

\_\_\_\_\_, J.  
CHAVEZ

We concur:

\_\_\_\_\_, P. J.  
BOREN

\_\_\_\_\_, J.  
ASHMANN-GERST

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physical custody. We have determined that the trial court did not err because it considered Riley's best interests. Therefore, we need not address mother's argument that any error was prejudicial. However, we note that even if we were to consider the question of prejudice, there is no reason to believe that a different outcome would result if the court were to reconsider the issue. The court noted that Riley was conflicted, that it was difficult for her to make a decision regarding the best custody arrangement, and that she had successfully been sharing equal time on alternating weeks with both parents. Under the circumstances, the trial court made a sound decision that Riley's best interests were served by maintaining the existing shared custody arrangement.