NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CU 1639

MICHELE N. YOUNG[1]

VERSUS

JOHN P. YOUNG

Judgment Rendered: JUN - 8 2007

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On Appeal from the
Twenty-Third Judicial District Court
In and for the Parish of Ascension
State of Louisiana
Suit Number 69,809

Honorable Thomas J. Kliebert, Jr., Presiding

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John P. Young
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Defendant-Appellant
In proper person

BEFORE: PARRO, GUIDRY, PETTIGREW, McCLENDON,
AND HUGHES, JJ.

Parro, J., dissents and assigns reasons.
McClendon, J. Dissents and Adopts Reasons Assigned by Judge Parro.

[1] Although the cover page of the district court record in this case shows the plaintiff-appellee's name as "Michelle," her petition for divorce and an affidavit she signed indicate the correct spelling is "Michele."

GUIDRY, J.

John P. Young appeals a judgment denying his motions for child support and for modification of the physical custody of his two daughters. For the following reasons, we amend the trial court's judgment and as amended, affirm.

FACTUAL AND PROCEDURAL BACKGROUND

John P. Young and Michele N. Young were married September 2, 1995, and had two children--Taylor Michele Young, born February 28, 1997, and Jordan Lynn Young, born February 1, 1999. John and Michele were divorced on June 27, 2002. John is the owner of a retail flooring business in Baton Rouge; Michele is an engineer with Exxon-Mobil. A precipitating factor in their divorce was Michele's relocation to Fairfax, Virginia, in order to take advantage of a promotion. She filed for divorce the week before that transfer in June 2001. In connection with a hearing on June 11, 2001, the couple agreed to joint custody, with Michele being given authority to relocate to Virginia with the two girls during the pendency of the proceedings and being designated as the temporary primary custodial/domiciliary parent, subject to "reasonable visitation" by John.[2] A stipulated judgment with these provisions was signed September 4, 2001. In the subsequent divorce judgment, the parties continued by stipulation the joint custody of the children, with John exercising most of his physical custody of the children during the summertime, on school breaks, and on holidays, and paying child support in the amount of $2,500 per month. The parties also agreed to share equally the transportation costs involved in enabling John to exercise his right to physical custody.

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[2] Although the term "visitation" is commonly used to refer to the time spent with the children by the non-domiciliary parent, this court has noted that when the parents have joint custody, the term "visitation," which is a right granted to a parent who does **not** have custody, is inapplicable. See Cedotal v. Cedotal, 05-1524, p. 5 (La. App. 1st Cir. 11/4/05), 927 So. 2d 433, 436. Therefore, although the parties and the court in this case used the term "visitation," this opinion will use the term "physical custody."

In June 2003, John filed a rule to show cause, seeking modification of custody to designate him as the primary domiciliary parent and asking for child support from Michele. In the alternative, he sought a fifty-fifty "shared custody" agreement and modification of child support to reflect such an arrangement. At a hearing on October 13, 2003, the parties entered into another stipulation. Among other things, they agreed to exercise joint custody with a fifty-fifty "shared custody" agreement, equal sharing of certain expenses, and no child support from either party.[3] To satisfy this stipulated judgment, John rented an apartment in Virginia, where his daughters live with him from the 1st through the 15th of every month, except during their summer vacation, when he has physical custody of them at his Louisiana residence.

In April 2005, John filed a rule to show cause why Michele should not pay him child support to assist in the expenses he was incurring for monthly transportation and the cost of maintaining a second residence in Virginia. The court ordered the parties to participate in mediation on this issue.[4] On May 10, 2005, John filed a motion for emergency ex parte custody, alleging that when he picked up his children, his eight-year-old daughter began crying and told him she was upset because she had been sleeping in the same bed with her mother and her mother's new boyfriend, "Roberto," "because she did not want anything bad to happen to Mommy." In the motion, John further alleged that even though his daughter was clearly uncomfortable with the situation, Michele had told him she intended to continue the practice, as there was nothing wrong with it. A hearing was set for June 13, 2005. Pending the hearing, the court ordered Michele not to

[3] There is no transcript of the hearing, but the minutes reflect that such an agreement was read into the record in open court on October 13, 2003, and a judgment containing these provisions was signed on April 5, 2004.

[4] Other than comments in later pleadings, the record contains nothing regarding the mediation process and its outcome. Obviously, the parties were unable to reach agreement.

have overnight visitation with a member of the opposite sex in the presence of the children.

A trial on John's rule to show cause and motion for emergency ex parte custody was held on December 2, 2005.[5] At the conclusion of the trial, the court held the record open to allow the deposition of John's accountant and discovery of other financial information, after which the parties could submit post-trial memoranda. On January 11, 2006, the court ordered that certain additional documents be designated and provided and that the deposition with John's accountant be taken ten days after those documents were exchanged by the parties. However, neither those documents nor a transcript of the deposition are in the record.[6] On March 7, 2006, John filed a motion for entry of judgment, in which he averred the deposition of his accountant had been taken on January 31, 2006,[7] and, to avoid further delay, moved for judgment on the evidence adduced at trial.

The trial court signed a judgment on April 17, 2006. Concerning John's request for child support, the court stated in written reasons for judgment that by establishing Michele's significant increase in her income, John had met his burden of proof of showing a material change in circumstances since the prior judgment was rendered. However, the court found the evidence John presented at trial did not contain sufficient information about his income to determine whether child support was due to him or to calculate the appropriate level of such support.

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[5] The hearing on the motion for emergency ex parte custody was originally set for June 13, 2005; however, the matter was not taken up until the December 2, 2005 trial on the rule to show cause.

[6] In addition, on February 23, 2006, the court signed a judgment denying a motion filed by Michele to quash a subpoena duces tecum and notice of taking a "1442 records only deposition." Although the minutes and the judgment reflect that a hearing on this motion was held February 16, 2006, the record does not include the motion or any other reference to the discovery matters adjudicated on that date. John's post-trial memorandum indicates that the information sought from Michele's employer concerned its contributions to her retirement plan and stock options, but such documentation is not in the record.

[7] The motion stated in one paragraph that the deposition was taken February 31, 2006; but in the succeeding paragraphs, it stated that thirty days had elapsed since the taking of the deposition on January 31, 2006, and computed the time delays for post-trial memoranda from that date.

Therefore, his motion for child support was denied. The court further found that the parties had stipulated that it was in the best interest of the children for John to continue to exercise his "visitation" in Virginia, and for that reason, declined to modify the physical custody schedule.

In this appeal, John challenges the court's refusal to change the physical custody schedule to be more workable for him, in light of the distance, time away from his business, and expenses required for him to be with his children in Virginia the first fifteen days of each month. He also disputes the court's conclusion concerning the adequacy of the information he provided concerning his income, and seeks an award of child support from this court. Finally, he asks this court to rule on his motion involving overnight visitation of Michele's boyfriend, which the court did not address in its reasons for judgment or in the judgment.

DISCUSSION

The issues before the trial court in this case involved John's requests to modify the physical custody and child support provisions of a judgment to which he had previously stipulated. In the Cedotal case, 05-1524 at pp. 5-6, 927 So.2d at 436, this court summarized the legal standard for modifying a stipulated judgment concerning child custody, as follows:

> When a custody decree is, as herein, a stipulated or consensual judgment, a party seeking modification of custody must prove that there has been a material change in circumstances (also referred to as a change in circumstances materially affecting the welfare of the child) since the original decree, as well as prove that the proposed modification is in the best interest of the child. Shaffer v. Shaffer, 00-1251 (La.App. 1 Cir. 9/13/00), 808 So.2d 354, 356-357 n.2, writ denied, 00-2838 (La.11/13/00), 774 So.2d 151.
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> The Louisiana Supreme Court has rightly recognized that unjustified litigation, the threat of litigation, or continued parental conflict can bring about unfavorable emotional consequences for a child. See Bergeron v. Bergeron, 492 So.2d 1193, 1200 (La.1986). This policy is as applicable to attempts to change physical custody as it is to attempts to change legal custody. Davenport v. Manning, 95-2349 (La.App. 4 Cir. 6/5/96), 675 So.2d 1230, 1232. Therefore, a parent seeking modification of a "physical" custody decree must meet

the two-prong test. See Lee v. Lee, 34,025 (La.App. 2 Cir. 8/25/00), 766 So.2d 723, 726, writ denied, 00-2680 (La.11/13/00), 774 So.2d 150.

The trial court in Cedotal had stated that the burden of proof for the parent seeking to modify the physical custody was to prove that it was in the best interest of the child to have the visitation as that parent wanted it to be. Finding this burden of proof was satisfied, the trial court modified the physical custody. In evaluating the trial court's decision, this court noted that by failing to first ascertain whether a change in circumstances materially affecting the welfare of the child had occurred, the trial court had applied an incorrect legal standard, and further stated:

> The trial court's failure to determine whether a change in circumstances materially affecting this child had occurred constitutes legal error. A legal error occurs when a trial court applies incorrect principles of law and such errors are prejudicial. Legal errors are prejudicial when they materially affect the outcome and deprive a party of substantial rights. When a prejudicial error of law skews the trial court's finding of a material issue of fact and causes it to pretermit other issues, the appellate court is required, if it can--if the record is otherwise complete--to render judgment on the record by applying the correct law and determining the essential material facts *de novo*. Evans, 708 So.2d at 735; see Polezcek v. Polezcek, 99-2076 (La.App. 1 Cir. 2/18/00), 752 So.2d 402, 404.
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> In this case, however, the trial court's legal error effectively precluded both parents the opportunity for a complete presentation of evidence, preventing this court from making a determination regarding whether a change in circumstances materially affecting the welfare of this child has occurred. A complete record is essential in that each child custody case must be viewed within its own peculiar set of facts. R.J. v. M.J., 03-2676 (La.App. 1 Cir. 5/14/04), 880 So.2d 20, 23.

Cedotal, 05-1524 at pp. 7-8, 927 So.2d at 437. Having reached this conclusion, this court reversed the judgment and remanded the matter for further proceedings.

In the instant case, the trial court stated in written reasons:

> The parties have agreed and stipulated that continuing Mr. Young's visitation in Virginia is in the best interest of the children; therefore, the Court declines to alter the visitation schedule at this time.

It is clear from this comment that the trial court did not consider any other factors in reaching its decision not to adjust the physical custody schedule. This was legal error, and by failing to consider whether a material change in circumstances affecting the welfare of these children had occurred, the court's decision was skewed. Therefore, this court must review the record *de novo* to determine if there is enough information for this court to make that determination, applying the correct principles of law.

The only evidence suggesting a material change in circumstances is the testimony of John and Michele that Michele's boyfriend spends the night while the children are present in the house, and more significantly, that she has allowed at least one of her children to sleep with her and her boyfriend in the same bed. Additionally, John testified that his youngest daughter was visibly upset about the boyfriend sleeping at the house. Assuming arguendo that this alone constitutes a change in circumstances materially affecting the welfare of the children, we still find that John has failed to produce any evidence that a modification of the custody agreement would be in the best interest of the children.

At trial, John testified that the current physical custody arrangement affected his business and personal life, essentially suggesting that a modification of the custody arrangement would be in *his* best interest. However, none of his testimony focused on how such a modification would be in his *children's* best interest. In fact, the evidence adduced supported the current fifteen-day arrangement.[8] John stated that his daughters look forward to him coming to Virginia, and while he is

[8] John asserts on appeal that the trial court erred in refusing to change the physical custody schedule to be more workable for him. Particularly, John states that he requested the court to alter his physical custody in Virginia to 10 days rather than 15, with the children spending a majority of their summer vacation and holidays with him in Louisiana. It is unclear from the record whether this particular demand or argument was before the trial court. However, to the extent that modification of the custody arrangement was before the trial court, and we have determined that John failed to produce evidence sufficient to establish that a modification was in the best interest of his children, we pretermit a discussion of this specific issue.

there, he cooks, cleans, and takes them to and from school. Accordingly, we find that John failed to produce any evidence as to the proposed physical custody modification and how that modification would be in the best interest of his children.

However, we do find that the parties stipulated during the trial that neither party was to have overnight guests of the opposite sex, who were not related by blood or marriage, while that party is exercising their physical custody of the children. During questioning by Michele's counsel, John was asked: "It's okay for you to have an overnight guest of the opposite sex when you have the kids but it's not okay for her?" John replied that "it's not okay for either of us [and] I will be glad to stipulate that neither of us can do it." Additionally, during Michele's testimony the court indicated that it objected to the practice of having overnight guests of the opposite sex, particularly when the children were sleeping in the same bed, and would issue a ruling to that effect. Michele's counsel replied: "that's all right with us." Accordingly, the custody agreement should be modified to include the limitation that neither party is to have overnight guests of the opposite sex who are not related by blood or marriage while that party is exercising his or her physical custody of the children.

With regard to modification of child support, we note that a child support obligation is subject to modification only when there has been a substantial change in circumstances between the time of the prior support award and the time of the motion for a modification. La. R.S. 9:311(A) and Barrios v. Barrios, 95-1390, p. 4 (La. App. 1st Cir. 2/23/96), 694 So. 2d 290, 293, writ denied, 96-0743 (La. 5/3/96), 672 So. 2d 691. The party seeking a modification has the burden of proving that a change has occurred. Once the moving party proves a change in circumstances, a presumption exists that the support obligation must be modified. The burden then

shifts to the other party to disprove the change or otherwise overcome the presumption. Barrios, 95-1390 at p. 4, 694 So. 2d at 293.

Additionally, in any proceeding to modify child support, the Child Support Guidelines are to be used. La. R.S. 9:315.1(A). The guidelines mandate that each party provide to the court proof of his or her income. Louisiana Revised Statute 9:315.2(A) states:

> Each party shall provide to the court a verified income statement showing gross income and adjusted gross income, together with documentation of current and past earnings. Suitable documentation of current earnings shall include but not be limited to pay stubs, employer statements, or receipts and expenses if self-employed. The documentation shall include a copy of the party's most recent federal tax return. A copy of the statement and documentation shall be provided to the other party.

In the instant case, the only proof of income submitted by John at trial was a 2003 federal income tax return showing a loss by his S Corporation. However, Michele admitted a 2004 federal tax return for John's retail flooring business, which suggests a substantial income to John for that year. John did not provide the court with his most recent federal tax return from 2004, nor did he submit a verified income statement, pay stub, business report, or any other documents that would establish his income for 2005. Additionally, evidence at trial indicated that John is involved in some real estate venture, but no evidence was offered to indicate how that venture affected his personal income.

While generally a remand is necessary in cases where the record contains inadequate information and documentation upon which to make a child support determination under the guidelines, we find a remand in this case is unwarranted. See Barrios, 95-1390 at p. 5, 694 So. 2d 290. The trial court, recognizing that the evidence was insufficient to make a child support determination, left the record open for sixty days to afford the parties the opportunity to correct deficient documents and for John to obtain the deposition of his accountant. However, the

record does not show that any such documents were ever introduced into evidence. Accordingly, under these circumstances, we find that the trial court was correct in finding that John failed to establish his income, and denial of his request for child support was proper.

CONCLUSION

For the foregoing reasons, we amend the trial court's judgment to reflect that neither John nor Michele is to have overnight guests of the opposite sex who are not related by blood or marriage. In all other respects, the trial court's April 17, 2006 judgment is affirmed. All costs of this appeal are assessed against John Young.

AMENDED AND AS AMENDED, AFFIRMED.

NOT DESIGNATED FOR PUBLICATION

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COURT OF APPEAL

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MICHELE N. YOUNG

VERSUS

JOHN P. YOUNG

BEFORE: PARRO, GUIDRY, PETTIGREW, McCLENDON, AND HUGHES, JJ.

PARRO, J., dissenting.

I disagree with the majority opinion, because I believe the trial court should be given an opportunity on remand to re-visit the issues in this case.

Regarding the overnight visitation of Michele's boyfriend, the trial court's failure to rule on John's motion on this issue would generally be construed as a rejection of that claim. Gautro v. Fidelity Fire and Cas. Ins. Co., 623 So.2d 106, 107 n.3 (La. App. 1st Cir.), writ denied, 629 So.2d 413 (La. 1993). Yet, given the trial court's comments during the trial, it is obvious that this omission from the judgment was inadvertent. However, it is not clear whether the trial court might have devised a reciprocal prohibition against either parent allowing overnight stays by persons of the opposite sex while the children were present, as the majority opinion does, or whether the ruling would have been directed only to prohibit Michele from allowing her children to be in the same bed with her and her boyfriend. Rather than making that ruling in this court, I would prefer to remand this case to allow the trial court to exercise its discretion and make the decision on this issue.

Additionally, this case is unique because of the extraordinary commitment John has demonstrated in order to remain fully present in his daughters' lives, despite the

1200 miles that separate them from him. He has taken on the financial responsibility of a second household across the country and leaves his business and other personal responsibilities for two weeks out of every month so he can be a father to his children. His request for a modification to the physical custody **schedule** does not seek to change the legal custody or the amount of time the girls spend with either parent, but merely to make the schedule more workable for him by increasing the summertime physical custody and reducing the amount of time he spends each month in Virginia. By commenting several times during the trial that the parties had already stipulated that the best interest of the children would be served by John's continued physical custody of them in Virginia, the trial court cut short John's attempts to provide a more complete explanation of how the children's interests might be better served by a modification of the **schedule**. Therefore, the evidence on this issue was effectively foreclosed by the trial court's comments. For this reason also, I would remand the case to allow John the opportunity to more fully explain why modification of the physical custody schedule is ultimately in the best interest of his daughters.

Finally, with reference to the issue of child support, the trial court found that John had satisfied his burden of proof under LSA-C.C. art. 142 that a material change in circumstances had occurred, in that Michele's income had increased substantially. Yet despite ordering the post-trial deposition of John's accountant and leaving the record open for that evidence, the trial court obviously did not have this deposition before him when judgment was rendered. Without that deposition and the financial information it would provide, neither the trial court nor this court can reach an equitable determination concerning John's entitlement to child support. For this reason also, I would remand for the receipt of this evidence.

Therefore, I respectfully dissent.