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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

STACY V., Respondent, v. FRANK B., Appellant.	B293010 (Los Angeles County Super. Ct. No. LF005780)

APPEAL from an order of the Superior Court of Los Angeles County, Shirley K. Watkins, Judge. Affirmed.

Nadel and Associates and Jeanne Collachia for Appellant.

Cohen and Schwartz and Kenneth L. Schwartz for Respondent.

Frank B. (Father) appeals from a family court order modifying a stipulated judgment reached with Stacy V. (Mother) and awarding Mother sole legal and physical custody over their two sons. Father contends his sending of derogatory messages to Mother did not constitute a significant change in circumstances affecting the welfare of the children because Father had sent similar messages prior to entry of the judgment.

The trial court did not abuse its discretion in finding Father's continued abusive behavior toward Mother in sending her dozens of messages berating her parenting style constituted a changed circumstance supporting a grant of sole legal and physical custody to Mother because of Father's inability to coparent their sons and his interference with Mother's custodial time. To hold otherwise would cloak the abusive parent with a form of immunity from a change in the custody order regardless of the continuation of the abuse. Further, it would discourage courts from entering orders optimistically assuming the parent will modify his or her behavior following counseling and giving that person a chance to prove he or she can be a good parent and partner. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Parties*

Mother lives in Tarzana and works as an elementary school teacher in Sherman Oaks. Father lives in Woodland Hills, about 20 miles from Mother, and has been retired since 2008. Mother and Father met in 2009. They have two children, Brendan (born in 2010) and Luke (born in 2011). Mother and Father never married or lived together. Before Luke was born, Father cared for Brendan three days per week while Mother worked.

B. *The Custody Action and Stipulated Judgment*

Mother and Father had disagreements about parenting starting when Mother was pregnant with Luke. On September 23, 2011 Father's former wife came to Father's home and discovered Father had left 11-month-old Brendan alone in his crib while Father went to pick up his older son (from his prior marriage). Father's former wife called the Los Angeles County Sheriff's Department, which referred the incident to the Los Angeles County Department of Children and Family Services (Department).

On September 29, 2011 Mother filed a petition in family court to establish parental relationship, seeking sole legal and physical custody over the boys and child support. On October 24, 2011 Father filed a cross-petition seeking joint legal and physical custody of the boys, with no child support.

On November 8, 2011, in response to the September 23 incident, the Department filed a petition in dependency court to remove Brendan and Luke from Father's custody. At the initial hearing on November 14, 2011, the dependency court ordered both boys detained in the care of Mother. At the jurisdiction and disposition hearing on December 11, 2011, Mother and Father admitted the allegations in the petition, and the court ordered joint legal custody of the boys, with Mother having sole physical custody. The court ordered Father to complete a parent education program and allowed him to have at least three unmonitored daytime visits per week. The court did not enter a final exit order but dismissed the petition.

On September 30, 2013 the family court issued a custody order awarding Mother sole legal and physical custody of the boys, with Father having daytime visitation every other weekend

(Friday through Sunday) and holidays in alternate years.[1] The court found, "[Father] will not cooperate with petitioner in co-parenting. He believes he is the only fit parent for Brendan and Luke. [¶] . . . [¶] . . . He consistently down plays [*sic*] any positive attributes that [M]other has and in fact engages in unrelenting attacks on [M]other . . . . [¶] . . . [¶] . . . Father will parent without consulting [M]other because he thinks he is the better parent and will not agree to any reasonable requests of [M]other."

Litigation continued in the family court over the next two years. During this period, Mother and Father separately met with a court-appointed child custody evaluator, Ron Colombo, Father completed a coparenting class and participated in anger management therapy.

On May 5, 2016 the family court issued a pendente lite order granting Father's request to modify custody and parenting time in light of testimony from the parties and Colombo. The court ordered joint legal and physical custody, with Mother and Father to have a "50/50 time schedule." The court imposed conditions to facilitate coparenting, including that Mother and Father could only communicate with each other through Our Family Wizard (OFW) messaging software. The court also ordered Mother and Father to continue therapy and anger management classes.

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[1] The family court had continued the hearing on Mother's and Father's petitions during the dependency proceedings. Commissioner Steff R. Padilla presided over the September 30, 2013 hearing and issued the custody order that day. The case was subsequently reassigned, then starting in December 2015 Judge Shirley Watkins presided over the case.

In its May 5, 2016 order, the family court admonished Mother and Father: "The parents should refrain from controlling the other parent in his or her parenting of the minors . . . . [¶] OFW is not to be used [for] personal attacks on the other parent or the other parent's parenting style. . . . Failure to comply with this order may result in change of custody or parenting time . . . ." The order provided further: "The court encourages both parents to limit critical, insulting and destructive emails to the other parent. Parents are cautioned that the messages on OFW will be considered in future custody determinations."

After multiple continuances, at the April 3, 2017 trial readiness conference, the court ordered Mother and Father to attend a settlement conference on May 24 before Judge Dianna Gould-Saltman. By this time Mother had filed her witness and exhibit lists, and Father had filed his witness list and trial brief.

At the May 24, 2017 settlement conference, Mother and Father executed a stipulation and order of settlement that provided for joint legal and physical custody and set forth a parenting plan and allocation of child-rearing expenses. Judge Gould-Saltman continued the case to August 17, 2017 for "disposition only."

C. *Entry of the August 17, 2017 Judgment*

On August 17, 2017 Judge Gould-Saltman entered a stipulated judgment signed by Mother and Father (2017 judgment). Consistent with the terms of the settlement, the 2017 judgment awarded Mother and Father joint legal and physical custody. The legal custody terms provided either parent could exercise control over the boys, except mutual consent was required for enrollment in school, nonemergency medical treatment other than routine checkups, mental health

counseling, and issuance of a driver's license. With respect to "any medical and mental health treatment or evaluation," each parent was required to notify the other within a reasonable time beforehand and identify the service provider. The boys (then ages five and six) would remain at their current elementary school, where Mother worked, through the fifth grade.

The 2017 judgment provided Father would have physical custody of the boys during the school year on the first, third, and fourth weekends of the month from Thursday morning through Monday morning and overnight from Tuesday to Wednesday following the second and fifth weekends of the month.[2] Mother would have physical custody the rest of the time. Mother and Father would alternate weekly custody during the summer, and the judgment provided a detailed schedule for vacations, birthdays, and holidays. The 2017 judgment also required Mother and Father to continue communicating through OFW except in an emergency.

Mother and Father and their counsel also executed Judicial Council Form FL-130, stipulating "[t]he parties agree that this cause may be decided as an uncontested matter" and "[t]he parties waive their rights to notice of trial, a statement of decision, a motion for new trial, and the right to appeal."

D. *Mother's Request for Order To Modify Custody*

Eight months later, on April 5, 2018, Mother filed a request for order (RFO) to modify custody to give her sole legal and physical custody of the boys "with a standard visitation order of first, third and fifth weekends for [Father]." Mother's RFO stated

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[2] The 2017 judgment defines the first weekend "as the first Thursday at 8:00 a.m. of any month during the year."

she was seeking modification of the May 5, 2016 order of 50/50 joint physical custody; Mother did not discuss the 2017 judgment.

Mother argued modification of custody was necessary because Father was extremely controlling and incapable of coparenting, and he would lash out at her "almost daily" over OFW, interfering with her custodial time and making handoffs and practical accommodations difficult. Mother submitted more than 80 OFW messages (out of hundreds) Father sent during the four-month period from December 2017 through March 2018 as evidence of Father's behavior. Mother pointed to the messages as examples of how Father interfered with her custodial time by, for example, requesting he pick the boys up from school during Mother's custodial time. Mother also asserted the boys spent too much time during the school week shuttling between her home in Tarzana, their school in Sherman Oaks, and Father's home in Thousand Oaks. Mother declared Father was pressing to sign the boys up for extracurricular activities and sports in Calabasas, the halfway point, rather than with their school peers. Mother asserted Father "has become somewhat obsessed with our children and their participation in sports," and Father was even suggesting to split the boys up because Luke had shown more interest in team sports.[3] Mother also stated Father had taken

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[3] At the hearing Father denied he wanted to "split[] the kids." The OFW messages filed by Mother reflect Father's recognition the boys were engaged in different activities and his suggestion the boys could separately attend activities, but the messages do not specifically reflect a proposed plan to separate the boys for custody purposes. However, Father concedes in his reply brief that he has suggested this as a possibility given the boys' different interests.

the boys for a physical examination without her consent in violation of the joint custody conditions.[4]

On June 7, 2018 Father filed a responsive declaration in which he claimed Mother was the one frustrating coparenting, including by reneging on arrangements to "meet half way" for the boys' activities. Father also argued Mother's RFO was not supported by a material change in circumstances affecting the boys: "The parties did not agree on the parenting style for their two boys before the [j]udgment filed August 17, 2017, and do not agree on parenting style and priorities for the parties['] two boys now. . . . [¶] . . . [¶] [Mother's] declaration claims that she is being negatively [a]ffected by the terms of the [j]udgment's 'timeshare' order she signed just months ago, filed August 17, 2017; but makes no mention of any effect on the health and well being of the parties['] two boys. The boys are OK." Father filed evidentiary objections to Mother's declarations in support of the RFO.[5]

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[4] Mother also asserted Father brought the boys to a therapist without telling her. Father declared he did not bring the boys for treatment, instead bringing them to Father's own therapy. We need not reach whether Father's conduct violated the 2017 judgment because the family court did not rely on this alleged violation in its order on Mother's RFO.

[5] On June 22, 2018 the family court ruled on Father's evidentiary objections, sustaining many of Father's objections to Mother's declaration and all of Father's objections to Mother's attorney's declaration. Neither party appeals the court's evidentiary rulings.

E. *The Family Court's Order Awarding Sole Legal and Physical Custody to Mother*

At the June 22, 2018 hearing on Mother's RFO, the family court[6] admonished Father regarding his abusive messages, which it found "completely and totally unacceptable." The court stated to Father, "So I'm giving you fair notice, that you will potentially lose legal custody, time, and suffer financial sanctions if you continue to send these kinds of messages which the court finds to be abusive." The court's written tentative ruling was to deny Mother's RFO with a warning to Father. Mother's attorney complained as to the tentative ruling that "there are no consequences" from Father's behavior.

Father argued his failure to obtain Mother's consent to take the boys for a physical examination did not violate the 2017 judgment because he only brought the boys to the doctor for a "physical exam," not "treatment." The court rejected Father "splitting that hair" and found it worrisome Father thought it was acceptable to take the boys to a doctor without notifying Mother.

After taking the matter under submission, on July 27, 2018 the court issued an order granting Mother's request and awarding Mother sole legal and physical custody of the boys. The court reduced Father's visitation during the school year so Father had the boys on the first, third, and fifth weekends of the month starting after school on Friday until 7:00 p.m. on Sunday evening (extended through Monday evening on holiday weekends). The court removed Father's Tuesday overnights, finding "it is in the best interest for the stability of the children for them to spend the night with [M]other on school nights." The court ordered that

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[6] Judge Watkins.

Father instead had afternoon visitation with the boys on Tuesdays and Thursdays after school until 7:00 p.m. The court did not substantially change Father's visitation schedule for summer breaks, vacations, and holidays.

In its order the family court recited the findings in the 2013 order awarding sole physical and legal custody to Mother and concluded "most those findings exist today."[7] The court found "Mother presented credible evidence supporting her claim that [F]ather shows continued disregard for the court's orders re [OFW] and that he makes personal attacks against [M]other in defiance of the court's orders. Father was warned on numerous occasions that failure to comply with custody orders could result in change of custody or parenting time and disputes these warnings. Father continues [to] violate court orders. Among other things, messages from [F]ather to [M]other are argumentative, judgmental, high conflict and evidence personal attacks. Evidence also supports [F]ather's interference with [M]other's custodial time and attempts to manage her time with the children."

The court excerpted more than 30 of Father's OFW messages between December 2017 and March 2018 as examples of "insults, derogatory references to [Mother's] parenting and decision making abilities or instructions as to the way she should care for the boys." Father's messages included: "[Y]our actions

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[7] The family court also relied on Colombo's March 23, 2016 testimony that he had "serious questions about [F]ather's approach to [M]other," and Father was unable to recognize and moderate his critical and alienating behavior. However, this prejudgment evidence (from March 2016) does not support the court's finding of changed circumstances following the 2017 judgment.

are morally and ethically reprehensible"; "everyone I speak to believes that you are hurting our boys, just in an attempt to hurt me . . . very sad for our boys"; "[y]ou need therapy to learn how to tell the truth and coparent with me—both concepts are related"; "I would ask you in the strong terms not to attend [Brendan's track meet]—as your presence will be disruptive to my custodial timeshare"; "they will not make any high school team, in any sport with the current path that you are following"; "Brendan should not be penalized due to your poor judgment;" "DO NOT GIVE HIM COUGH SYRUP!!!"; "do not give him Tylenol to break the fever"; "you have not created an environment of discipline for them"; "[h]ow can you teach English, if you cannot read"; "[p]erfect . . . you chose another hook-up over our son's soccer game"; "[d]isgusting behavior and harmful to our boys"; "please stop your narcissistic behavior—it is hurting our boys"; and "[i]f you cannot cooperate and/or co-parent with me, I will not bring Brendan to any future track practice or meets." In one message cited by the court, Father claimed the upcoming Tuesday, December 5, 2017, was the fifth weekend of November, and Father demanded, "Do you agree that I will pick [up] our boys tomorrow after early dismissal or should I plan on having the LAPD officer assist me with that transfer?"

In addition to the OFW messages, the court cited Father's "obsessive fixation" with growing the boys into college athletes and Father's "parenting judgment about splitting the children"; Father's bringing the children to a physical examination without consulting Mother and later refusing to identify the physician; Father's judgmental references to Mother's intimate relationships; and Father's hair-splitting and tortured interpretations of prior court orders. The court concluded the evidence before it "supports a material change in circumstances

and the need to change custody in the best interests of the children."

F. *Father's Request for Reconsideration*

On August 6, 2018 Father filed a request for reconsideration in which he argued Mother had not demonstrated significant changed circumstances affecting the boys' welfare. Father highlighted the lack of evidence the existing parenting plan was negatively affecting the boys. Father filed a supplemental declaration explaining his conduct was done to further the boys' best interest.

After hearing oral argument on September 11, 2018, the next day the court issued an order denying Father's motion, stating, "The court finds the 7/27/18 [order] is in the best interest of the children. The court finds that [Father] has no self-awareness of the issues of concern raised by the court in the [order]." The court added: "Father's obsessive concern for protection of the genetically transported intellectual and physical gifts that he has given to the children ignores the greater issue of their emotional well-being. Father equates athletic success with lifetime success, ignoring the other aspects of overall well-being. . . ."

The court restated its findings regarding Father's abusive OFW messages and further found, "Even upon reconsideration, the court did not hear from [Father] any reasonable explanation for his behavior in violating court orders." The court reprised its conclusion the evidence showed a "material change in circumstances and the need to change custody in the best interests of the children."

Father timely appealed.[8]

DISCUSSION

A. *The Changed Circumstance Rule*

"An order for joint custody may be modified or terminated upon the petition of one or both parents . . . if it is shown that the best interest of the child requires modification or termination of the order." (Fam. Code, § 3087.)[9] "Under California's statutory scheme governing child custody and visitation determinations, the overarching concern is the best interest of the child." (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255 (*Montenegro*).) In determining the best interest of the child, the court must consider "all relevant factors, including the child's health, safety, and welfare, any history of abuse by one parent against any child or the other parent, and the nature and amount of the child's contact with the parents." (*In re Marriage of Brown & Yana* (2006) 37 Cal.4th 947, 955-956.)

However, "[o]nce the trial court has entered a final or permanent custody order reflecting that a particular custodial arrangement is in the best interest of the child, 'the paramount need for continuity and stability in custody arrangements—and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker—weigh

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[8] Although Father does not specify in his notice of appeal whether he is appealing from the July 27, 2018 custody order or the September 12, 2018 order denying reconsideration, we consider the arguments raised by Father in his opening brief as to both orders.

[9] All further statutory references are to the Family Code.

heavily in favor of maintaining' that custody arrangement. [Citation.] In recognition of this policy concern, we have articulated a variation on the best interest standard, known as the changed circumstance rule, that the trial court must apply when a parent seeks modification of a final judicial custody determination." (*In re Marriage of Brown & Yana, supra*, 37 Cal.4th at p. 956; accord, *Montenegro, supra*, 26 Cal.4th at p. 256 [Under the changed circumstance rule, the court "should preserve the established mode of custody unless some significant change in circumstances indicates that a different arrangement would be in the child's best interest."]; *In re Marriage of McKean* (2019) 41 Cal.App.5th 1083, 1089-1090 [family court's modification of custody order from joint to sole custody was abuse of discretion because of lack of evidence of changed circumstances].)

B. *The 2017 Judgment Is a Final Custody Order*

Father contends the 2017 judgment is a final custody determination, and the family court therefore applied the wrong standard in modifying custody based on the boys' best interest without a significant change in circumstances affecting the boys' welfare. We agree the 2017 judgment was a final order but reject Father's contention the family court applied the wrong standard.[10]

Although stipulated custody orders are treated the same as orders entered after trial (*Montenegro, supra*, 26 Cal.4th at p. 257), the Supreme Court has cautioned that "[b]ecause many

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[10] On appeal Mother does not address whether the judgment was a final custody determination. Rather, she appears to argue in her respondent's brief there were changed circumstances.

parties would not enter into a stipulated custody order if a court might later treat that order as a final judicial custody determination, we must be careful in construing such orders." (*Id.* at p. 258.) "[A] stipulated custody order is a final judicial custody determination for purposes of the changed circumstance rule only if there is a clear, affirmative indication the parties intended such a result." (*Ibid.*)

Here, it is clear Mother and Father intended the 2017 judgment to be a final custody determination. The stipulated agreement is entitled a "Judgment," as part of which the parties waived their right to a trial. (Cf. *Montenegro, supra*, 26 Cal.4th at p. 259 [stipulated custody order not a final determination where it failed to mention the words such as "'final,'" "'permanent,'" or "'judgment'"].) Mother and Father reached the settlement at the trial readiness conference, by which time they had filed their witness and exhibit lists and trial briefing. Mother and Father did not seek to continue the trial; instead, they lodged the stipulated judgment and "agree[d] that this cause may be decided as an uncontested matter" and "waive[d] their rights to notice of trial, a statement of decision, a motion for new trial, and the right to appeal. . . ." Further, the terms of 2017 judgment show the intent of the parties to reach a long-term resolution, including the requirement Mother and Father give their mutual consent before the boys could obtain a driver's license, even though the boys were only five and six at the time of the settlement.

Although Father is correct modification of the 2017 judgment required changed circumstances, we reject Father's contention the trial court applied the wrong standard in granting Mother's RFO. It is true Mother's RFO confusingly cited to the May 2016 pendente lite custody order rather than the 2017

judgment as the status quo, but Father discussed the 2017 judgment and the changed circumstances standard in his responsive papers. In its July 27, 2018 order, the family court construed Mother's petition as alleging conduct "resulting in a material change in circumstances requiring the change in custody," and the court concluded, "the evidence presented by [M]other supports a material change in circumstances and the need to change custody in the best interests of the children." Similarly, in its order denying Father's motion for reconsideration, the court again concluded "the factors and matters testified to and referred to in the evidence presented by [M]other supports a material change in circumstances and the need to change custody in the best interests of the children."[11]

C. *Standard of Review*

"The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test." (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32; accord, *Montenegro, supra*, 26 Cal.4th at p. 255.) "[W]e must uphold the trial court 'ruling if it is correct on any basis, regardless of whether such basis was actually invoked.'" (*Montenegro*, at p. 255.) However, appellate courts are "less reluctant to find an abuse of discretion when custody is changed than when it is originally awarded, and reversals of such orders have not been uncommon." (*Speelman v.*

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[11] As Father points out, during the hearing the family court stated the changed circumstances rule applies only to stipulated custody orders that expressly reference *Montenegro*. We are not aware of any authority for the family court's conclusion a stipulated order must refer to *Montenegro* to be deemed a final custody determination. Although the court misstated the law, it found there were changed circumstances.

Superior Court (1983) 152 Cal.App.3d 124, 129 [family court erred in changing final custody order to grant mother sole custody based child's best interest absent changed circumstances]; accord, *Christina L. v. Chauncey B.* (2014) 229 Cal.App.4th 731, 738-739 [reversing family court's modification of custody order to give father joint custody, finding father's desire for children to spend time with half-sister who was now living with him was not substantial change in circumstances, and father could not prove allegations of mother's neglect].)

D. *Changed Circumstances Support an Award of Sole Legal and Physical Custody to Mother*

Father contends the trial court abused its discretion in awarding Mother sole legal and physical custody of the boys based primarily on Father's derogatory messages to Mother, without evidence Father's conduct negatively impacted the boys' wellbeing. Because Father's conduct showed his inability to coparent as envisioned by the 2017 judgment and his efforts to interfere with Mother's parenting of the boys, the family court did not abuse its discretion.

If a parent is awarded "sole legal custody," the parent "shall have the right and the responsibility to make the decisions relating to the health, education, and welfare of a child." (§ 3006.) "'Sole physical custody' means that a child shall reside with and be under the supervision of one parent, subject to the power of the court to order visitation." (§ 3007.) "'Joint physical custody' means that each of the parents shall have significant periods of physical custody." (§ 3004.) Although the Family Code does not define "significant periods of physical custody," the appellate courts have provided guidance on the distinction

between joint and sole physical custody. "'Where children "shuttle[] back and forth between two parents" [citation] so that they spend nearly equal times with each parent, or where the parent with whom the child does not reside sees the child four or five times a week, this amounts to joint physical custody.'" (*Celia S. v. Hugo H.* (2016) 3 Cal.App.5th 655, 663; accord, *In re Marriage of Biallas* (1998) 65 Cal.App.4th 755, 760 (*Biallas*).)

However, where "a father has a child only 20 percent of the time, on alternate weekends and one or two nights a week, this amounts to sole physical custody for the mother with 'liberal visitation rights' for the father." (*In re Marriage of Lasich* (2002) 99 Cal.App.4th 702, 715; accord, *Biallas, supra*, 65 Cal.App.4th at p. 760 [custody alternate weekends and one weeknight every week constitutes liberal visitation, not joint custody]; *In re Marriage of Whealon* (1997) 53 Cal.App.4th 132 [same].)

The requirement for a showing of changed circumstances "applies equally whether the contemplated modification affects physical or legal custody." (*In re Marriage of McLoren* (1988) 202 Cal.App.3d 108, 116 [reversing family court's modification of custody from sole to joint legal custody where there was no evidence parents "currently are ready, willing, or able to engage in" cooperative parenting efforts]; accord, *In re Marriage of Brown & Yana, supra*, 37 Cal.4th at pp. 955-956.)

Mother presented the court with a fusillade of more than 80 messages Father sent Mother during a four-month period after entry of the 2017 judgment in which Father relentlessly verbally attacked Mother's parenting of the boys. He criticized how she planned their activities while in her custody ("Brendan should not be penalized due to your poor judgment"); the impact of her character on the boys ("[d]isgusting behavior and harmful to our boys"); her intelligence ("[h]ow can you teach English, if you

cannot read"); her personal life ("[p]erfect . . . you chose another hook-up over our son's soccer game"); and her care for the children when sick ("DO NOT GIVE HIM COUGH SYRUP!!!"). Father continually upbraided Mother for failing to coparent with him and threatened to interfere with Mother's custodial timeshare (e.g., "If you cannot cooperate and/or co-parent with me, I will not bring Brendan to any future track practice or meets.").

Although Father's verbal abuse was directed toward Mother, the family court did not abuse its discretion in finding his abusive messages were interfering with Mother's custodial time. Father repeatedly asked Mother to allow him to pick up the boys during her custodial time.[12] Although Mother was not required to acquiesce in Father's repeated demands to take the boys during Mother's custodial time, his constant barrage of requests was coercive at times. For example, on December 3, 2017 Father wrote to Mother that he was entitled to have the boys for an overnight stay because it was the Tuesday after the fifth weekend of November. Although the parties had a dispute about the meaning of the 2017 judgment's reference to the fifth weekend of the month where the weekend fell in the following month, Father could appropriately have sought judicial resolution of this ambiguity instead of threatening Mother he

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[12] For example, Father requested he be allowed to pick up the boys on January 9 and January 23, 2018, which were the Tuesdays after the first and third weekends of January, although the 2017 judgment provided he was entitled to have the boys on the Tuesdays following the second and fifth weekends of the month.

would call the police to come to the boys' school to "assist [him] with that transfer."[13]

In his responsive declaration and request for reconsideration, Father failed to justify his conduct toward Mother other than insisting he was motivated only by his love and commitment to the boys' success. But this underscores the court's finding Father "has no self-awareness of the issues of concern raised by the court" and "will not cooperate with [M]other in co-parenting and believes he is the only fit parent for the children."

Father argues on appeal his verbal abuse does not constitute changed circumstances because "there is no significant difference between the emails that pre-date the 2017 judgment and the 'change of circumstance' emails." We reject this argument. It is evident Father was controlling and verbally abusive toward Mother prior to the 2017 judgment awarding him joint legal custody.[14] But Father's persistence in this conduct

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[13] Father also sought to pick up the boys the following Tuesday, December 12, the Tuesday after the first weekend of the month, which was not his custodial time.

[14] Father invites us to review the OFW correspondence between Mother and Father from early 2016 included in Father's 2016 request for temporary joint custody. We do not find the 2016 messages, although at times offensive, nearly as pervasively abusive as the postjudgment correspondence (e.g., "[p]rogramming our children to parrot things that did not occur is mental child abuse"; "[i]t seems evident that when the boys return to you after a time with me, you quiz them to the point of interrogation"; "[p]lease confirm that our children are safe"; "[y]ou continue to spin things"; and "I must now write you . . . to follow the court orders and allow me the opportunity to speak to our children."

following entry of the judgment (after months of counseling), by sending abusive messages on the court-monitored OFW service, ignoring the court's warning in 2016 "that the messages on OFW will be considered in future custody determinations," and consistently demanding visitation during Mother's custodial time constitute postjudgment evidence Father was incapable of coparenting with Mother as contemplated by the 2017 judgment. The trial court did not abuse its discretion in finding this was a changed circumstance.

Mother's evidence Father took the boys to the doctor without advance notice also supports a finding of changed circumstances. Even if the doctor's visit was for a routine checkup, as argued by Father, the 2017 judgment required each parent to notify the other within a reasonable time before "any medical . . . treatment or evaluation" and to identify the doctor. Father did not notify Mother before taking the children to the doctor or give her the doctor's name after the visit.

E. *The Family Court Did Not Abuse Its Discretion in Finding a Reduction in Father's Custodial Time Was in the Boys' Best Interest*

Father contends the family court's order, by significantly limiting the time the boys stay overnight with him, was not in the boys' best interest because the order was improperly based on a finding Father was "too involved" with his children, and further, Father's conduct falls short of personal attacks, threats, or physical abuse. Although Father is correct the court's order significantly limited Father's parenting time, a parent's conduct need not rise to the level of threats or physical abuse to support a change in a visitation schedule. Father's characterization of his

messages to Mother as not involving personal attacks is inaccurate.

Under the 2017 judgment, during the school year Father had the boys from Thursday morning through Monday morning on the first, third, and fourth weekends of the month, with an overnight stay on Tuesdays following the second and fifth weekends of the month. Under the modified schedule, on Father's weekends he has the boys only from Friday afternoon until Sunday evening—two nights instead of four. In addition, the change in Father's weekend schedule from the first, third, and fourth weekends to the first, third, and fifth weekends means in most months he will have only two weekends instead of three. Father also lost his Tuesday overnight visits following his noncustodial weekends. However, the substitution of Tuesday and Thursday afternoons will allow Father, who is retired and able to travel on weekdays, to participate in the boys' extracurricular activities.

For the same reasons we conclude the family court did not abuse its discretion in awarding sole legal and physical custody to Father, it did not abuse its discretion in finding modification of the visitation schedule was in the boys' best interest. As discussed, Father's abusive messages interfered with Mother's custodial time by, for example, threatening to call the police if Mother did not accede to Father's demand to have an overnight visit on a disputed week (instead of requesting the court resolve the ambiguity in the 2017 judgment). The court also acted within its discretion in basing its order on Father's "obsessive fixation" with growing the five- and six-year-old boys into college athletes, Father's bringing the boys to a physical examination without consulting Mother, and Father's violation of the court's orders by his verbally abusive behavior.

The court also took into account Mother's legitimate concern that the constant shuttling of the boys between their school in Sherman Oaks, her home in Tarzana, handoffs in Calabasas, and Father's home in Thousand Oaks, particularly on school days, was not in the boys' best interest. This was the basis for the court's removal of Father's Tuesday overnight visits, finding "it is in the best interest for the stability of the children for them to spend the night with [M]other on school nights." Similarly, requiring Father to return the boys to Mother on Sunday night, instead of Monday morning before school, allowed the boys to stay with Mother the night before school. On these facts, the family court did not abuse its discretion in finding the modified visitation schedule was in the boys' best interest.[15] (*Montenegro, supra*, 26 Cal.4th at p. 256.)

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[15] Father can prospectively seek to restore joint custody based on changed circumstances, including cessation of the abusive messages, reduction in parental conflict, control of his "obsessive fixation" with the boys' athletic grooming, and compliance with the court's orders. Further, even without a change of custody, Father could in the future present evidence that a modification of the visitation schedule (for example, by restoring a weekend night) is in the boys' best interest. (See *In re Marriage of Birnbaum* (1989) 211 Cal.App.3d 1508, 1518 [where a court's order does not change custody but only alters the parenting schedule, the changed circumstance rule does not apply, and "the court possesses the broadest possible discretion in adjusting coparenting residential arrangements involved in joint physical custody"]; *In re Marriage of Lucio* (2008) 161 Cal.App.4th 1068, 1077-1080 ["The changed circumstance rule does not apply to a modification request seeking a change in the parenting or visitation schedule."].)

DISPOSITION

We affirm the family court's July 27, 2018 custody order. Mother is entitled to recover her costs on appeal.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

ZELON, J.