

AUG 19 2019

By Brian Cotta, Clerk *WMC*
Deputy

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CRYSTAL V.,

Appellant,

v.

ROBERT G.,

Respondent.

F077615

(Super. Ct. No. PFL256462)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Glade F. Roper, Judge. (Retired judge of the Tulare Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

Haynes and Boone, Mary-Christine Sungaila and Marco A. Pulido; Family Violence Appellate Project, Jennafer Dorfman Wagner, Shuray Chorishi, Cassandra Allison, and Erin C. Smith; Central California Legal Services and Jeneé Barnes for Appellant.

Manatt, Phelps & Phillips, Joanna S. McCallum and Maura K. Gierl for California Women's Law Center as Amicus Curiae on behalf of Appellant.

Robert G., in pro. per., for Respondent.

-ooOoo-

Crystal V. and her ex-boyfriend Robert G. are the parents of a minor child. On March 21, 2018, the Tulare County Superior Court issued an order for child custody and visitation in which it stated Crystal had sole legal and physical custody of the child but ordered “the child [to] reside with [Robert] from Tuesday of each week at 8:00 a.m. until Wednesday at 6:30 p.m. and every Thursday at 4:00 p.m. or until after school once [the child] enters school until Friday at 6:30 p.m.” (Boldface omitted.) The order also addressed custodial arrangements during vacations, holidays, and other special occasions.

Crystal appeals from that order and makes two contentions. First, she asserts, the order effectively amounted to an award to Robert of joint physical custody. Since Robert was found to have committed acts of domestic violence against her within a five-year time period preceding the order, the court’s failure to apply the rebuttable presumption under Family Code¹ section 3044 – that an award of joint physical custody of the child to Robert was detrimental to the child’s best interests – was reversible error. Second, the parties’ stipulated custody order in August 2017 was a final judicial custody determination. As such, the court was required to uphold that determination absent a significant change in circumstances. Its failure to do so was also reversible error.²

We reverse the March 21, 2018 child custody and visitation order.

¹ Subsequent statutory citations refer to the Family Code.

² Robert did not file a respondent’s brief, but did appear at oral argument.

We previously permitted California Women’s Law Center to file an amicus brief in support of Crystal. The brief rehashes Crystal’s points with respect to section 3044 but also raises public policy arguments that did not affect our ultimate disposition.

We deny California Women’s Law Center’s motion to judicially notice the legislative history behind Assembly Bills Nos. 840 (1999-2000 Reg. Sess.) (Stats. 1999, ch. 445) and 2044 (2017-2018 Reg. Sess.) (Stats. 2018, ch. 941) and Senate Bill No. 265 (2003-2004 Reg. Sess.) (Stats. 2003, ch. 243), which purportedly contain “the public policy considerations” for Family Code sections “relating to the protection of children from domestic abusers.”

BACKGROUND

Crystal and Robert met in 2010 and began dating in 2011. Their child was born on August 8, 2014. By that point, Crystal and Robert were no longer in a relationship.

On December 14, 2016, Crystal filed a request for a domestic violence restraining order against Robert. At a February 16, 2017 hearing,³ she testified he abused her during pregnancy, i.e., he struck her with an open palm, choked her, slammed her against the garage door, spit on her face, and threatened her with a gun. During a scheduled visitation with their child, Robert pushed the front door into Crystal's shoulder and made pejorative comments about her. He also broke into her house on two occasions and once waited outside her home in his car all night. Other witnesses corroborated Robert abused Crystal while she was pregnant, threatened her, uttered profanity in front of their child, and often behaved angrily and irrationally. Thereafter, the superior court concluded incidents of domestic violence occurred and granted the request for a restraining order. The court further pronounced:

“Because of the finding of domestic violence, there's a presumption in California that the offending parent should not have legal or physical custody if it's occurred in the last five years, and I find that it has.”

The restraining order, which was filed on March 21, 2017, and set to expire on February 16, 2019, specified, inter alia: (1) Crystal “shall have sole legal and physical custody of the minor child”; (2) Robert “shall visit with the child from 8:00 a.m. until 12:30 p.m. [every Tuesday, Wednesday, and Friday] and this shall be expanded to 8:00 a.m. to 6:00 p.m. after May 30, 2017”; (3) Robert “is not to consume alcohol or any illegal drugs”; (4) Crystal may test Robert for drugs “twice a month any weekday”; (5) Robert “may not drive the child around without a valid driver's license or allow anyone to drive the child . . . without a valid driver's license and a mandatory amount of

³ Judge Glade F. Roper presided.

insurance”; and (6) excluding court-ordered visitation, Robert “must stay at least . . . 100 yards away from” Crystal and their child. (Boldface omitted.)

On June 5, 2017, Crystal filed a request to modify the visitation schedule, claiming Robert “does not possess a valid driver[’]s license, proper insurance nor does he have the proper child restraints” yet “has been seen driving around town with the child on several occasions.” She attached photographs in support of her allegations. Crystal also attributed their child’s physical, mental, and emotional regression to the visits.

On August 2, 2017, the court referred the parties to Family Court Services for same-day mediation and child custody recommending counseling. The parties agreed Crystal should have sole legal and physical custody but could not agree on visitation: whereas Crystal sought visitation supervised by a third party, Robert wanted to add a monthly overnight visit to the current schedule. Robert admitted he did not have a valid driver’s license. Nonetheless, he drove the child approximately four times since March 21, 2017, and drove as recently as July 28, 2017. The child custody recommending counselor noted Robert’s license was suspended because he was convicted of driving under the influence (DUI) on January 25, 2011, and July 14, 2017, respectively. Due to Robert’s “blatant disregard for the child’s safety and the court[’]s current orders in regards to . . . driving,” the counselor recommended supervised visitation at a Tulare County Family Services “CHAT House.”

Immediately following mediation and counseling, the matter proceeded to a contested court hearing.⁴ The court received the counselor’s report as well as Robert’s “Negative” July 11, 2017 drug test showing amounts of amphetamines and cocaine in his system well below the cut-off. Robert insisted he had “been in full compliance 100 percent of the court order” and disputed the drug test. He indicated he would regain his license by October 2017. The court stated:

⁴ Judge Lloyd L. Hicks presided.

“Okay. Here’s my concern, and it sort of mirrors the counselor’s. You knew there was a court order not to drive without a license; not to drive without insurance; not to drive without a seat. You disregarded that. . . . You decided to ignore the law. The seat concerns me. That’s very[,] very dangerous, not having a restraint seat. But, nevertheless, you deliberately violated a court order thinking you get to decide what’s more important. That concerns me. What really concerns me is the drug test. Because although it didn’t reach the levels that result in a criminal conviction, those things don’t get in there by themselves. . . . [¶] . . . [¶]

“ . . . You have both cocaine and meth [¶] . . . [¶] . . . residue as of the time of the test. It’s extremely unlikely to the point of vanishing that you could accidentally eat something or take something that would cause both of those. I suppose you could argue, well, I took some supplements that had the compound of meth. But when you have both, you’ve been using drugs is my finding. That’s what really concerns me.”

The court adopted the counselor’s recommendation. It further pronounced:

“I’m going to award sole legal and physical custody of the child to the mother which you agreed to. The child shall primarily reside with mother at all times and father’s visits shall be through Family Services C[HAT] House. [¶] . . . [¶] . . . And I’m going to set a review about six months out [¶] . . . [¶]

“ . . . And what . . . here’s what you [Robert] should be doing. Number one, get your driver’s license back. [¶] . . . [¶] . . . Get insurance. [¶] . . . [¶] . . . And come in showing you’ve got a child seat. [¶] . . . [¶] Secondly, the visits are monitored. [¶] . . . [¶] . . . And then my suggestion is that you might want to bring in a drug test result that you’ve voluntarily done [¶] . . . [¶] . . . a couple of weeks before showing not a trace of any of these banned substances. [¶] . . . [¶]

“ . . . So that’s sort of a road map for you. The idea at the review is to try to get you back more visitation. [¶] . . . [¶] . . . But that is the order in the meantime.”

The supervised visitation order, which was filed on August 2, 2017, read, inter alia:

“Evidence has been presented in support of a request that the contact of . . . [Robert] with the child[] . . . be supervised based upon allegations of [¶] . . . neglect”

In a report filed on March 7, 2018, the child custody recommending counselor pointed out the parties participated in another mediation counseling session on

February 9, 2018, “as ordered by the court.” The counselor revealed “no changes have occurred” since August 2, 2017. In particular, Robert “has not obtained his driver’s license.” Moreover, “the parties have been terminated from CHAT House visits due to three consecutive cancelations.” Crystal “canceled a January 16, 2018 visit due to the child being ill” while Robert “canceled his January 23, 2018 visit[] as he had a last[-]minute doctor[’s] appoint[ment] and canceled his January 30, 2018 visit due to not having the funds to pay the associated fees.” The counselor concluded “no significant change in circumstances . . . would warrant a change to the current court order”

At the outset of a March 21, 2018 hearing,⁵ the court acknowledged “[the] parties went to mediation” and “reached an agreement” on August 2, 2017, but outstanding issues were “not resolved” at the February 9, 2018 session. Thereafter, Robert asked for overnight visitation. He testified he canceled the first CHAT House visit due to “a scheduling conflict for [his fiancée’s] ultrasound” and canceled the second CHAT House visit because “the money [for the visit] got steep” and “all [his] money was tied up for [an apartment] deposit” Robert stated he was charged with DUI in May 2016 but “[the] case was officially dismissed” in October 2017. He had yet to regain his driver’s license because “there’s an automatic two-year hold which will end May 28th of this year.” Robert claimed he would have a license in “two months.”

Robert’s fiancée testified she had been with Robert for over a year and had never observed him under the influence of drugs or becoming violent after drinking. She attested he was “a really good father.” On cross-examination, the fiancée conceded Robert previously drove the child without a license. She insisted “someone with a valid driver’s license,” including herself, would transport the child.

Crystal testified Robert violated the terms of the domestic violence restraining order twice after the court issued the supervised visitation order. On both occasions, he

⁵ Judge Roper presided.

was outside her workplace and she called the police for assistance. Crystal also claimed Robert constantly drove without a license rather than use public transit and abused cocaine. In a brief, she argued he “failed to rebut the [section 3044] presumption by a preponderance of evidence” and “failed to provide . . . evidence of a substantial change in circumstances.” (Boldface omitted.)

Before taking the matter under submission, the court advised it would not give any weight to Robert’s negative July 11, 2017 drug test. It explained:

“There’s a reason why there’s a cutoff. . . . Any drug expert will testify to that. . . . [¶] So I’m not going to consider a trace amount that’s below the cutoff to represent drug use. That’s contrary to the whole concept of drug testing.”

Thereafter, the child custody and visitation order was filed. It specified, *inter alia*: (1) Crystal “shall have sole legal custody”; (2) Crystal “shall have sole physical custody, . . . subject to the . . . Court ordered visitation plan”; (3) during the school year, “[b]eginning [March 21, 2018], the child shall reside with [Robert] from Tuesday of each week at 8:00 a.m. until Wednesday at 6:30 p.m. and every Thursday at 4:00 p.m. or until after school once [the child] enters school until Friday at 6:30 p.m.”; (4) “[t]he child shall reside with each parent for up to 2 consecutive weeks for each parent’s annual vacation”; and (5) “[h]olidays and special occasions with the child shall be shared between the parents.”⁶ (Boldface omitted.)

⁶ The court provided the following schedule in the event the parties could not mutually agree on one themselves: (1) during odd-numbered years, the child will reside with Crystal on Independence Day, Thanksgiving, and Christmas and with Robert on Easter, Halloween, and Christmas Eve; (2) during even-numbered years, the child will reside with Robert on Independence Day, Thanksgiving, and Christmas and with Crystal on Easter, Halloween, and Christmas Eve; (3) the child will reside with Crystal on Mother’s Day; (4) the child will reside with Robert on Father’s Day; and (5) on the child’s birthday, the child will stay with the parent with the “nearest scheduled time with the child.”

DISCUSSION

I. Threshold matters

At the outset, we must determine (1) whether there was a final custody order in 2017 (see *Montenegro v. Diaz* (2001) 26 Cal.4th 249, 256 (*Montenegro*) [changed circumstance-rule triggered “once a final judicial custody determination is in place”]); and (2) whether the court’s March 21, 2018 order awarded Robert de facto joint physical custody rather than mere visitation (see *Celia S. v. Hugo H.* (2016) 3 Cal.App.5th 655, 664 (*Celia*) [“[T]he court may award . . . visitation that does not amount to joint custody because nothing in section 3044 prevents a trial court from awarding visitation.”]; *Enrique M. v. Angelina V.* (2004) 121 Cal.App.4th 1371, 1379 [“[W]here a court’s order does not change custody, but rather alters a parenting schedule, the changed[-]circumstance rule does not apply.”], italics omitted).

a. Final custody order

In early 2017, the court granted Crystal’s request for a domestic violence restraining order. Although this order specified, inter alia, Crystal “shall have sole legal and physical custody of the minor child,” as a matter of law, “[a] domestic violence order is not the same as a final judicial custody determination.” (*Keith R. v. Superior Court* (2009) 174 Cal.App.4th 1047, 1054, italics omitted.)

On August 2, 2017, in connection with Crystal’s request to modify the visitation schedule, the parties attended mediation and child custody recommending counseling. According to the counselor’s report, they could not resolve the visitation issue but agreed Crystal should maintain sole legal and physical custody. Following a same-day contested hearing, the court pronounced it would “award sole legal and physical custody of the child to the mother which you [Robert] agreed to.” (See *Montenegro, supra*, 26 Cal.4th at p. 258 [“[A] stipulated custody order is a final judicial custody determination for purposes of the changed[-]circumstance rule only if there is a clear, affirmative indication

the parties intended such a result.”].) Moreover, Robert never disputed that he agreed to this custodial arrangement. The August 2017 order was a final custody order.

b. *The March 21, 2018 order: de facto joint physical custody*

“[I]n determining the true nature of the court’s order, we must consider the legal effect of the order, not the label the court attached to it.” (*Celia, supra*, 3 Cal.App.5th at p. 664.)

“ ‘Joint physical custody’ means that each of the parents shall have significant periods of physical custody.” (§ 3004; see *ibid.* [“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 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.” (*Celia, supra*, 3 Cal.App.5th at p. 663.) “ ‘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.]” (*Id.* at pp. 663-664; accord, *People v. Mehaisin* (2002) 101 Cal.App.4th 958, 964; *In re Marriage of Lasich* (2002) 99 Cal.App.4th 702, 715.) “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, supra*, at p. 664.)

Pursuant to the March 21, 2018 order, during a regular week, Robert has two separate stints with the child: (1) between 8:00 a.m. on Tuesday and 6:30 p.m. on Wednesday; and (2) between 4:00 p.m. (or, once the child is in school, after school) on Thursday and 6:30 p.m. on Friday. Considering that the child would be asleep at night, this schedule essentially gave three days to Robert (Tuesdays, Wednesdays, and Fridays) and four days to Crystal (Mondays, Thursdays, Saturdays, and Sundays). This is a de

facto joint custody order. (*S.Y. v. Superior Court* (2018) 29 Cal.App.5th 324, 332.) That conclusion is negligibly impacted by custodial arrangements during vacations, holidays, and other special occasions. The child stays with Robert for up to two weeks during his annual vacation and with Crystal for up to two weeks during her annual vacation, offsetting each parent's gains and losses. Likewise, the court's schedule dictating custody during holidays and other special occasions rotates annually, offsetting each parent's gains and losses over a two-year period. (See *ante*, fn. 6.)⁷

II. Reversal of the March 21, 2018 order

a. Standard of review

"The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test." (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32 (*Burgess*)). "The precise measure is whether the trial court could have reasonably concluded that the order in question advanced the 'best interest' of the child." (*Ibid.*) "A court abuses its discretion in making a child custody order if there is no reasonable basis on which it could conclude that its decision advanced the best interests of the child." (*In re Marriage of Fajota* (2014) 230 Cal.App.4th 1487, 1497.) "A court also abuses its discretion if it applies improper criteria or makes incorrect legal assumptions." (*Ibid.*, italics omitted.) "A discretionary order that is based on the application of improper criteria or incorrect legal assumptions is not an exercise of informed discretion, and is subject to reversal even though there may be substantial evidence to support that order." (*Mark T. v. Jamie Z.* (2011) 194 Cal.App.4th 1115, 1124-1125.)

b. Section 3044

To determine whether a custodial arrangement would be in the best interest of the child, the court must consider "[t]he health, safety, and welfare of the child" (§ 3011,

⁷ Since the record does not demonstrate otherwise, we presume the parties did not mutually agree on a different schedule.

subd. (a)); “[a]ny history of abuse by one parent or any other person seeking custody against . . . [¶] . . . [a]ny child to whom he or she is related by blood or affinity or with whom he or she has had a caretaking relationship, no matter how temporary[,] [¶] . . . [t]he other parent[, and/or] [¶] . . . [a] parent, current spouse, or cohabitant, of the parent or person seeking custody, or a person with whom the parent or person seeking custody has a dating or engagement relationship” (*id.*, former subd. (b)(1)-(3), amended by Stats. 2018, ch. 941, § 1, eff. Jan. 1, 2019); “[t]he nature and amount of contact with both parents” (§ 3011, subd. (c)); and “[t]he habitual or continual illegal use of controlled substances, the habitual or continual abuse of alcohol, or the habitual or continual abuse of prescribed controlled substances by either parent” (*id.*, subd. (d)).

“Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence against the other party seeking custody of the child or against the child or the child’s siblings within the previous five years, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child, pursuant to [s]ection 3011. This presumption may only be rebutted by a preponderance of the evidence.” (§ 3044, former subd. (a), amended by Stats. 2018, ch. 941, § 3, eff. Jan. 1, 2019.) “The legal effect of the presumption is to shift the burden of persuasion on the best interest question to the parent who the court found committed domestic violence.” (*Celia, supra*, 3 Cal.App.5th at p. 662.)

“In determining whether the presumption . . . has been overcome, the court shall consider all of the following factors: [¶] (1) Whether the perpetrator of domestic violence has demonstrated that giving sole or joint physical or legal custody of a child to the perpetrator is in the best interest of the child. In determining the best interest of the child, the preference for frequent and continuing contact with both parents . . . or with the noncustodial parent . . . may not be used to rebut the presumption, in whole or in part. [¶] (2) Whether the perpetrator has successfully completed a batterer’s treatment program

. . . . [¶] (3) Whether the perpetrator has successfully completed a program of alcohol or drug abuse counseling if the court determines that counseling is appropriate. [¶] (4) Whether the perpetrator has successfully completed a parenting class if the court determines the class to be appropriate. [¶] (5) Whether the perpetrator is on probation or parole, and whether he or she has complied with the terms and conditions of probation or parole. [¶] (6) Whether the perpetrator is restrained by a protective order or restraining order, and whether he or she has complied with its terms and conditions. [¶] (7) Whether the perpetrator of domestic violence has committed any further acts of domestic violence.” (§ 3044, former subd. (b), amended by Stats. 2018, ch. 941, § 3, eff. Jan. 1, 2019.) “If the trial court determines a parent has overcome the section 3044 presumption and awards sole or joint custody to a parent who committed domestic violence, the court must state the reasons for its ruling in writing or on the record.” (*Celia*, *supra*, 3 Cal.App.5th at p. 662, citing § 3011, subd. (e)(1).)

“The clear terms of section 3044 require that a court apply a presumption that it is detrimental to the best interest of the child to award joint or sole physical or legal custody to a parent if the court has found that that parent has perpetrated any act of domestic violence against the other parent in the preceding five years. The presumption is rebuttable, but the court *must* apply the presumption in any situation in which a finding of domestic violence has been made. A court may not ‘ “call . . . into play” the presumption contained in section 3044 only when the court believes it is appropriate.’ [Citation.]” (*In re Marriage of Fajota*, *supra*, 230 Cal.App.4th at p. 1498; see *Celia*, *supra*, 3 Cal.App.5th at p. 661 [“This presumption is mandatory and the trial court has no discretion in deciding whether to apply it”].)

At the February 16, 2017 hearing, the court found Robert perpetrated domestic violence against Crystal and granted her request for a restraining order. It explicitly recognized the statutory presumption against awarding sole or joint legal or physical custody to offenders like Robert. The court issued a restraining order that, *inter alia*, gave

Crystal sole legal and physical custody and instructed Robert not to drive without a valid driver's license and to stay at least 100 yards away from Crystal and their child outside of scheduled visitation. Between the filing of the restraining order on March 21, 2017, and the filing of the challenged child custody and visitation order on March 21, 2018, Robert repeatedly violated the terms of the restraining order. By his own admission, he had driven the child without a valid driver's license approximately four times and still did not have a license. Crystal alleged Robert was outside her workplace on two separate occasions. Robert did not prove he successfully completed a batterer's treatment program. Given the March 21, 2018 order granted Robert de facto joint physical custody, the court either ignored the section 3044 presumption or concluded Robert rebutted the presumption by a preponderance of the evidence. Regarding the latter, however, the court "must state the reasons for its ruling in writing or on the record." (*Celia, supra*, 3 Cal.App.5th at p. 662, citing § 3011, subd. (e)(1).) It did not. The court "therefore abused its discretion by failing to properly apply section 3044's rebuttable presumption and awarding [Robert] joint physical custody without evidence showing that custody arrangement was in the child[]'s best interest." (*Celia, supra*, at p. 664.)

c. Changed-circumstance rule

"Although we are reversing the [March 21, 2018] order on the basis of the section 3044 presumption, we shall address [the changed-circumstances rule] for the guidance of the trial court on remand." (*Christina L. v. Chauncey B.* (2014) 229 Cal.App.4th 731, 737 (*Christina*).)

"In an initial custody determination, the trial court has 'the widest discretion to choose a parenting plan that is in the best interest of the child.' [Citation.] It must look to all the circumstances bearing on the best interest of the minor child. [Citation.]" (*Burgess, supra*, 13 Cal.4th at pp. 31-32, italics omitted; accord, *Ragghanti v. Reyes* (2004) 123 Cal.App.4th 989, 996.) "[A]fter a judicial custody determination, the noncustodial parent seeking to alter the order for legal and physical custody can do so

only on a showing that there has been a substantial change of circumstances so affecting the minor child that modification is essential to the child's welfare." (*Burgess, supra*, at p. 37.) "The changed circumstances test requires a threshold showing of detriment before a court may modify an existing final custody order that was previously based upon the child's best interest." (*Ragghanti v. Reyes, supra*, at p. 996; see *Christina, supra*, 229 Cal.App.4th at p. 738 ["A 'substantial showing' must be made to modify a final custody determination."].) "[T]he burden of showing a sufficient change in circumstances is on the party seeking the change of custody. [Citations.]' [Citation.]" (*Speelman v. Superior Court* (1983) 152 Cal.App.3d 124, 129-130.)

"[T]he changed-circumstance rule is not a different test, devised to supplant the statutory test, but an adjunct to the best-interest test. It 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.) "[A]ppellate courts have been less reluctant to find an abuse of discretion when custody is changed than when it is originally awarded, and reversals of such orders have not been uncommon." (*Speelman v. Superior Court, supra*, 152 Cal.App.3d at p. 129; accord, *Christina, supra*, 229 Cal.App.4th at p. 738.)

As noted, in 2017, there was a final custody order awarding Crystal sole legal and physical custody. (See *ante*, at pp. 8-9.) At the March 21, 2018 hearing, Robert testified he canceled scheduled visitations at the CHAT House due to scheduling conflicts and financing. He did not regain his driver's license. Robert's fiancée testified Robert was "a really good father" but acknowledged he previously drove the child without a license. There was no "substantial change such that it was 'essential or expedient for the welfare


of the child[] that there be a change” ’ [citation] or that the child[] would suffer detriment absent the change in custody [citation].” (*Christina, supra*, 229 Cal.App.4th at p. 739.) Hence, the court abused its discretion when it changed the custodial arrangement.


DISPOSITION

The March 21, 2018 child custody and visitation order is reversed and the matter is remanded to allow the superior court to determine whether Robert G. has met his burden to rebut the presumption under section 3044. (*Christina, supra*, 229 Cal.App.4th at p. 737.) In any further proceedings, the court shall consider whether Robert G. has met his burden to show a change in circumstances sufficient to justify altering the prior custody order. (*Id.* at p. 739.) Costs on appeal are awarded to Crystal V.


DETJEN, J.

WE CONCUR:


HILL, P.J.


SMITH, J.