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## VISITATION HESITATION

The recent 4<sup>th</sup> District Court of Appeal decision, *In re Marriage of Lucio*, 2008, 161 Cal.App. 4<sup>th</sup> 1068, establishes a bright line rule that requires a best interests standard of review, for family law requests to modify visitation orders. The *Lucio* decision also makes it clear that a parent's physical or legal custody of a child is irrelevant to the Court's application of the best interests' standard to a modification of visitation request. This standard is a lesser standard of persuasion than the traditional changed circumstances rule which the courts apply to modification of final custody determinations.

Prior to *Lucio*, three primary reported cases applied the best interests' standard to modification of visitation requests. Like *Lucio*, the parents in these cases had prior custody orders. However, unlike *Lucio*, all the parents had shared joint physical and joint legal custody of their children.

*In re Marriage of Birnbaum* (1989) 211 Cal.App.3d 1508, decided by the First District Court of Appeals, involved a case where both parents agreed to joint legal and custody orders in a Marital Settlement Agreement. Years later, the parents asked the trial court to modify the prior custody and visitation orders. In affirming the trial court's modification of the parent's time share with the children, the appellate court held that an order modifying a "co-parenting residential agreement" does not constitute a change in custody. Thus, proof of changed circumstances was unnecessary because the trial court did not make a change of custody, just a "rearrangement of the children's residential timetable."

In *Enrique M. v. Angelina V.* (2004) 121 Cal.App.4th 1371, after a final custody order granting the parties joint legal custody and providing that the parents will eventually share joint physical custody, the parties entered into a stipulation which retained those custody provisions. Then, the father filed an Order to Show Cause ("OSC") and requested that the Court modify 'visitation' instead of 'custody' by granting him additional overnights with the child. The trial court refused to grant father's requests because it found that he had failed to meet his burden of proof to demonstrate that there had been a change in circumstances since the prior stipulated order. The Fourth District Court of Appeals, relying on *Birnbaum*, reversed this decision and held that the trial court erred in applying the changed-circumstances standard instead of a best interests' standard to the father's request to modify the parenting schedule.

In *Niko v. Foreman* (2006) 144 Cal.App.4th 344, the Fourth District Court of Appeal majority affirmed the trial court's application of a best interests standard in making the determination that the mother could move to Colorado with the parties' child without regard to the parties' prior stipulated Judgment which granted them joint legal and joint custody and an equal timeshare with the child. On appeal, the justices reasoned that the lower court had only modified the existing co-parenting plan, thus leaving the pre-existing joint custody order in place.

The *Lucio* case involved a dissolution of marriage case, and the parties had two children. The father was

a registered sex offender who, prior to the parties' dissolution trial, had plead guilty to two separate criminal charges of indecent exposure in violation of *Penal Code* section 314, subdivision 1, and of lewd conduct in violation of *Penal Code* section 647, subdivision (a).

Prior to trial, the parties entered into a parenting agreement which granted the father monitored visitation with the intended goal of having unmonitored visits once the father's probation terminated. The visitation schedule and the selection of the monitor were resolved in the Judgment, which granted joint legal custody of the children to the parties, sole physical custody of the children to the mother, and monitored visits for six hours each Sunday to the father. Subsequent to the entry of the Judgment, the father completed three years of therapy, and his probation period expired. By early 2006, the father had lost all contact with the children.

In April 2006, the father brought an OSC requesting that the Court modify the prior child custody order to grant him joint physical custody with the children. After a hearing on July 18, 2006, the Judge denied the father's OSC and recommended that he retain counsel prior to returning to court so that he would be presented as "not a danger to the children or the community." The formal order after hearing, entered on September 20, 2006, reflected the Court's modification of the joint legal custody order provided for in the Judgment to sole legal custody to the mother. The order also reinstated the father's monitored visitation. The father did not appeal from this OSC. It is unclear from the record how the trial Court modified legal custody without a showing of change in circumstances pursuant to *In re Marriage of McLoren* (1988) 202 Cal.App.3d 108.

On September 6, 2006, the father brought a second OSC seeking an alteration to the visitation set forth in the Judgment and requesting that the custody order be modified to a "shared parenting plan with no monitored visits." At this OSC, the father was represented by counsel. In the father's declaration submitted with his OSC, he argued his belief that it was in the children's best interests to spend "a considerable amount of time" with him. The Father also submitted a declaration from his former treating psychologist and a declaration from a clinical and forensic psychologist, which respectively stated that the father presented no harm and no danger to his children. On June 4, 2007, the trial court formally dismissed the father's second OSC as having failed to allege a change in circumstances arising subsequent to the September 20, 2007 order. Thus, the trial Court did not reach the merits of father's modification request.

On appeal, the Fourth District Court of Appeals found that the parties intended the custody and visitation provisions of their Judgment to be a "final judicial custody determination" within the meaning of the California Supreme Court decision of *Montenegro v. Diaz* (2001) 26 Cal.4th 249, so as to trigger the change in circumstances rule in modification of physical custody requests. However, since father's second OSC did not seek a change in physical custody, and only sought a change in visitation, the change in circumstances rule was not applicable. Unlike the first OSC, the father did not seek a change in custody. The second OSC was not an attempt to re-litigate the first OSC since the father was seeking unmonitored visits, after completing his probation and therapy. Thus, the correct test was the best interests of the child. As a result, the Court remanded the case back to the trial court to consider the second OSC request for modification of visitation under the correct standard.

In making its holding, the *Lucio* court specifically referenced the California Supreme Court's decision in *In re Marriage of Brown & Yana* (2006) 37 Cal.4th 947, as being consistent with its interpretation of the law. The Supreme Court in *Brown & Yana* reversed the appellate court's decision which held that a

parent was entitled to an evidentiary hearing to allege a change in circumstances to obtain a custody modification in a case involving the custodial parent's decision to relocate with the child. In *Brown & Yana*, after a contested custody dispute, the trial court made a final judicial custody order awarding to the mother sole legal and physical custody of the parties' son within the meaning of *Montenegro*. Years later, the mother sought to modify the father's visitation in light of her intended move to Nevada with the child. The father sought to modify custody seeking joint custody, expanded visitation and the appointment of minor's counsel for the child. The trial Court in *Brown & Yana* refused to grant the father an evidentiary hearing on the issue of modification of custody, although it granted the father a hearing on the issue of modification of visitation.

Like in *Brown & Yana*, the *Lucio* court concluded that the father was entitled to a hearing on the issue of modification of visitation. In a footnote, however, the *Lucio* Court stated that it did not know if the father would have been permitted live testimony at a best interests' hearing on the merits had he been afforded one, or if the Court would have exercised its discretion to rely on the declarations submitted alone pursuant to *Reifler v. Superior Court* (1974) 39 Cal.App.3d 479, 483 - 484. The Court did not express whether or not the father's past behavior as a registered sex offender, subsequent therapy and completion of probation, would play any role in the trial court's best interests' determination. Further, the Court did not express an opinion as to whether father's claim that it was in the children's best interests to spend time with him was sufficient to meet the best interests of the child standard.

In the aftermath of the *Lucio* decision, the Court's primary focus in applying the best interests standard to modification of visitation requests, will be the child's health, safety and general welfare as required by *Family Code* §3011. In addition, the Courts will rely upon *Family Code* §3040(b), which states that there is neither a preference nor presumption for joint custody and that the Court has the widest discretion to choose a parenting plan in the best interests of a child.

What is not clear under *Lucio* is the type of hearing that trial Courts will be inclined to grant litigants seeking to modify their prior visitation orders. To establish why it is in the best interests of a child to have a parent share in that child's upbringing, evidence and testimony presented must be consistent with constitutional principles, case law, statutes governing trial court procedures and local court rules. Since public policy dictates cases should be determined on their merits, a litigant seeking an evidentiary hearing should be prepared to demonstrate why a hearing is necessary to the particular facts of his or her case.

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