Filed 7/11/19 Marriage of Haverstock CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of BROOKE AND GREGORY HAVERSTOCK.	
BROOKE NICOLE HAVERSTOCK, Respondent, v. GREGORY JONAS HAVERSTOCK, Appellant.	E070549 (Super.Ct.No. SICVFL1152092) OPINION

APPEAL from the Superior Court of Inyo County. Brian Lamb, Judge. Reversed.

Wood Law Group, Christopher R. Wood, Frederick G. Good and Gian Carlo Simonetti, for Appellant.

Law Offices of Mark D. Johnson and Mark D. Johnson, for Respondent.

I.

INTRODUCTION

Appellant, Gregory Jonas Haverstock (Father), appeals a postjudgment order denying his petition for modification of child custody and visitation (Modification Petition).[1] This case is unique in that, rather than the custodial parent moving away, the custodial parent, respondent, Brooke Nicole Haverstock (Mother), moved 200 miles with her two daughters to the city of the noncustodial parent, Father. Because of this move, Father has requested the original custody order awarding Mother sole physical custody changed to joint physical custody. Father is also requesting increased visitation.

Father contends the trial court erred in not stating its reasons for denying modification of the sole physical custody order. He also argues that the trial court abused its discretion by denying modification of the sole physical custody order and visitation, based on finding there were insufficient changed circumstances. Father and Mother (Parents) both agree the trial court relied on the wrong standard when ruling on Father's visitation modification request. The court should have applied the best interests standard, not the changed circumstances standard. Mother, however, argues this did not constitute prejudicial error.

---

[1] The trial court bifurcated Father's request for modification of child support from the remainder of his Modification Petition and transferred the child support matter to the Department of Child Support Service for consideration.

We conclude the trial court abused its discretion in denying Father's Modification Petition based on the finding that circumstances had not substantially changed. We conclude there were substantial, material, changed circumstances supporting a finding it would benefit the children to change Mother's sole physical custody to joint physical custody. We also conclude that the trial court erred in denying Father's request for modification of visitation based on finding insufficient changed circumstances, whereas, the best interests standard applies. Furthermore, the trial court abused its discretion in denying several of Father's visitation modification requests agreed to by both Parents. We reject Father's contention the trial court committed prejudicial error by not providing a written statement of reasons for the court's decision, although it would have been helpful to the parties and this court.

The trial court's postjudgment order denying Father's Modification Petition is therefore reversed, with directions that the trial court grant Father's request for joint physical custody. On remand, the trial court is also directed to reconsider Father's request for visitation modification, applying the best interests standard.

II.

FACTS AND PROCEDURAL BACKGROUND

Parents married in 2004. They have two daughters, Cl.H., who is 10 years old, and Ch.H., who is eight years old. From 2010 until Mother went to nursing school in 2013, Mother and the girls lived in Bishop. Parents separated in April 2011, and in May 2011, Mother filed a petition for dissolution of marriage. In November 2015, Parents

executed a dissolution settlement agreement of their rights and obligations arising from their marriage, including child custody, support, and visitation. The dissolution proceeding was uncontested, with a stipulated settlement judgment entered in December 2015 (Judgment).

The child custody and visitation orders attached to the Judgment awarded Parents joint legal custody and awarded Mother sole physical custody. Under the Judgment, Father was awarded shared holiday visitation and visitation the second and fourth weekends of the month, and alternating fifth weekends. Father's weekend visitation was to begin Friday when Cl.H. got out of school, or if she was not in school at noon. Father's visitation ended on Sunday at 3:00 p.m.

Because the girls were living with Mother in Bakersfield, and Father was living in Bishop, Father was to pick up the girls in Bakersfield at the beginning of visitation, and Mother was to pick them up in Bishop at the end of Father's visitation. Father was responsible for transportation both ways for holiday visitation. Father was also entitled to visitation during the girls' summer vacation, with his visitation consisting of two blocks of time, one for seven days and one for 10 days. The Judgment further provides that, if either parent requires childcare for four or more hours, the other parent must be given the first opportunity to care for the girls before other arrangements are made.

In January 2016, Mother and the girls moved back to Bishop.

A. *Father's Modification Petition*

On October 19, 2017, Father filed a Modification Petition. Father requested increased visitation and a change of Mother's sole physical custody to joint physical custody. Father was agreeable to the girls spending equal amounts of time with both parents. Father was able to care for the girls while mother was working, thereby eliminating the need for nonparental care.

Mother accepted Father's offer to provide daytime and evening childcare, but would not allow the girls to remain overnight on school nights when Mother had back-to-back 12-hour work shifts, beginning at 7:30 a.m. and ending at 8:00 p.m. Father argued that modifying visitation to allow overnight visits on school nights would eliminate the late evening transfer and need for an early morning caregiver. Father believed that Parents' actual timeshare would then be nearly equal.

Father stated in his supporting declaration of facts (attachment 10) that there had been significant changes in circumstances since the Judgment was entered. Mother had changed employment and moved with the girls to Bishop from their residence in Bakersfield. This decreased the amount of travel required for visitation and made it easier for Father to provide the girls with additional care. As a consequence, Father was providing "much additional care." Mother was currently employed at a hospital as a registered nurse. The girls were older and wanted to spend more time with Father. The existing visitation schedule did not reflect these changes. Father believed he was being treated as an unpaid caregiver, rather than as a parent, and was being taken advantage of.

While Mother was working, Father provided the majority of the childcare. When Mother worked consecutive shifts during the school week, she picked up the girls between 7:50 and 8:20 p.m., and then the following morning had a babysitter wake up, dress, feed, and transport the girls to school. Father believed this was disruptive to the girls, resulting in many unexcused absences. It also artificially inflated Mother's timeshare percentage by giving Mother credit for time with the girls while they were sleeping and while Father was helping the girls with their homework and feeding them.

Father requested in his declaration (attachment 2(b)) that visitation be modified to extend weekend visitation on the second, fourth, and alternating fifth weekends. Extended weekend visitation would begin Friday after school and end when school was dismissed on Monday. If the girls were not in school on Friday, visitation would begin at 9:00 a.m. In addition, Father requested being afforded the opportunity to provide childcare on the days Mother worked back-to-back shifts, in which case the girls would remain overnight with Father. Father further requested adding Veterans Day to the list of shared visitation holidays and striking the Bakersfield transportation requirements.

B. *Mother's Response to Father's Modification Petition*

On November 14, 2017, Mother filed a responsive declaration to Father's Modification Petition. Mother stated in her supporting declaration that she acknowledged "significant changes have occurred," but she did not "believe all pertinent circumstances" had changed. Mother believed Father's Modification Petition was "about money and not custody." Mother explained that after she graduated from nursing school in Bakersfield, she decided to move back to Bishop, "to limit transportation time for the girls, and to facilitate and support them having contact with their father."

Mother further stated in her declaration that she adhered to the four-hour first right of refusal clause condition included in the Judgment by notifying Father of her work schedule as soon as it was confirmed. Mother worked three 12-hour shifts a week. When Mother worked shifts during weekdays, she hired a childcare provider to get the girls ready for school and take them to school. After Father voiced concern about hiring childcare for this purpose, Mother began taking the girls to work with her in the morning. While there, the girls read or watched a video. At 7:30 a.m., Mother walked the girls to school. Mother denied that her work schedule had caused the girls to be tardy or absent from school. The girls had no tardies during the current school year and their only absences had been when they had a cold and when Father took them on an unexcused trip to visit Father's wife's family. Mother acknowledged there was a problem with tardies during the beginning of the previous 2016-2017 school year. This was because Mother mistakenly believed the tardy bell rang at 8:15 a.m. instead of 8:19 a.m.

Mother further stated that, after her work shift, she picked up the girls between 7:40 and 8:00 p.m. Mother believed it is important for the girls to sleep in their own beds and have a consistent bedtime routine. Father could help out with this by getting the girls ready for bed before they are picked up or, alternatively, he could allow Mother's "partner," Frank, to pick them up at 5:00 or 6:00 p.m. Father refused this last option.

Mother was concerned about Father's household. The girls told her alcohol is consumed in Father's home. Also, Mother believed Father had "a history of drug and alcohol abuse that has not been addressed." In addition, Father's current wife was the woman who had a relationship with Father while Mother was pregnant with Ch.H. Father's wife therefore did not have "a positive track record as a good role model." Ch.H. told Mother that Father's wife spoke negatively about Mother. Mother also accused Father of criticizing her and sending her "bullying texts."

Mother objected to being required to provide Father with her work schedule in compliance with the four-hour first right of refusal clause in the Judgment, because Father refused to provide her with his schedule. Father told her he was willing to care for the girls any time Mother allowed him to. On three instances, the girls told Mother they were watched by Father's wife. Mother requested the court to reevaluate the four-hour right of refusal clause, because Father was not honest about who was caring for the girls when they were staying with him. Without providing specific facts, Mother claimed Father has a "disregard for authority and propensity for untruths."

Mother further stated in her declaration that Father and his wife were expecting their first child in January 2018. Mother believed increasing visitation during this time was insensitive to the girls and showed Father's lack of understanding of the demands of a newborn. Mother stated that she always tried to do what was in the girls' best interests and had always been there for them, including when Father twice abandoned the family, once while Mother was pregnant with Ch.H. and a second time when Ch.H. was six months old. Mother said she had worked hard to earn an additional degree and works hard to support the girls. Mother believed that, although the girls were getting older, visitation with Father should not increase.

Mother attached to her response a visitation verification form, in which Mother provided a log of Father's visitation hours during the months of October 2016, through September 2017, showing that Father visited the girls an average of 170 hours a month. The visitation verification form also stated Father had visitation with the girls every second and fourth weekend of the month from 2:15 p.m., Friday, until 3:00 p.m., Sunday. He also had visitation during one-half of the girls' Easter vacation (four and one-half days), one-half of the girls' Christmas vacation (eight days), and 10 days in the summer.

Mother objected to Father's visitation modification request to extend his weekend visitation until after school ended on Mondays. Mother also objected to Father's request that on the days when Mother worked and was personally unable to care for the girls, Father would be afforded the opportunity to care for the girls. In addition, she rejected Father's request that, when Mother's work schedule encompassed continuous days, the

girls could remain in Father's care overnight. Mother disagreed with Father's request to change holiday visitation to beginning at the end of the last day of school before the holiday, and ending at the end of the day school resumes. Mother agreed with Father's request to add the Veteran's Day holiday to the list of scheduled holidays.

Mother filed an income and expense declaration in December 2017, stating she had worked as a registered nurse at a hospital in Inyo County since February 2016. She further stated that the girls spent 77 percent of their time with her and 20 percent of their time with Father.

C. *Father's Reply to Mother's Response*

On December 13, 2017, Father filed a reply declaration denying Mother's accusations that he lied, was abusive, and bullied her. Father agreed the girls needed to sleep in their own beds and maintain a consistent bedtime routine. This was why the girls had their own beds, bedroom, and consistent bedtime routine when they stayed with him. He believed it was in their best interests to stay with him when Mother was working late back-to-back shifts on school nights. By not allowing the girls to stay with Father on those nights the girls were shuffled back to Mother's home and had only about 30 minutes with her before they went to bed, and in the morning they were cared for by a nonparental caregiver, instead of allowing Father to care for them and walk them half a block from his house to their school. Father believed Mother should not alternatively be taking the girls to work with her before school, rather than allowing Father to care for them.

Father denied Mother's claim he had a "'history of drug and alcohol use that has not been addressed.'" He also denied any history of arrests, charges, or "ramifications." Controlled substances were not used in his home and alcohol consumption was infrequent. Father also denied Mother's accusations that he did not abide by the right of first refusal clause and had twice abandoned the family.

D. *Hearing on Father's Modification Petition*

On December 20, 2017, the trial court heard Father's Modification Petition.

1. Father's Testimony

Father testified to the same facts stated in his Modification Petition declarations and to the following additional facts. Father had agreed to the stipulated Judgment order giving Mother sole physical custody because Mother was living in Bakersfield with the girls and Father was living in Bishop. Father wanted sole physical custody changed to joint physical custody because Mother had moved with the girls to Bishop, where they have been living since January 2016.

Since Mother's move to Bishop, Father has been providing substantially more time with the girls during the school week, because he lives close to the girls, and Mother needs childcare because of her work schedule. Father has changed his work schedule to accommodate Mother's schedule and provide requested childcare. Father is an archeologist with the Bureau of Land Management. He is on a "Maxiflex schedule," in which he is required to work 80 hours in a two-week period. There are guidelines on

how he must carry out his work schedule, but it is relatively flexible. Father generally is able to alter his schedule to provide care for the girls.

In June 2016, six months after Mother moved back to Bishop, Father sent Mother an e-mail, asking her to agree to changing the visitation schedule. Father was "concerned that the children were being Ping-Ponged back and forth with too many transitions in the course of a regular day." There also had been school attendance issues and Father thought that the late evening transitions were contributing to that. Father believed that the original agreement, ordered when Mother and the girls lived in Bakersfield, did not reflect current circumstances.

The current routine was that Mother told Father when she needed childcare on weekdays. Mother gave him her schedule. Father told her he was available. Father picked up the girls at school at 1:30 or 2:15 p.m., depending on the day, and then took them to Father's home and cared for the girls until Mother finished work. Mother picked up the girls, took them to her home, and got them ready for bed. The next morning the girls are woken up by a paid care provider, because Mother went to work at 6:00 a.m., before the girls woke up. In 2017, Father picked up the girls during the school week two to three times a week, every week. When the girls were not in school, Mother asked Father to provide childcare beginning at 2:00 p.m. on specified days.

Father believed the current arrangement was not working well because the girls were being "Ping-Ponged" between Parents. Father wanted the court to allow the girls to stay at his home overnight on school days when he cared for the girls during Mother's back-to-back work shifts.

Father also requested a change in the transitions during holidays and vacations. Father believed it would be better for the girls to have the transitions occur when the girls' school day ended, rather than transitioning the girls from one parent to the other at 3:00 p.m. on Sunday. Weekend visitation currently began on Friday, right after school, and ended Sunday at 3:00 p.m. The 3:00 p.m. time was originally chosen because it made it easier for Mother to pick up the girls in Bishop and drive them back to Bakersfield. After Mother moved to Bishop, the 3:00 p.m. pick up time did not make sense. Also, when Mother worked a 12-hour shift on Sunday, Father sometimes did not know until Sunday morning, if he would be providing childcare that day until 3:00 or 8:00 p.m. Father therefore preferred that his weekend visitation be from when the girls got out of school on Friday until after he took the girls to school on Monday. In addition, Father requested that Veteran's Day be added to the list of shared holidays. It was inadvertently omitted from the holiday list.

During cross-examination, Father was shown an order for a hearing on March 13, 2012, that stated Mother had sole physical custody of the girls. The order further stated that Father must abstain from consumption of alcohol and marijuana use when he had physical custody of the girls. It also ordered Father to continue counseling to address

marijuana issues. Father acknowledged he went to counseling and had addressed the issues. Father stated he had no established history of substance abuse during the pendency of the instant case. Father acknowledged he had previously enrolled in a chemical dependency program. Mother raised the issue in 2012 that Father drank five to six beers daily and used marijuana six to eight times a day. At that point, Father voluntarily completed a year-long counseling program and has abstained from drug and alcohol use since successfully completing the program. Father testified he has not used any illegal narcotics or marijuana since 2012.

Father denied Mother's accusation that he had abused her or anyone else. Father acknowledged Mother's declaration in 2012, accusing him of breaking into her house, stealing her car and cell phone, damaging her furniture, stealing documents, and destroying her cell phone. Father explained that the home and car were their joint property. Father borrowed the car to transport the girls safely because the vehicle he had been driving had a broken seat belt.

Father acknowledged that during the current school year the girls had not had any tardies, but during the previous school year the girls had over 18 tardies. This was why he stated in his declaration that there had been a problem with the girls getting to school on time. Mother recently made changes in response to the tardy allegation, by taking the girls to work with her before school. This may have addressed the tardy issue, but Father believed it did not resolve the underlying issue of what was best for the girls.

After Father filed his Modification Petition, Mother permitted the girls to stay with him for five consecutive days, including two school days. This was because Mother had to make up missed work time after returning from her 10-day vacation. Father was the "default child caregiver" for the five day period. Normally, Mother does not allow Father to have the girls overnight.

2. Mother's Testimony

Mother testified during the Modification Petition hearing to the same facts stated in her declaration and to the following additional facts. Father's visitation with the girls from 2011 until 2013 was extremely inconsistent. He had visitation once or twice a month. It was agreed Mother would have sole physical custody and Father could visit the girls two evenings a week, for three hours. After Mother and the girls moved to Bakersfield in 2013, Mother took the girls to see Father every other weekend.

Mother moved to Bakersfield with the girls to attend nursing school in 2013 and graduated from the program in May 2015. When the Judgment was entered Mother was living in Bakersfield, but her job there was not working out. She was therefore planning to move back to Bishop.

In January 2016, two weeks after the final Judgment was entered on December 14, 2015, Mother moved back to Bishop and began working as a registered nurse at the county hospital, where she currently works. Mother did not want to stay in Bakersfield. She thought about moving to San Diego, where her parents and sister lived, but decided to move to Bishop because it was hard on the girls to drive back and forth from

Bakersfield to Bishop every other weekend. The girls were missing their soccer games and school activities. Mother thought moving to Bishop was best for the girls and would facilitate their relationship with Father. Father did not visit the girls in Bakersfield and rarely picked them up there. Instead, Father's parents or Mother drove the girls to Bishop and Mother always drove them back.

Mother believed the childcare right of first refusal condition was not working because it was difficult for her to give Father her work schedule every month, because he was abusive and harassed her. Also, the first right of refusal clause made it difficult to find and retain good caregivers. Mother also objected to Father not giving her his work schedule, because she had to give him hers.

The girls were not tardy because of her work and were not tardy from September 2017 to December 2017. In 2016, the girls were tardy for several reasons. Cl.H. was tardy because she did not like her teacher and "was dragging her feet." Cl.H. told Mother she would read a book before class in the corner of the classroom and would be marked tardy because she was not in her seat. Ch.H has not had any tardies.

Mother denied ever leaving the girls unattended in the hospital lobby while at work. The girls were with Mother where she could see them when at work or she watched them on a monitor. Mother brought the girls to work on days when she went to work at 7:00 a.m. At 7:30 a.m., Mother walked the girls to school which was near the hospital.

After Mother got off work at 7:30 p.m., she picked the girls up from Father's home, took them to her home, checked their homework, got them ready for bed, read to them, and put them to bed at 8:30 p.m. Mother believed granting Father's visitation requests would result in Father receiving more than a 50 percent visitation share and it would penalize her for having a career that allows her to support the girls. It would also be extremely disruptive. Because of her work schedule changes, the girls would not know where they would be spending the night during school nights. They were accustomed to always spending school nights at Mother's home.

Father's house was "very fun" but "a little crazy and chaotic." The girls got candy and meals in front of the TV. Mother believed that allowing the girls to stay overnight on school nights was not a good idea because it was a challenge to get them back into their routine. Their schedule should stay the same. However, Mother was agreeable to extending weekend visitation to allowing the girls to spend Sunday night with Father. She wanted to encourage the girls' relationship with Father but did not want to disrupt their stability.

Mother acknowledged she stated in her declaration that there had been changed circumstances, but the changes were not all "pertinent." Mother explained that what she meant was that Father exercised 17 percent visitation because he currently lived in the same city as Mother and the girls. Before, he only exercised 5 percent visitation. The existing Judgment gave Father 25 percent visitation.

Mother would like the right of first refusal childcare condition changed. Mother does not want it to apply when she is at work. That way Mother could hire quality childcare and would not have to give Father her work schedule. Also, it would reduce Father's harassing texts and e-mails. In addition, there were several occasions when the girls were left with his "girlfriend at the time" (now, wife), when Father should have been watching them.

Mother believed it was in the girls' best interests to continue the existing 2015 Judgment orders, with the exception of extending Father's weekend visitation to ending Monday after school. Mother also did not object to adding Veteran's Day to the list of shared holidays. Mother did not want the girls spending the night with Father on school nights. Mother believed the right of first refusal rule should be eliminated to allow for greater predictability in childcare and less conflict in scheduling last minute childcare.

On cross-examination, Mother testified that it was in the girls' best interests to grant Father's request to ease holiday transitions by beginning and ending holiday visitation at the end and beginning of the school day, so that Mother and Father would not have to see each other. Mother's work schedule was made on a six-week basis. During the six-week period, her work days varied and were not always consecutive. Her work schedule was based on the need to provide coverage for her unit, so there were enough nurses for the patient ratio. Mother could request certain work days. She always requested not to work on the weekends she had the girls and requested to work when Father had the girls.

Mother believed it was better for the girls to be cared for by a childcare provider because of Father's "history" of having chemical dependency issues, and he still drank alcohol. Although Father brought up changing visitation, Mother objected because she went through a lot to achieve a secure job to support the girls, and felt changing visitation would penalize her for having a good job. Also, she believed Father's visitation request would result in increasing his time share to more than 50 percent.

E. *Ruling on Father's Modification Petition*

On March 20, 2018, the trial court issued a Memorandum and Order denying Father's Modification Petition (Order). The trial court noted in its Order that the hearing on Father's Modification Petition occurred about two years after entry of the Judgment containing the court's prior custody and visitation orders. The Order briefly summarizes Father's and Mother's arguments and then states the following: "While the circumstances relevant to the best interests of the child are 'changing,' in the court's judgment, significantly changed circumstances have not been shown so as to justify a new determination of the minor's physical custody and visitation. [¶] For all the reasons stated, the petitioner's Request for Orders filed October 16, 2017 is hereby denied. The court's prior findings and orders remain in full force and effect according to their terms. As the court's decision is to deny, for the reasons stated, the respondent's motion for change of child custody and child visitation issues, and neither party asked the court to

grant or deny joint custody of the children, neither party has the right to request a statement of reasons, and in the court's discretion, none shall issue. Family Code section 3082."

III.

STATEMENT OF REASONS

Father contends the trial court committed prejudicial error by failing to set forth its reasons and findings supporting its March 20, 2018, order denying modification of child custody. We disagree.

Under Family Code section 3082,[2] "When a *request for joint custody* is granted or denied, the court, upon the request of any party, shall state in its decision the reasons for granting or denying the request. A statement that joint physical custody is, or is not, in the best interest of the child is not sufficient to satisfy the requirements of this section." (Italics added.) The "statement of reasons was not intended to set forth the legal basis for the decision, but to provide parents with the reasons—in plain, everyday English—why the court granted or denied joint custody." (*In re Marriage of Buser* (1987) 190 Cal.App.3d 639, 642.) Here, the trial court acknowledged in its written decision that it was not stating its reasons for its order. The court concluded it was not required to do so because there was no request to grant or deny joint custody.

[2] Unless otherwise noted, all statutory references are to the Family Code.

Father argues that, although a statement of reasons is not required under section 3082 unless a party requests one, he was not required to make such a request because the trial court implicitly stated it would provide a statement of reasons when the court said, at the end of the hearing, that it was taking the matter under submission and would issue a written decision.

We conclude the trial court was not required to provide a statement of reasons under these circumstances. First, we do not construe the court's statement that it was taking the matter under submission and would provide a written decision, as implicitly agreeing to provide a statement of reasons under section 3082. It cannot be assumed that stating the court will provide a "written decision" means anything more than that the court will rule on the matter and the ruling will be in writing. The parties therefore did not have a reasonable expectation that the trial court would provide a statement of reasons.

Second, neither party requested the court to grant or deny joint custody. Section 3002 defines "'[j]oint custody'" as "joint physical custody and joint legal custody." Father only requested modification of physical custody, although granting his request for joint physical custody would have resulted in joint custody as defined in section 3002, since Mother and Father already had joint legal custody. Regardless, a statement of reasons was not required under section 3082 because Father did not request one and the absence of a statement of reasons does not constitute prejudicial error.

IV.

MODIFICATION OF PHYSICAL CUSTODY

Father contends the trial court erred in denying his request to modify the order awarding Mother sole physical custody of his two daughters. Father requested that the original order be changed to joint physical custody. The trial court stated in its written decision that it was denying modification of physical custody because Father had not established significantly changed circumstances.

At the time of entry of the original Judgment, Mother and the girls lived in Bakersfield, 200 miles from Father, who lived in Bishop. After Mother and the girls moved to Bishop, Father requested the trial court to change sole physical custody to joint custody because he had been spending more time with the girls and was providing childcare for the girls while Mother was working.

A. *Law Applicable to Child Custody Modification*

The trial court has discretion to modify an existing custody order based on changed circumstances. (*Marriage of Burgess* (1996) 13 Cal.4th 25, 32; *Jane J. v. Superior Court* (2015) 237 Cal.App.4th 894, 901 (*Jane J.*).) "This discretion may be abused by applying improper criteria or by making incorrect legal assumptions." (*Jane J.*, *supra*, at p. 901.)

Ordering a change in child custody requires a persuasive showing of substantial changed circumstances affecting the child. (*Jane J.*, *supra*, 237 Cal.App.4th at p. 902; *In re Marriage of C.T. and R. B.* (2019) 33 Cal.App.5th 87, 102 (*C.T.*).) A trial court shall

not change physical custody unless there are material facts and circumstances occurring after the prior custody order that render it essential or expedient for the welfare of the child that there be a change. (*C.T.*, *supra*, at p. 102.) "'The court can then inquire whether alleged new circumstances represent a significant change from preexisting circumstances, requiring reevaluation of the child's custody.' [Citation.]" (*Marriage of Burgess*, *supra*, 13 Cal.4th at p. 37, quoting *Burchard v. Garay* (1986) 42 Cal.3d 531, 534.) The courts are reluctant to order a change of custody because it is undesirable to change the child's established mode of living. (*C.T.*, *supra*, at p. 102; *Jane J.*, *supra*, at p. 902.)

The burden is on the moving party to show how circumstances have changed and why custody modification would be in a child's best interests. (*Burchard v. Garay*, *supra*, 42 Cal.3d at pp. 535-536.) "The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test. [Citation.]" (*Marriage of Burgess*, *supra*, 13 Cal.4th at p . 32.)

B. *Analysis*

As the noncustodial parent seeking a change in the existing physical custody order, Father has the initial burden of establishing a substantial change of circumstances supporting a determination that a different custody arrangement would be in the girls' best interests. (*C.T.*, *supra*, 33 Cal.App.5th at p. 103; *Jane J.*, *supra*, 237 Cal.App.4th at p. 902.) Father argues he met his initial burden of proof. We agree.

There is overwhelming evidence demonstrating substantial changed circumstances and that it is beneficial to the girls to change Mother's sole physical custody to joint physical custody. Mother and the girls are now living close to Father in Bishop, and both parents are spending significant periods of time with the girls, to the clear benefit of the girls. According to Father's supporting Modification Petition declaration and testimony, he is providing the majority of childcare when Mother is working. He has adjusted his work schedule so that he can accommodate Mother's need for afterschool childcare for the girls. The girls are also spending alternate weekends and holidays with Father in accordance with the original visitation order.

Mother acknowledged in her declaration responding to Father's Modification Petition that "significant changes have occurred," but then added that she did not "believe all pertinent circumstances" had changed. Mother explained that what she meant by this was that Father was not currently exercising more visitation than the 25 percent share of visitation ordered in the original Judgment. Although the amount of Father's current visitation might not exceed the 25 percent time share the trial court ordered in the original Judgment, this does not refute the overwhelming evidence establishing substantially changed circumstances affecting the wellbeing of the girls. (*Jane J.*, *supra*, 237 Cal.App.4th at p. 902; *C.T.*, *supra*, 33 Cal.App.5th at p. 102.)

We recognize that Father must not only show substantial changed circumstances. He must also show that changing the sole physical custody order to joint physical custody, will not detrimentally affect the girls' interest in continuity and stability, and that changing the physical custody order is in the girls' best interests. (*C.T.*, *supra*, 33 Cal.App.5th at p. 103.) Father has established this as well. This case does not involve removing the girls from Mother's physical custody. Rather, it involves Mother moving so that the girls will be closer to Father, resulting in Father spending more time with them and providing childcare while Mother is working. The record shows that, as a consequence of Mother relocating, both parents are sharing in the raising of the girls and spending substantial time with the girls, which is in the girls' best interests. Changing the physical custody order from sole physical custody to joint physical custody merely reflects this beneficial change in Father's increased shared parenting of the girls. Section 3004 defines "'[j]oint physical custody'" as follows: "[E]ach 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."

The record shows that, after Mother and the girls moved to Bishop in January 2016, Father has been consistently visiting the girls on alternating weekends, as well as providing afterschool childcare. Therefore, Mother's sole physical custody should be changed to joint physical custody. This is consistent with Mother and Father's shared parenting since January 2016, and reflects both parents' frequent, continuing contact with

the girls. Mother and Father are commended for sharing in caring for the girls, which is in the girls' best interests. Under these circumstances, we conclude the trial court erred in finding circumstances had not changed, and abused its discretion in denying Father's request to change sole physical custody to joint physical custody.

V.

MODIFICATION OF VISITATION

Mother and Father agree that the trial court's written order on Father's petition for modification of visitation reflects that the court relied on the wrong standard. The trial court states in its order that the Modification Petition is denied because, "While the circumstances relevant to the best interests of the child are 'changing,' in the court's judgment, significantly changed circumstances have not been shown so as to justify a new determination of the minor's physical custody and visitation.

Section 3100, subdivision (a) provides: "[T]he court shall grant reasonable visitation rights to a parent unless it is shown that the visitation would be detrimental to the best interest of the child. In the discretion of the court, reasonable visitation rights may be granted to any other person having an interest in the welfare of the child." In making this determination regarding visitation, "the court shall, among any other factors it finds relevant, and consistent with Section 3020, consider all of the following: [¶] (a) The health, safety, and welfare of the child." (§ 3011.)

Section 3020, subdivision (a) provides, in relevant part, that "it is the public policy of this state to ensure that the health, safety, and welfare of children shall be the court's primary concern in determining the best interests of children when making any orders regarding the physical or legal custody or visitation of children." Subdivision (b) further states that "it is the public policy of this state to ensure that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy . . . ."

Visitation orders are thus generally modifiable whenever the court finds modification is necessary and proper and in the child's best interests. (§§ 3022, 3087, 3088.) A request to change a co-parenting schedule, not amounting to a de facto change in a joint custody order, is not subject to the changed circumstances rule. This is because, as explained in *Burchard v. Garay*, *surpa*, 42 Cal.3d at page 535, the changed circumstance rule is an adjunct to the best interest test when considering a request to modify custody. (Accord, *Enrique M. v. Angelina V.* (2004) 121 Cal.App.4th 1371, 1379.)

Therefore, the changed circumstance rule applies to a custody modification request but "does not apply to a modification request seeking a change in the parenting or visitation schedule." (*Marriage of Lucio* (2008) 161 Cal.App.4th 1068, 1077.) "Unlike a change in custody, an alteration in a parenting or visitation schedule does not cause a disruption in '"established patterns of care and emotional bonds with the primary

caretaker"' [citation] justifying the added burden of demonstrating changed circumstances. [¶] The same is true when one parent has sole physical custody, and the change does not amount to a move-away: An alteration to the noncustodial parent's visitation schedule would not destabilize the custody arrangement, or disrupt established patterns of care and emotional bonds, particularly when, as here, the noncustodial parent already has visitation rights." (*Id*. at p. 1079.)

Here, Father is not requesting that the girls be removed from Mother's home. Father is only requesting additional visitation. Mother has agreed to most of his visitation modification requests, with the exception Mother objects to allowing the girls to spend the night at his home on school nights, when Mother works a back-to-back 12-hour shift.

At the time of the hearing on Father's Modification Petition, Mother informed the court she agreed to Father's request to modify visitation by (1) extending Father's weekend visitation to beginning right after the girls get out of school on Friday until after school the following Monday, (2) adding Veteran's Day to the schedule of shared holidays, and (3) striking the requirements regarding transporting the girls to and from Bakersfield. Even though Mother and Father agreed to these modifications, the trial court nevertheless issued a blanket order denying Father's entire modification petition. The trial court based its ruling on a finding that circumstances had not substantially changed, when, in fact they had changed.

Furthermore, Father presented evidence that it was in the girls' best interests to modify visitation, particularly as to those visitation requests Mother agreed to in court. Although, the reporter's transcript of the Modification Petition hearing indicates the trial court discussed the girls' best interests when considering whether to modify visitation, the written order states that the court denied Father's entire Modification Petition based on there not being substantial changed circumstances. This constitutes an abuse of discretion. First, there was no reasonable basis for the trial court to deny the visitation modification requests agreed upon by both Mother and Father. Second, the trial court states in its order that it denied Father's request for modification of visitation based upon the wrong standard and erroneous assumption Father had not established substantial changed circumstances, without considering whether modifying visitation was in the girls' best interests. The order denying Father's petition for modification of visitation is therefore reversed, and the matter is remanded to allow the trial court to reconsider and rule on whether granting each of Father's requests for modification of visitation is in the girls' best interests.

VI.

DISPOSITION

The trial court's postjudgment order denying Father's petition for modification of child custody and visitation is reversed, and the matter is remanded to the trial court with directions that the trial court (1) enter a new order granting Father's request to change sole physical custody to joint physical custody and (2) reconsider whether granting each of Father's requests for modification of visitation is in the girls' best interests.

The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

RAPHAEL
J.