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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

BENJAMIN V., Plaintiff and Respondent, v. JOHANNA V., Defendant and Appellant.	B278896 (Los Angeles County Super. Ct. No. ND069673)

APPEAL from an order of the Superior Court of Los Angeles County, Randall F. Pacheco, Judge. Reversed and remanded with directions.

Castellanos Law Group, Gabriel Castellanos, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

I. INTRODUCTION

Johanna V. (Mother) appeals from the trial court's order granting the petition by Benjamin V. (Father) to modify the joint physical custody arrangement for their child. Mother, citing *Montenegro v. Diaz* (2001) 26 Cal.4th 249, 256 (*Montenegro*), contends the modification was a change to a final custody order that required a significant change of circumstance. We agree. The trial court's order was a de facto modification of a final custody determination from joint physical custody to sole. The trial court, however, did not apply the changed circumstance rule discussed in *Montenegro* before imposing the modification. We therefore reverse with directions for the trial court to apply the changed circumstance rule in the first instance.

II. BACKGROUND

A. *Prior Joint Physical Custody Arrangement*

Mother and Father were married for approximately nine years five months. They had one child together born in 2007 (the child). On May 6, 2014, Mother and Father obtained a judgment of dissolution. The parties agreed to joint legal and physical custody of the child. As to the joint physical custody, the parties agreed to the following, which the trial court referred to as a "two two five" schedule: "Petitioner [Father] shall have the custody of and responsibility for the minor child during the following time periods and the times not specified herein shall be for the [r]espondent [Mother]: [¶] a. Every Wednesday, pick[]up from school (3:00 p.m. if a non-school day), to Friday, drop off at school (3:00 p.m. if a non-school day), commencing forthwith; and

[¶] b. Alternating weekends, determined by Friday, from Friday, pick up at school (3:00 p.m. if a non-school day), to Monday, drop off at school (3:00 p.m. if a non-school day), commencing March 21, 2014." Both parents resided in California and lived within less than a mile of one another.

B. *Father's Petition to Modify Joint Physical Custody*

On August 10, 2015, Father petitioned for a domestic violence restraining order against Mother on behalf of Father, Father's wife, and the child. Father also requested modification of the custody and visitation orders. The trial court issued a temporary restraining order. The trial court denied Father's request to modify the custody and visitation orders pending a hearing scheduled for August 28, 2015.[1] Mother had previously petitioned for and received a temporary domestic violence restraining order against Father on November 13, 2012.

C. *Psychological Reports*

The parties stipulated to an evaluation by a court-appointed expert pursuant to Evidence Code section 730. On July 11, 2016, clinical psychologist W. Russell Johnson submitted a report to the court. Johnson interviewed both parents and the child. Based on his evaluation, Johnson recommended a stable school week residence for the child. Johnson noted that the child had very strong, negative reactions to failing to achieve self-imposed performance standards. Johnson opined that children of the child's age benefit from authoritative parenting and Father's parenting style was authoritative, while Mother's parenting style

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1 The parties agreed to drop the temporary restraining order.

was permissive.[2] Johnson further noted that "Due to [the child's] temperament, he will do best with a school week that offers him a consistent daily routine."

Johnson therefore recommended that during the school year, Father's home should be the child's primary residence. Johnson recommended a parenting schedule in which Mother would have custody of the child for two evenings a week from 5:30 p.m. to 7:30 p.m., and the first, third, and fifth weekends of each month. For the remaining time, the child would reside with Father.

Mother submitted a rebuttal from her own expert, psychologist Mitchell Harris. Harris asserted several errors by Johnson which led Harris to conclude that Johnson favored Father and did not fairly evaluate the data. Harris noted that Johnson's recommendation did not address the child's stated preference to not be separated from either parent for five days.

D. *Custody Evaluation Hearing*

The custody evaluation hearing occurred on August 24, 2016. The trial court found Johnson's psychological report persuasive. Johanna's counsel argued that a significant change of circumstance was required to modify the prior custody arrangement.

The court concluded that the best interest of the child required a consistent home for the school week. Although both

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[2] Johnson stated that authoritative parents are "supportive and nurturing, support their children's growing independence, encourage communication and provide reasonable discipline." Permissive parents "provide both inadequate interpersonal boundaries and insufficient supervision, structure and discipline."

Mother and Father were "more than adequate parents," in light of the observations in Johnson's report, the court concluded the child should reside with Father during the school week. The court did not, however, make any findings about whether there had been a change in circumstance.

E. *Modification of Joint Physical Custody Order*

The trial court issued a new joint physical custody order on September 22, 2016 regarding the school year as follows: "Respondent [Mother] shall have the custody of and responsibility for the minor child during the following time periods and the times not specified herein shall be for the [p]etitioner [Father]: [¶] a. Every Tuesday and Thursday, pick up from school [12:00 p.m. (noon), if a non-school day] to 6:30 p.m., commencing August 25, 2016 . . . . ; and [¶] b. Every [first], [third], and [fifth] weekends of the month, determined by Friday, from Friday, pick up from school [12:00 p.m. (noon) if a non-school day] to Monday, drop off at school [12:00 p.m. (noon) if a non-school day]." Both parents purportedly maintained joint legal and physical custody of the child.

III. DISCUSSION

Mother argues the trial court erred by modifying the joint physical custody order issued on May 6, 2014 because it was a final judicial determination of custody and thus any modification required a showing of changed circumstances. "Under the so-called changed circumstance rule, a party seeking to modify a permanent custody order can do so only if he or she demonstrates a significant change of circumstances justifying a modification. [Citation.] . . . 'The changed-circumstance rule . . . provides, in

essence, that once it has been established that a particular custodial arrangement is in the best interests of the child, the court need not reexamine that question. Instead, it 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. The rule thus fosters the dual goals of judicial economy and protecting stable custody arrangements.' [Citation.]" (*Montenegro, supra*, 26 Cal.4th at p. 256.)

We first address whether the May 6, 2014 custody order was final. "[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." (*Montenegro, supra*, 26 Cal.4th at p. 258.) We independently determine whether a judgment is a final judicial custody determination. (*In re Marriage of Richardson* (2002) 102 Cal.App.4th 941, 949.)

We find the May 6, 2014 custody order was final. First, the stipulated custody order was attached as part of a judgment of dissolution and the parties agreed "[t]his stipulated judgment constitutes the entire agreement of the parties." Second, as to the judgment of dissolution, the parties waived their right to appeal, to request a statement of decision, to move for a new trial, and to move for reconsideration. Third, the parties acknowledged their rights and obligations "and agree[d] and wish[ed] to be bound by the terms of this judgment." Fourth, there is no language in the judgment that suggests the parties intended to resolve custody at a later proceeding. These factors constitute a "clear, affirmative indication" that the parties intended the May 6, 2014 custody order to be final.

The changed circumstance rule applies when custody is changed from joint to sole, or vice versa. (*In re Marriage of Lucio*

(2008) 161 Cal.App.4th 1068, 1077; *Enrique M. v. Angelina V.* (2004) 121 Cal.App.4th 1371, 1379-1380; *In re Marriage of Birnbaum* (1989) 211 Cal.App.3d 1508, 1513.) Conversely, the changed circumstance rule does not apply when the joint custody award itself is not changed, but the court instead changes the schedule for when a child resides with a particular parent. (*Enrique M. v. Angelina V., supra*, 121 Cal.App.4th at p. 1382; *In re Marriage of Birnbaum, supra*, 211 Cal.App.3d at p. 1513.)

We thus consider whether the September 22, 2016 order resulted in a de facto change of physical custody from joint to sole. Family Code section 3004 provides: "'Joint physical custody' means that each of the parents shall have significant periods of physical custody. Joint physical custody shall be shared by the parents in such a way so as to assure a child of frequent and continuing contact with both parents, subject to [s]ections 3011 and 3020." (Cf. Fam. Code, § 3007 ["'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"].)

"The Family Code does not define what amounts to 'significant' time with each parent for identifying a joint physical custody arrangement, but case law establishes guidelines to help answer that question. [Citations.] '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.' [Citations.] [¶] In contrast, 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.' [Citations.]" (*Celia S. v. Hugo H.* (2016) 3 Cal.App.5th 655, 663-664.) Court of Appeal opinions

have described physical custody, in which one parent has alternate weekends and one weeknight per week, as that parent having liberal visitation rights, with the other parent having de facto sole physical custody. (See, e.g., *In re Marriage of Biallas* (1998) 65 Cal.App.4th 755, 758, 760 [father having custody of child from Thursday evening to Friday morning, and every other weekend from Friday evening until Monday morning, had liberal visitation rights, not joint physical custody]; *In re Marriage of Whealon* (1997) 53 Cal.App.4th 132, 137 [father who had custody of child every Wednesday evening from 6:00 p.m. to Thursday morning at 9:00 a.m., plus alternate weekends from 6:00 p.m. Friday to 9:00 a.m. the following Monday, did not have joint physical custody, but liberal visitation rights].)

While Mother and Father continued to share joint legal custody, the trial court's September 22, 2016 order was a significant change to the joint physical custody order. The original physical custody arrangement permitted each parent approximately 50 percent of custody during the school year, which is 42 weeks. By this court's calculation, the September 22, 2016 custody order resulted in Mother having custody of the child for 24.4 percent of the time during the school year.[3] Taking the

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[3] There are 7,056 hours in 42 weeks. Pursuant to the September 22, 2016 order, Mother generally has about 3.5 hours of custody after school (assuming pickup at 3:00 p.m. to 6:30 p.m.) on Tuesdays and Thursdays. During the school year, Mother would have a total of 294 hours of custody mid-week.

Mother also had custody of the child on the first, third, and fifth weekends of each month, from Friday after school to Monday drop off at school. Assuming a pickup time of 3:00 p.m., and a drop off time of 8:00 a.m., this amounts to approximately 65 hours per weekend.

summer into consideration, in which Mother and Father each had custody of the child for five of the 10 weeks, Mother had approximately 29 percent of custodial time over the entire year.[4] Although the September 22, 2016 custody order categorized Mother and Father as maintaining joint physical custody, we "look[] at the existing de facto arrangement between the parties to decide whether physical custody is truly joint or whether one parent has sole physical custody with visitation rights accorded the other parent." (*In re Marriage of Biallas, supra*, 65 Cal.App.4th at pp. 759-760.) Based on the record, we conclude the September 22, 2016 order amounted to a de facto change of physical custody because it gave Father sole physical custody of the child, and gave Mother liberal visitation rights. (*Celia S. v. Hugo H., supra*, 3 Cal.App.5th at pp. 663-664; *In re Marriage of Biallas, supra*, 65 Cal.App.4th at p. 760; *In re Marriage of Whealon, supra*, 53 Cal.App.4th at p. 137.)

Beginning August 25, 2016, the number of weekends during the school year in which Mother had custody of the child was 22. Mother therefore had approximately 1,430 hours of custodial time over these weekends. Mother thus had a total of approximately 1,724 custodial hours over the 42-week school year. Mother received additional hours on Tuesdays, Thursdays, and Fridays, when there was no school because her time would begin at noon rather than 3:00 p.m. On Mondays when there was no school, Mother's custody would end at noon rather than 8:00 a.m. But there is no evidence in the record that such additional amounts would not bring her total custodial time beyond 30 percent.

[4] There are 840 hours in five weeks. Adding 840 to 1,724 gives Mother a total custody time of approximately 2,564 hours. There are 8,760 hours in a year.

Because there was a final judicial custody determination, the trial court was required to "'preserve the established mode of custody unless some significant change in circumstances indicate[d] that a different arrangement would be in the child's best interest.'" (*Montenegro, supra*, 26 Cal.4th at p. 256.) The record indicates the trial court did not apply the changed circumstance rule. Whether a change of circumstance meriting a different custody arrangement has occurred is within the trial court's discretion. (*Montenegro, supra*, 26 Cal.4th at p. 255; *Christina L. v. Chauncey B.* (2014) 229 Cal.App.4th 731, 738.) We decline to rule on matters where the trial court has not exercised its discretion in the first instance, and will remand with directions for the trial court to exercise its discretion. (See *Right Site Coalition v. Los Angeles Unified School Dist.* (2008) 160 Cal.App.4th 336, 345 [role of appellate court is to review trial court's exercise of discretion, not to do so in the first instance]; *Richards, Watson & Gershon v. King* (1995) 39 Cal.App.4th 1176, 1181 [remand to allow trial court to exercise its discretion when it failed to do so].) We note that the burden of showing a sufficient change of circumstances lies with the party seeking to change the custody arrangement. (*In re Marriage of Carney* (1979) 24 Cal.3d 725, 731; *Christina L. v. Chauncey B., supra*, 229 Cal.App.4th at p. 738.)

IV. DISPOSITION

The September 22, 2016 order is reversed and remanded. The trial court is directed to determine whether some significant change of circumstances has occurred meriting a change from joint to sole physical custody, consistent with our opinion.

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KIM, J.*

We concur:

BAKER, Acting P.J.

MOOR, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.