

161 Cal.App.4th 1068, 74 Cal.Rptr.3d 803, 08 Cal. Daily Op. Serv. 4069, 2008 Daily Journal D.A.R. 4994
(Cite as: 161 Cal.App.4th 1068, 74 Cal.Rptr.3d 803)

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Court of Appeal, Fourth District, Division 3, California.

In re MARRIAGE of Amanda and Bernardo LUCIO.

Amanda Lucio, Respondent,
v.

Bernardo Lucio, Appellant.

No. G039072.

April 8, 2008.

Background: Father brought order to show cause (OSC) requesting alteration to visitation arrangement set forth in judgment of dissolution of marriage. The Superior Court, Orange County, No. 03D007342, Michael J. Naughton, J., dismissed OSC and awarded attorney fees to mother.

Holdings: The Court of Appeal, Fybel, J., held that:
(1) father's request was not for a de facto joint custody arrangement;
(2) proper standard for request to alter visitation was best interests of child; and
(3) order for father to pay mother's attorney fees as sanction was not merited.

Reversed and remanded.

West Headnotes

[1] Child Custody 76D ↪577

76D Child Custody

76DIX Modification

76DIX(B) Grounds and Factors

76Dk577 k. Visitation. Most Cited Cases

The trial court considers a request to change a parenting or visitation arrangement under the best interests of the child standard.

[2] Child Custody 76D ↪553

76D Child Custody

76DIX Modification

76DIX(B) Grounds and Factors

76Dk553 k. Welfare of child and material change in circumstances. Most Cited Cases

Under the "changed circumstance rule," after 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, custody modification is appropriate only if the parent seeking modification demonstrates a significant change of circumstances indicating that a different custody arrangement would be in the child's best interest.

[3] Child Custody 76D ↪33

76D Child Custody

76DII Grounds and Factors in General

76DII(A) In General

76Dk33 k. Multiple factors. Most Cited Cases

Child Custody 76D ↪500

76D Child Custody

76DVIII Proceedings

76DVIII(C) Hearing

76Dk500 k. In general. Most Cited Cases

When the parents are unable to agree on a custody arrangement, the court must determine the best interest of the child by setting the matter for an adversarial hearing and considering 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. West's Ann.Cal.Fam.Code § 3040(b).

[4] Child Custody 76D ↪531(1)

76D Child Custody

76DVIII Proceedings

76DVIII(D) Judgment

76Dk531 Operation and Effect

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76Dk531(1) k. In general. Most Cited Cases

Child Custody 76D ↪552

76D Child Custody

76DIX Modification

76DIX(B) Grounds and Factors

76Dk552 k. In general. Most Cited Cases

Once 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 heavily in favor of maintaining that custody arrangement. West's Ann.Cal.Fam.Code § 3040(b).

[5] Child Custody 76D ↪577

76D Child Custody

76DIX Modification

76DIX(B) Grounds and Factors

76Dk577 k. Visitation. Most Cited Cases

A showing of changed circumstance is not required to support a parent's request for a change in a parenting or visitation arrangement not amounting to a change from joint custody to sole custody, or vice versa.

[6] Child Custody 76D ↪555

76D Child Custody

76DIX Modification

76DIX(B) Grounds and Factors

76Dk555 k. Change in circumstances or conditions. Most Cited Cases

A showing of changed circumstance is required to support a modification request seeking a change in a final determination of custody.

[7] Child Custody 76D ↪555

76D Child Custody

76DIX Modification

76DIX(B) Grounds and Factors

76Dk555 k. Change in circumstances or conditions. Most Cited Cases

Child Custody 76D ↪574

76D Child Custody

76DIX Modification

76DIX(B) Grounds and Factors

76Dk570 Agreements

76Dk574 k. Operation and effect. Most Cited Cases

Dissolution judgment including comprehensive child custody and visitation order resolving issues left open at mediation between parents was "final judicial custody determination," and thus showing of changed circumstance would be required to support any modification request seeking change in custody, even though parents reached partial parenting agreement in mediation.

[8] Child Custody 76D ↪577

76D Child Custody

76DIX Modification

76DIX(B) Grounds and Factors

76Dk577 k. Visitation. Most Cited Cases

Father's requested alterations to existing parenting and visitation schedules, granting him unmonitored visits with children from Friday night to Sunday night on alternate weeks, would not have created de facto "joint custody arrangement," as would require showing of changed circumstances, since alterations would not disrupt children's established patterns of care and emotional bonds with mother, and were not on par with a request to change physical custody from sole to joint custody, or vice versa.

[9] Child Custody 76D ↪577

76D Child Custody

76DIX Modification

76DIX(B) Grounds and Factors

76Dk577 k. Visitation. Most Cited Cases

The proper standard for the trial court to con-

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sider a father's order to show cause (OSC) requesting an alteration to the visitation arrangement set forth in the judgment of dissolution of his marriage was the best interests of the child standard, rather than the changed circumstances standard; the OSC did not request a change in custody.

See 10 Witkin, Summary of Cal. Law (10th ed. 2005) Parent and Child, §§ 196, 227, 252; Cal. Jur. 3d, Family Law, § 928.

[10] Costs 102 ↪2

102 Costs

102I Nature, Grounds, and Extent of Right in General

102k1 Nature and Grounds of Right

102k2 k. In general. Most Cited Cases

The Court of Appeal would consider attorney fee award to mother, after dismissal of father's order to show cause (OSC) requesting alteration to visitation arrangement set forth in judgment of dissolution of marriage, to have been granted pursuant to statute authorizing sanctions for conduct frustrating policy to promote settlement and reduce costs, rather than granted based on need and ability to pay, even though trial court did not identify statutory basis for award, since trial court's order made clear court's belief that father's OSC was an attempt to relitigate an earlier OSC, and trial court stated that father chose to bring action in spite of the language of statute limiting unsupervised visitation for sex offenders. West's Ann.Cal.Fam.Code §§ 271, 2030, 2032, 3030.

[11] Costs 102 ↪2

102 Costs

102I Nature, Grounds, and Extent of Right in General

102k1 Nature and Grounds of Right

102k2 k. In general. Most Cited Cases

The party requesting a statutory attorney fee award as a sanction in a child custody proceeding is not required to demonstrate financial need for the award. West's Ann.Cal.Fam.Code § 271.

[12] Child Custody 76D ↪924

76D Child Custody

76DXIII Appeal or Judicial Review

76Dk924 k. Determination and disposition of cause. Most Cited Cases

Costs 102 ↪2

102 Costs

102I Nature, Grounds, and Extent of Right in General

102k1 Nature and Grounds of Right

102k2 k. In general. Most Cited Cases

Trial court's order for father to pay mother's attorney fees, as statutory sanction for conduct frustrating policy to promote settlement and reduce costs in father's order to show cause (OSC) requesting alteration of child visitation arrangement set forth in judgment of dissolution of marriage, could not stand, since trial court's incorrect application to OSC of changed circumstances standard, rather than best interests of child standard, required reversal of order dismissing OSC. West's Ann.Cal.Fam.Code § 271.

[13] Costs 102 ↪2

102 Costs

102I Nature, Grounds, and Extent of Right in General

102k1 Nature and Grounds of Right

102k2 k. In general. Most Cited Cases

Father was not subject to pay mother's attorney fees as sanctions for father's order to show cause (OSC) requesting alteration to child visitation arrangement set forth in judgment of dissolution of marriage, absent evidence that victim of offense for which father was required to register as sex offender was young enough that trial court's power to grant unsupervised visitation would be limited, since second OSC was not merely attempt to relitigate earlier OSC; second OSC differed from first by seeking change in visitation schedule rather than change in custody, and second OSC was filed after father had completed probation and therapy. West's Ann.Cal.Fam.Code §§ 271, 3030.

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****805** Gilligan Law Corporation and John J. Gilligan, Seal Beach, for Appellant.

Law Offices of Jeffrey W. Doeringer and Jeffrey W. Doeringer, Huntington Beach, for Respondent.

of the child standard, and therefore reverse the June 4 Order and remand for further consideration.

FN1. We use the parties' first names to avoid confusion, not out of disrespect.

*1072 OPINION

FYBEL, J.

INTRODUCTION

[1] Under the changed circumstance rule, after 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, custody modification is appropriate only if the parent seeking modification demonstrates “ ‘a significant change of circumstances’ indicating that a different custody arrangement would be in the child’s best interest.” (*In re Marriage of Brown & Yana* (2006) 37 Cal.4th 947, 956, 38 Cal.Rptr.3d 610, 127 P.3d 28.) But the changed circumstance rule does not apply when a parent requests only a change in the parenting or visitation arrangement not amounting to a change from joint custody to sole custody, or vice versa. Instead, the trial court considers a request to change the parenting or visitation arrangement under the best interests of the child standard.

In this case, Bernardo Lucio (Bernardo) brought an order to show cause (OSC) requesting an alteration to the visitation arrangement set forth in the judgment of dissolution of his marriage to Amanda Lucio (Amanda).^{FN1} The dissolution judgment granted Amanda sole physical custody of the children and permitted Bernardo monitored visits for six hours each Sunday. In a postjudgment order dated June 4, 2007 (the June 4 Order), the trial court dismissed the OSC, stating Bernardo failed to ****806** allege changed circumstances that would allow the court to consider his request to alter the visitation arrangement. The court erred because Bernardo did not request a change in custody and therefore was not required to demonstrate changed circumstances. We cannot tell how the trial court would have exercised its discretion had it considered Bernardo’s request under the best interests

In a postjudgment order entered on July 11, 2007 (the July 11 Order), the trial court awarded Amanda attorney fees. The July 11 Order did not identify the statutory basis for the award, and the parties dispute whether the award was a sanction under Family Code section 271 or was based on need and ability to pay under section 2030. Based on the record before us, we conclude the trial court awarded attorney fees as a sanction against Bernardo under section 271 for seeking to change the visitation arrangement. Our reversal of the June 4 Order eliminates the grounds for sanctioning Bernardo, and therefore we also reverse the July 11 Order.

*1073 FACTS AND PROCEEDINGS IN THE TRIAL COURT

The marriage of Amanda and Bernardo was dissolved on August 23, 2004. The dissolution judgment awarded Amanda sole physical custody of Jordan (born in 1995) and Juliana (born in 2001), and awarded Bernardo and Amanda joint legal custody.

The dissolution judgment granted Bernardo monitored visitation for six hours every Sunday. On February 25, 2003, Bernardo had pleaded guilty to one count of indecent exposure in violation of Penal Code section 314, subdivision 1. He was sentenced to 30 days in jail, placed on three years’ formal probation, and ordered to register under Penal Code section 290. In 2002, Bernardo had pleaded guilty to one count of lewd conduct in violation of section 647, subdivision (a) and had been placed on informal probation. The record on appeal does not reveal the ages of the victims of either crime. A partial parenting agreement reached at a mediation in May 2004 included the provision that “father shall have monitored visitation with the children, with the goal of having unmonitored visits

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once the father's probation is terminated.”

Bernardo completed three years of therapy and his probation ended in March 2006. In April 2006, Bernardo, in propria persona, brought an OSC (the First OSC) requesting the trial court to modify the existing child custody order by granting joint physical custody of the children. A hearing on the First OSC was conducted on July 18, 2006. At the hearing, the court soundly advised Bernardo: “I really think you should get a lawyer. This is extremely complex. This is extremely sensitive and extremely difficult. You're not going to be able to do this by yourself. [¶] Get a lawyer and come back when you have done that which the attorney suggested you should do because you're not going to be able to make this happen yourself. It's going to take an experienced lawyer to set this up right, so you're presented as being somebody [who] is not a danger to the children or the community.” The court denied the First OSC, and Amanda's counsel agreed to prepare a formal order.

Bernardo obtained counsel and, on September 6, 2006, before entry of the formal order denying the First OSC, brought another OSC (the Second OSC) requesting the custody order be modified to “shared parenting plan with no monitored visits.” In a supporting declaration, Bernardo stated**807 his probation had ended in March 2006 “without incident,” and he had completed three years of therapy, as his probation officer had directed. Bernardo also stated: “Previously, Amanda allowed me to call and at least speak with the children over the phone. Now, Amanda refuses to allow me to talk to the children at all. All contact whatsoever between the children and I have been cut off by *1074 Amanda since early 2006.” He believed, “it is in the children's best interest for them to spend a considerable amount of time with me” and suggested unmonitored visits on alternating weekends. Bernardo stated he intended to call his probation officer to testify at the hearing on the Second OSC.

A formal order denying the First OSC was entered on September 20, 2006. In the order, the

court also awarded Amanda sole legal custody of the children and reinstated monitored visitation for Bernardo. Bernardo did not appeal from the September 20, 2006 order.

On September 21, 2006, Bernardo submitted a declaration from his former treating psychologist, Dr. Anthony Fiore, in support of the Second OSC. Dr. Fiore stated: “At no time during my treatment of Mr. Lucio has Mr. Lucio shown any tendencies to perform any sexually deviant acts upon children, especially his own children. In my opinion, Mr. Lucio is not a pedophile and has exhibited no outward signs of being a danger to children. Based upon my treatment of Mr. Lucio, I am confident he presents no harm whatsoever to his children and is free to visit with them without the need for a monitor.”

On October 5, 2006, Amanda filed an OSC requesting an award of attorney fees in the amount of \$5,000 (the Attorney Fees OSC). She claimed an award of attorney fees was justified because the Second OSC did not describe any circumstances that had changed since the court denied the First OSC. She denied blame for Bernardo's inability to have monitored visitation, claiming Family Assessment, Counseling & Education Services (F.A.C.E.S.) was “unwilling to schedule monitored visitation” due to “the unavailability of an Order directing monitored visitation between [Bernardo] and our minor children to recommence.”

On November 1, 2006, Amanda filed a responsive declaration to the Second OSC. She requested the visitation arrangement set forth in the September 20, 2006 order remain in effect because: “[Bernardo] is a registered sex offender and despite having been recently released from formal probation, [Bernardo] continues to refuse to avail himself of monitored visitation arrangements with F.A.C.E.S. which I have attempted to make on numerous occasions. The order to show cause filed by [Bernardo] is almost identical to that which he filed on April 17, 2006 and which was heard and denied by the court on July 18, 2006.”

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Bernardo retained a clinical and forensic psychologist, Dr. Laura A. Brodie, who interviewed him for an hour and tested him for eight hours between November 29, 2006 and January 8, 2007. In her report, Dr. Brodie concluded: "Psychosexual assessment of Mr. Lucio indicates he has a normal heterosexual interest pattern. He shows no deviant sexual interest in children. *1075 There was no interest in sexual violent themes. [¶] Research has shown that the behavior of exhibitionism is more closely associated with an impulse control disorder and is not associated with pedophilia. There is no indication of current impulse control issues in Mr. Lucio's assessment. Mr. Lucio has completed a three[-]year program and shows insight into understanding his problem, is able to identify his triggers and avoid being in the type of situations that formerly triggered **808 the behavior. He appears open and honest about his behaviors and his role in being unable to see his children without a monitor. [¶] It is my professional opinion Mr. Lucio is not a danger to his children and does not have a deviant sexual interest in children."

The Second OSC and the Attorney Fees OSC were heard on April 24, 2007. At the hearing, the trial court dismissed the Second OSC without prejudice on the ground it was "premature" because it was filed before entry of the formal order on the First OSC. The court requested the parties submit updated income and expense declarations for purposes of the Attorney Fees OSC.

In the June 4 Order, the trial court formally dismissed the Second OSC, stating: "The Court finds that [Bernardo] has failed to allege any change of circumstances having occurred after the last Order was entered on September 20, 2006 as required by *Brown vs. Yana* (2006) 37 Cal.4th 947 [38 Cal.Rptr.3d 610, 127 P.3d 28] which would allow the Court to consider [Bernardo]'s request as contained in the Order to Show Cause and based thereon dismisses/denies [Bernardo]'s Order to Show Cause in [its] entirety."

The trial court received the parties' updated in-

come and expense declarations and, in the July 11 Order, awarded Amanda \$5,000 in attorney fees. The court stated: "*Family Code Section 3030* is quite specific about custody and unsupervised visitation to P[enal]C[ode section] 290 registrants such as [Bernardo]. The expert report suggests that he had poor impulse control which he is now over. Given the fact, that one of the victims of the P[enal]C [ode section] 314[, subdivision]I was a 15[-]year[-]old girl, the Court did not believe that this type of behavior is so predictable. The Court believes that the intent of the Statute is rather clear and that [Bernardo]'s chances of prevailing [on the Second OSC] were from the outset rather slim. He and his attorney chose to bring this action and have a hearing in spite of the opposition of [Amanda] and the language of Family Code [section] 3030." FN2

FN2. Family Code section 3030, subdivision (a)(1) provides: "No person shall be granted physical or legal custody of, or unsupervised visitation with, a child if the person is required to be registered as a sex offender under Section 290 of the Penal Code where the victim was a minor, or if the person has been convicted under Section 273a, 273d, or 647.6 of the Penal Code, unless the court finds that there is no significant risk to the child and states its reasons in writing or on the record. The child may not be placed in a home in which that person resides, nor permitted to have unsupervised visitation with that person, unless the court states the reasons for its findings in writing or on the record."

*1076 Bernardo timely appealed from the June 4 Order and the July 11 Order.

DISCUSSION

I.

The Trial Court Erred in Dismissing the Second OSC Because Bernardo Was Not Required to Prove Changed Circumstances to Seek a Change of the Visitation Schedule. The Correct Test Was Best In-

