

1 Marie C. Bechtel and Carla M. Roden, opposed those requests, and thereafter the matter set out
2 on the standard custody case track, including various judicial custody conferences and a child
3 custody evaluation with Family Court Services.

4 At the conclusion of trial, the Court instructed the parties to exchange written closing
5 arguments and proposed statements of decision no later than close of business on December 29,
6 2011, and the matter was deemed submitted. The Court has considered the arguments and
7 moving papers filed by both parties, reviewed the court file, carefully examined numerous
8 exhibits, and listened carefully and evaluated the credibility of a number of witnesses. On March
9 13, 2012, the Court issued and filed its "Statement of Decision Order re: Move Away Child
10 Custody and Visitation." On March 28, 2012, Jaime filed an objection to this pleading under the
11 assumption the Court intended the document to be a proposed statement of decision under
12 *California Rules of Court, rule 3.1590(b)*. The Court will address Jaime's objections in detail in
13 Section II, below. Having considered Jaime's objections, the Court now issues its Final
14 Statement of Decision.

15 **I. FACTUAL AND PROCEDURAL BACKGROUND**

16 Jaime and Danielle were married June 30, 2001, and separated on or about December 23,
17 2005, after a marriage of four years and five months. They share joint legal and joint physical
18 custody of Cyrus and Cyrell.

19 Throughout their four-and-a-half-year marriage, the parties had only modest means and
20 relied in large part on assistance from their extended families. After they married in June 2001,
21 they moved into a trailer behind Jaime's parents' house in Morgan Hill. After both parties had
22 been unemployed, in late December 2001 Jaime began working for Frito Lay, and Danielle
23 worked for Target. In late November 2002, Jaime left Frito Lay. During this time, they moved
24 in with Jaime's cousin Michael where they remained for six months.

1 In the spring of 2003, when Danielle was pregnant with the parties' second child, Cyrell,
2 they moved in with Danielle's mother and stepfather in Salinas. In July 2003, Jaime returned to
3 Frito Lay. In or around February 2004, the parties and their two children moved into their first
4 apartment of their own in Morgan Hill. Danielle attended Morgan Hill Adult School and
5 obtained her GED and a certificate related to hospitality management. In the late spring or early
6 summer, Danielle began a retail job at General Nutrition Centers. Jaime continued to provide
7 support for the family while working for Frito Lay.

8 In July 2004, Jaime was arrested for and charged with the rape of his 14-year-old cousin,
9 who, along with her mother, father, and brother, had lived with the parties for approximately two
10 weeks that summer. The criminal court dismissed the forcible rape charges, but Jaime pled no
11 contest to attempted statutory rape.

12 By late 2005, the marriage began to break down. Jaime testified that he and Danielle
13 argued about her apparent desire to live the single life and that each party accused the other of
14 cheating. Danielle testified that there was a history of domestic violence with Jaime throughout
15 their relationship, culminating with an incident at the end of November 2005, in which Danielle
16 alleged's Jaime choked, hit, kicked, and beat her. It was at this time she decided she had to
17 leave.

18 The parties agreed to an informal shared custody arrangement. Jaime testified the
19 agreement was to exchange the children every two days or so. Danielle testified the agreement
20 was to exchange the children regularly and/or upon request, but not at set intervals. They could
21 not resolve this dispute.

22 On January 17, 2006, Danielle initiated a family law action seeking sole physical
23 custody, with unspecified visitation to Jaime, based on allegations of domestic violence. But she
24 failed to properly serve Jaime. Jaime subsequently filed his own family law action on January
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1 25, 2006, and was granted temporary sole legal and sole physical custody of the minor children
2 based on an allegation that Danielle withheld the children.

3 The two cases were consolidated with Jaime's action as the lead case. The matter
4 proceeded to an emergency screening with Mary Day Rolison, LCSW, at Family Court Services
5 on January 31, 2006. Ms. Rolison recommended and the Court adopted a temporary order for
6 joint legal and joint physical custody at a 50-50 timeshare. The parties then attended mediation
7 at Family Court Services on March 6, 2006, and reached an agreement to maintain joint legal and
8 joint physical custody at an equal timeshare.

9 Although the parties had agreed to an equal timeshare arrangement with the children,
10 Jaime testified, and the testimony of other witnesses corroborated, that a month or two after the
11 mediated agreement was reached, Danielle only saw the children once per month, on average.
12 Jaime, who was still attending school full time, became the *de facto* primary custodian and relied
13 on his immediate family members for support. It was not until March or April 2008 that
14 Danielle began spending substantial, regular time with the children.

15 Danielle testified that she began using methamphetamine sometime in 2006. Jaime
16 testified that he was aware of Danielle's drug use and, in fact, used drugs with her on various
17 occasions. Jaime further testified that his drug use was sporadic, on occasions when he was
18 away from the children.

19 In December 2006, Danielle was prosecuted in the San Francisco County Superior Court
20 for solicitation of prostitution. Over the course of those 15-month proceedings, she was twice
21 arrested on bench warrants for failure to appear at pre-trial hearings. The prostitution charge was
22 dismissed in February 2008 after Danielle completed the diversion program, which consisted of
23 participation in counseling aimed at reforming women engaged in prostitution.

24 Danielle testified that she began dating her now-husband, Marvin Jones, in May 2007
25 after the pair met at a coffee shop inside a downtown San Jose library. She testified that in or

1 around August 2007 she moved into the three-bedroom apartment that Marvin was sharing with
2 two roommates. Danielle testified that Marvin was a tremendously positive influence on her,
3 that he helped her to get out of prostitution, and turn her life around, and immediately began
4 providing for her, Cyrus, and Cyrell as though they were his own family.

5 Danielle admits to using methamphetamine on more than one occasion in 2007. In
6 August 2007, Danielle was charged and convicted in the Santa Clara County Superior Court of
7 possession of a controlled substance. Danielle again availed herself of a pretrial diversion
8 program, and the drug possession charge was dropped after she paid monetary fines and
9 completed a several-weeks-long drug treatment course through Proyecto Primavera.

10 Marvin testified that Danielle did not disclose and he was not aware of any illicit drug use
11 on her part in 2007. He further testified that, although he, at some later point in time, became
12 aware that Danielle had been arrested for drug possession, he was not aware of any drug use on
13 Danielle's part until 2010 when she told him she had recently used drugs with Jaime and Jaime's
14 fiancée, Jessica Gallardo. Danielle and Marvin now have a daughter together, Isis, who was
15 born in August 2009.

16 Jaime began dating his now-fiancée, Jessica Gallardo, in November 2007. Jaime and
17 Jessica had known each other through First Apostolic Church since approximately 2000, but did
18 not forge a personal relationship until they began dating. Jessica testified that she knew Danielle
19 through the church, as well, but did not establish any kind of relationship with her until early
20 2010. Jaime and Jessica began living together in February 2008. Their household included
21 Cyrus and Cyrell as well as Abigail, Jessica's daughter from a previous relationship. Jessica
22 testified that she was ignorant of Jaime's drug use until after they had moved in together, and she
23 began to observe that on occasion Jaime would not sleep or eat for abnormal periods of time.
24 Jaime and Jessica now have a son, Dominic, who was born in July 2009.

1 In January 2008, Danielle was arrested for and charged in the Santa Clara County
2 Superior Court with misdemeanor child endangerment based on a December 2007 incident in
3 which Cyrell, then four years old, was found wandering the streets of downtown San Jose on a
4 weekday morning while in Danielle's care. The charge was subsequently reduced to the
5 California Penal Code Section 415 catch-all category of fighting, noise, or offensive words, to
6 which Danielle pled no contest and for which she was sentenced to one year of probation and a
7 16-week parenting class.

8 Marvin testified that in January 2010, he learned that he had been hired for a job with
9 Apple Computers in North Carolina and was given a start date of August 30, 2010. By that time,
10 much of the initial acrimony had subsided and the parties were maintaining a peaceful
11 co-parenting existence. In February 2010, Jaime and Jessica moved into the small Berry Court
12 apartment complex where Danielle and Marvin were living. Danielle quickly undertook to
13 befriend Jessica, and by April 2010, they were spending a substantial amount of time together.
14 It was during this time that Danielle testified that Jessica confided in her that Jaime was abusing
15 her, including burning her on the arm with a knife. Jessica denied she ever confided in Danielle
16 and the burn on her arm was an accident.

17 Jaime and Jessica testified that Danielle and Jaime used methamphetamine together on
18 numerous occasions while they were living as neighbors. Jessica testified that on one occasion
19 she tried methamphetamine with Danielle. Danielle characterizes the use with Jessica as a
20 one-time relapse instigated by Jaime, because he had purchased the drugs, whereas she had given
21 up the drug "lifestyle" several years earlier. Jaime maintains that was not the first time the
22 parties used methamphetamine together, and that Danielle had sought to obtain
23 methamphetamine from him several times while they were neighbors. Danielle denies these
24 allegations.

1 Danielle testified that when she found out that Jaime was being violent against Jessica
2 and her knowledge of his continued drug use, she became concerned for the safety of their
3 children. On August 30, 2010, Danielle filed an *ex parte* motion seeking sole legal and sole
4 physical custody of the minor children and permission to relocate to North Carolina with the
5 minor children to live with Marvin. Danielle based her request on allegations that Jaime was
6 physically abusing Jessica and that Jaime was using methamphetamine. The parties attended
7 three emergency screenings at Family Court Services, during the course of which Jaime tested
8 positive for methamphetamine use. At first, Jaime was not forthcoming about his drug use and
9 denied using methamphetamine; however, he did acknowledge that he did indeed use during his
10 interview with the Family Court Services screener, Mary Day Rolison, LCSW. Danielle tested
11 negative for methamphetamine use during the emergency screening, but admitted to having used
12 methamphetamine in July 2010.

13 The resulting *Request and Order Pursuant to an Emergency Screening* filed September
14 21, 2010, maintained joint legal and joint physical custody, but restricted Jaime to
15 non-professional supervised visitation every Tuesday and Thursday from 2:30 p.m. until 7:00
16 p.m. and every first, third, and fifth Saturday and Sunday from 10:00 a.m. until 7:00 p.m. The
17 order further required that both parties attend self-help classes, such as Narcotics Anonymous
18 (Danielle once per week, and Jaime three times per week), and that Jaime complete 16-week
19 courses in Conflict Accountability and Parenting Without Violence and submit to hair-follicle
20 drug tests on a quarterly basis for a period of two years.

21 On November 30, 2010, the Court referred Danielle's move-away request to a custody
22 evaluation with Family Court Services. On December 13, 2010, a custody review hearing was
23 held and, in consideration of Jaime's sobriety and compliance with the court-ordered
24 rehabilitation programs, the Court lifted the requirement that Jaime's visitation be supervised. At
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1 that time, the Court also issued an *Employment Efforts Order* as to both parties, who were then
2 unemployed.

3 The parties commenced a custody evaluation with Lynn Huggins, LMFT, on January 18,
4 2011. On March 14, 2011, Ms. Huggins issued a *Request and Order Pursuant to an Evaluation*
5 recommending that Danielle's custody, visitation, and move-away requests be granted. Jaime
6 objected to Ms. Huggins' recommendations, and as such, those issues were set for a four-day
7 trial in the Civil Division commencing September 6, 2011, with an accompanying Mandatory
8 Settlement Conference in the Family Division on August 22, 2011. At said Mandatory
9 Settlement Conference, the Court vacated the September trial dates and set the matter for the
10 instant cumulative two-day trial in the Family Division.

11 **II. JAIME'S OBJECTIONS TO PROPOSED STATEMENT OF DECISION**

12 At the outset, the Court apologizes for any confusion that resulted from its March 13,
13 2012 "Statement of Decision Order re: Move Away Child Custody and Visitation." The Court
14 finds Jaime was correct to treat that pleading as a proposed statement of decision under
15 *California Rules of Court (C.R.C.), rule 3.1590*. For purposes of this discussion, the Court will
16 refer to the March 13, 2012 pleading as "the proposed SOD." Jaime timely served objections to
17 the proposed SOD. (*C.R.C., rule 3.1590(g)*.) As such, the Court has considered Jaime's
18 objections, and will address them, below, before making its final ruling on the matter.

19 Jaime begins his objections by restating objections he made a trial to the Court
20 considering certain documents, testimony and evidence. The Court overruled Jaime's objections
21 at trial, and stands by its rulings now. Jaime raises one new procedural objection, objecting to
22 any portion of the proposed SOD that relied on facts, opinions, conclusions and/or orders set
23 forth in Danielle's Closing Argument, which Danielle filed with the Court on December 30,
24 2011, the same day as Jaime filed his closing argument. The Court finds no prejudice to Jaime in
25 considering Danielle's closing argument, to the extent it was not timely filed and served.

1 Jaime then proceeds to make specific objections to the Court's substantive findings,
2 which the Court will address in turn, using the headings noted by Jaime:

3 Evaluation Under Family Code section 3011:

4 *Social Support/ Living Arrangements:* In the proposed SOD, the Court did explain how
5 the change in living environment will impact Danielle, noting that while she does not currently
6 have friends and family in North Carolina, her new spouse, Marvin Jones, is a strong partner and
7 support person. Moreover, Danielle and Marvin have indicated a plan for expanding their social
8 support network.

9 *Nature and Amount of Contacts with Both Parents:* The Court believes it has sufficiently
10 addressed this issue in the proposed SOD. The Court's ultimate finding is that Danielle denied
11 visitation to Jaime out of concerns for the children's safety, based on the fact both Jaime and his
12 significant other, Jessica Gallardo, denied the domestic violence issues which the Court finds
13 existed between them.

14 *Whether the Parents Have Drug or Alcohol Issues:* The Court addresses both parties'
15 past drug issues in the proposed SOD. The Court finds that both parties have taken steps to
16 address their problems and live positive lives. The Court did not find the testimony of Dr.
17 Michael Kerner on this issue to be beneficial, as the Court finds his opinion as to traits and
18 characteristics of methamphetamine users as a group did not apply to the parties in this
19 proceeding. The Court finds Danielle did not minimize her past drug use.

20 *History of Domestic Violence:* In the proposed SOD, the Court addressed at length its
21 findings regarding Jaime's perpetration of domestic violence against Jessica, and the evidence
22 supporting that finding. The Court found the evidence regarding the parties' children's
23 description of this violence to be credible. The Court also found the testimony of eyewitness
24 Anjelita Gonzalez to be credible. In doing so, the Court recognizes that two witnesses'
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1 perception of events can be different from one another. That difference, called an inconsistency
2 by Jaime in his objections, does not make the witnesses' testimony any less valid.

3 The Court also found credible the testimony of witness Marylou Aguirre, Danielle's
4 mother. The Court did not address Ms. Aguirre's admission that she has made allegations of
5 domestic violence against spouses and children, because the Court did not find that admission
6 relevant to the proceedings. In evaluating Ms. Aguirre's credibility, the Court was aware that
7 she has a potential bias in favor of Danielle. Despite any potential bias, the Court finds Ms.
8 Aguirre's testimony to be credible.

9 Similarly, the Court found credible Danielle's testimony regarding an incident between
10 Jessica and Jaime involving a burn on Jessica's arm. The Court did not find relevance in the fact
11 law enforcement officials did not take action on the incident, or that Family Court Services
12 personnel found Jessica's explanation (that she was injured in a cooking accident) "plausible."
13 Nor did the Court find relevance in the fact that Family Court Services previously issued
14 recommend orders following emergency screenings giving Jaime joint custody of the children.
15 For purposes of the issues presently before it, this Court is the ultimate trier of fact and is
16 charged with evaluating the credibility of competing witnesses. The Court has done so in this
17 matter following a full trial and presentation of evidence, something that neither the law
18 enforcement officials nor the Family Court Services personnel Jaime references in his objections
19 undertook before making their recommendations. This fact is particularly important with regards
20 to Jaime's argument that the Court is barred from considering Danielle's allegations because the
21 emergency screeners would not have sent the parties home with a joint custody order had there
22 been evidence of domestic violence. An emergency screening involves a brief snapshot into the
23 parties' lives, conducted with limited investigation over a short period. The Court issues its
24 current findings following a multiple-day trial. Res judicata does not apply to preclude the Court
25 from considering Danielle's allegations.

1 *History of Child Abuse:* The Court has considered both parties' histories with law
2 enforcement and their subsequent conduct in reaching its decision in this matter. As discussed in
3 detail in the proposed SOD, the Court believes both parties have successfully rehabilitated
4 themselves, completing all Court-mandated programs. The Court does not believe any further
5 discussion is necessary.

6 *Health, Safety and Welfare of the Children:* Again, the Court believes is has fully
7 addressed this issue in the proposed SOD. The Court took both parties' histories into account in
8 reaching its decision and determined that both parties have rehabilitated themselves. The Court
9 does not believe it is necessary to delve further into Danielle's past, nor is it necessary to delve
10 further into Jaime's past.

11 Factors to Consider from *Burgess* and *LaMusga* and Other Factors

12 *Distance:* The Court has not *speculated* as to how the children will cope with a cross-
13 country move; its findings are based on the evidence presented at trial, as discussed in the
14 proposed SOD. Namely, Lynn Huggins of Family Court Services testified both children have
15 good coping skills and will adjust to the transition.

16 *Parents' Communication:* The Court considered and weighed all of the evidence
17 presented at trial. The findings set forth in the proposed SOD are still relevant today, particularly
18 Ms. Huggins's testimony that Jaime admits he used the children to communicate with Danielle.

19 *Parents' Relationship with Children:* The Court stands by its discussion in the proposed
20 SOD of the impact Jaime's domestic violence has had on the children.

21 *Children's Relationship with Siblings:* The parties asked the Court to take judicial notice
22 of the court files, in addition to considering the testimony and evidence presented at the trial. In
23 the proceedings leading to trial, Danielle submitted a declaration discussing Cyrus's exhibition
24 of violent behavior. As the declaration was part of the court files, of which the Court took
25 judicial notice, it was appropriate for the Court to consider the declaration in making its decision.

1 *Criminal Record of Parents:* In evaluating Jaime’s criminal record, the Court did not
2 give any import to the title of the crime or the nature of his plea to the crime. Rather the Court
3 considered the nature of Jaime’s conduct in commissioning the crime, and, more importantly, the
4 actions Jaime took afterwards to rehabilitate himself. The Court focused on the positive forward
5 motion Jaime is making in his life, rather than the technical distinction between attempted sexual
6 assault and attempted statutory rape.

7 Evaluator’s Report

8 The Court’s findings in the proposed SOD make it clear that Ms. Huggins’s report was
9 but one factor the Court considered in reaching its decision in this matter. The Court also made
10 clear in the proposed SOD that the Court took into consideration the lapse in time between Ms.
11 Huggins’s report and the trial. The Court does not believe any further discussion of this issue is
12 required.

13 Credibility

14 Jaime objects to the Court’s findings regarding the credibility of various witnesses.
15 While it is within Jaime’s right to object, the Court stands by its previous findings. As the trier
16 of fact, the Court is tasked with evaluating each witness’s credibility, which it has done as set
17 forth in the proposed SOD, based on the evidence presented at trial.

18 Findings/ Conclusions

19 Jaime suggests it was inappropriate for the Court to make a finding under Family Code
20 section 3044, as neither party had asked the Court to make such a finding. Moreover, Jaime
21 argues that such a finding was not supported by the evidence at trial. The Court disagrees. In
22 the proposed SOD, the Court discussed at length the evidence regarding domestic violence that
23 was presented at the trial, and the findings the Court made thereon. The nature of the current
24 proceeding required the Court to make findings regarding Jaime’s commission of domestic
25 violence. The Court’s obligation thereafter to consider the presumption of Family Code section

1 3044 arises regardless of whether a party has explicitly requested a so-called 3044 finding. The
2 Court does agree that, in the proposed SOD, it made a misstatement regarding the nature of the
3 presumption. In the proposed SOD, the Court stated, “When a Court makes a finding of
4 domestic violence against a parent seeking custody, that parent has a right to rebut that finding
5 by the preponderance of the evidence.” As Jaime points out in his objections, section 3044
6 creates a rebuttable presumption “that an award of sole or joint legal or physical custody of a
7 child to a person who has perpetrated domestic violence is detrimental to the best interest of the
8 child... .” (*Fam. Code, 3044(a).*) It is this presumption that is rebuttable by a preponderance of
9 the evidence. This was a non-substantive oversight on the Court’s part. In its subsequent
10 discussion of whether Jaime had rebutted the presumption, the Court was considering not
11 whether Jaime had rebutted a presumption of domestic violence, but whether Jaime had rebutted
12 the presumption that the award of sole or joint custody of the children to him would be
13 detrimental to the children’s best interest. The Court’s analysis supports a finding that Jaime did
14 not rebut that presumption. The Court has amended its discussion of section 3044 in this Final
15 Statement of Decision to correct for the oversight.

16 The remainder of Jaime’s objections (to the Court giving Danielle sole legal custody and
17 to the Court’s alleged impartiality and prejudgment of the case) are baseless and without merit.
18 The Court stands by its findings in the proposed SOD.

19 Based on the above, the Court adopts its proposed SOD as its Final Statement of
20 Decision, amending the section headings to account for the addition of this discussion about
21 Jaime’s objections, and amending the discussion in the sections entitled Findings and
22 Conclusions to address the Court’s oversight in its discussion of Family Code section 3044. The
23 Final Statement of Decision, with these amendments, is set forth below.

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1 In the case at bar, Danielle has been the de facto primary custodial parent of the children
2 for over a year pursuant to the *September 2010 Emergency Screening Order*. A request for
3 permission to relocate with a minor child made by a parent with sole physical custody under an
4 existing order or by a *de facto* custodial parent in conjunction with an initial custody
5 determination is considered under the changed circumstances rule. (See *In re Marriage of*
6 *LaMusga (2004) 32 Cal.4th 1072, 1088.*) In such cases, the noncustodial parent has the burden
7 of showing that “as a result of relocation with [the moving] parent, the child will suffer detriment
8 rendering it ‘essential or expedient for the welfare of the child that there be a change [in
9 custody].” (*Id.* at 1089 [citing *In re Marriage of Burgess, (1996) 13 Cal.4th 25, 38*].) However,
10 a different analysis may be required when parents share joint physical custody of the minor
11 children under an existing order or by default, and one parent seeks to relocate with the minor
12 children. (*Ibid* [citing *Burgess, supra, 13 Cal.4th at 40, fn. 12.*] “In such cases, if it is shown
13 that the best interests of the children require modification or termination of the order, the court
14 ‘must determine de novo what arrangement for primary custody is in the best interest of the
15 minor children.’” (*Ibid.*)

16 In the current case, the parents share joint physical and legal custody and there has been
17 no final judicial custody determination. The September 21, 2010, *Request and Order Pursuant to*
18 *an Emergency Screening* expressly states that it is a “Temporary Recommended Order.” Both
19 parties agree that any proposed change to the joint legal and joint physical custody arrangements
20 set forth therein must be evaluated under the best interest standard. The Court agrees.

21 2. No Evidence of Bad Faith

22 Courts are not required to second guess the underlying reasons for the proposed move, as
23 long as there is no evidence the proposed move-away is in bad faith or intended to frustrate the
24 other parent’s relationship with the child. (*Burgess, supra, 13 Cal.4th at 36.*) In the current
25 case, Danielle wishes to move to join her husband (Marvin) who already lives and works in

1 North Carolina. The parents had been sharing custody and getting along well. The only reason
2 Danielle requested permission to move to North Carolina is that Marvin was offered a job there.
3 Otherwise, they would have never considered it. Danielle also testified that they would pay for
4 two trips for the children to travel to California to visit their father if granted permission to move.

5 Jaime testified that Danielle kept the children away from him for two weeks during their
6 initial separation in December 2005. She also frustrated his visits by claiming the children were
7 sick when they were not and interfering with his phone calls to the children. Jaime also testified
8 that Danielle refused to modify the current custody order to give Jaime overnight visits with the
9 children. Jaime alleges that these acts by Danielle are motivated by bad faith or a desire to keep
10 Cyrus and Cyrell from him and a desire to be a gatekeeper. Danielle disputes Jaime's allegations
11 that she interfered with phone calls or kept the boys from him when they were not sick. Danielle
12 also testified that she refused to allow overnight visits because she was concerned that neither
13 Jaime or Jessica are taking responsibility for the violence in their relationship; and it is not safe
14 for the children. The Court finds the evidence of bad faith presented by Jaime is not persuasive.
15 The Court finds that Danielle's move-away request is in good faith.

16 **B. Evaluation Under Family Code Section 3011**

17 In an initial custody determination, the trial court has the widest discretion to choose a
18 parenting plan that is in the best interests of the child. It must look to all the circumstances
19 bearing on the best interests of the minor child. *Family Code section 3011* lists specific factors,
20 among others, that the trial court must consider in determining the best interests of the child in a
21 proceeding to determine custody and visitation: (a) the health, safety, and welfare of the child;
22 (b) any history of abuse by one parent against the child or against the other parent; and (c) the
23 nature and amount of contact with both parents. In an initial custody determination, a parent
24 seeking to relocate with the minor children bears no burden of establishing that the move is
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1 necessary. In general, the trial court shall consider the effects of relocation on the best interests
2 of the minor children.

3 The Court addresses the factors below.

4 **a. Medical and Educational Needs of the Children - Lynn Huggins**

5 testified that the teachers she interviewed reported that both parents were involved in the
6 children's education and the boys' homework was always completed regardless who had
7 custody. Both parents shared information and attended teacher conferences. Neither Cyrus nor
8 Cyrell had any special educational needs and a change of school should not be of concern. There
9 were also positive reports from the children's medical providers that the parents shared
10 information and were cooperative. Both parents brought the children in for medical
11 appointments and followed recommendations. It appears the parents are cooperative and both
12 parents are capable of caring for the educational and medical needs of the children.

13 **b. Social Support/Living Arrangement of Parents – Jaime has a**

14 good support system in California with his parents and other family members. His parents have
15 shown their full support of Jaime and the children, consistently providing shelter and financial
16 support when needed. Jessica and Jaime are now living in a spacious home with their children in
17 Morgan Hill. Danielle does not have any relatives or friends in North Carolina. However,
18 Danielle's husband, Marvin Jones, has shown to be a good support system, both socially and
19 financially, for Danielle and the boys throughout their relationship. Marvin testified that he has
20 met his neighbors and their children. There are a number of community family events which
21 will help to expand their social network. Marvin has rented a spacious three-bedroom, two-bath
22 home in North Carolina.

23 **c. The Nature and Amount of Contact With Both Parents -**

24 Danielle has been the primary caretaker for the children for over a year as a result of the
25 September 2010 emergency screening order. However, the parents historically have shared a 50

1 percent timeshare. Although Jaime's timeshare was restricted this last year, he frequently asked
2 Danielle to give him overnights and additional time with the boys. Jaime appeared to maximize
3 the time he did have with the children. Danielle testified that she refused Jaime overnights with
4 the boys, because she was concerned for the safety of the boys because neither Jaime nor Jessica
5 had taken responsibility for the violence in their relationship.

6 **d. Whether the Parents Have Drug or Alcohol Abuse Issues -**

7 Both parents also have a history of drug use. Danielle successfully completed a drug program in
8 2008 and had been clean and sober until she relapsed by using methamphetamine in July 2010.
9 She has been clean and sober since the relapse and has been attending self-help groups. Jaime
10 admitted using drugs throughout the relationship with Danielle and Jessica. However, during the
11 September 2010 emergency screening, Jaime denied any drug use. He subsequently tested
12 positive for methamphetamine. Since the emergency screening, all Jaime's drug tests have been
13 negative, and he has complied with all Family Court Services' screening orders by attending
14 self-help groups and other requirements. So it appears that both parents have been clean and
15 sober since trial and are on a positive path of recovery.

16 **e. Whether There is a History of Domestic Violence -**

17 **i. Jaime's Domestic Violence Against Jessica -** Jessica and

18 Jaime vehemently deny that there has been any domestic violence in their relationship. A
19 number of witnesses would disagree. The most compelling witnesses are Cyrus and Cyrell.
20 Lynn Huggins interviewed the children on two separate occasions: January 28, 2011, and
21 February 16, 2011. She testified they said the same thing during each interview. As part of her
22 interview, she asked each child "what has been the best time that you've had with your mom,
23 best time you've had with your dad; worst time you've had with your mom, worst time you've
24 had with your dad?"

1 Ms. Huggins testified that both boys separately, as well as together, said the worst time
2 they ever had with their dad was an event that occurred on March 28, 2010. When Ms. Huggins
3 interviewed them on January 28, 2011, the boys said it was a birthday party for Zeke, and Jessica
4 forgot the costumes. Dad pulled Jessica's hair, grabbed the keys, and banged her head against
5 the car door. She was crying. Dad hurt Jessica. Cyrus told Ms. Huggins that when they were
6 home, he went upstairs and didn't want to talk to anyone. Ms. Huggins interviewed the boys
7 again on February 16, 2011. In addition to the March 28, 2010 event, the boys described
8 another worst time they had with dad was when dad got mad at the old apartment and punched
9 a hole in the door. Ms. Huggins testified when the children were describing these events, they
10 were both sad and scared. Ms. Huggins testified she believed the boys, felt they were credible,
11 and had not been coached.

12 Cyrus and Cyrell also told the same story to Mary Rolison during the September 2010
13 emergency screening. Ms. Huggins testified that the details of the boys' statements were
14 consistent and the same for both Huggins and Rolison over the course of several months. Ms.
15 Huggins testified that the children had vivid memories of what happened. The boys never saw
16 mom (Danielle) do anything scary.

17 Jaime and Jessica testified about the events that happened on March 28, 2010. They both
18 testified they had a heated discussion after it was discovered that Jessica had forgotten a gift and
19 the costumes for Zeke's birthday party. Jaime wanted to leave the party and Jessica wanted to
20 stay. Jaime walked toward Jessica and slammed his hand hard against the car. They both
21 testified that Jaime never hit Jessica, he never banged her head against the door, and he never
22 pulled her hair.

23 Anjelita Gonzalez, an independent witness, testified about the same March 28, 2010
24 event witnessed by Cyrus and Cyrell. Anjelita knew all the parties, because they attend the same
25 church, but testified they were not personal friends. Anjelita said that she heard a woman (later

1 identified as Jessica) pleading and crying. She saw a man (later identified as Jaime) pull
2 Jessica's hair and hit her two times in the face with his fist. She also testified that there were
3 four children present during this violent attack. The children were later identified as Dominic,
4 Abigail, Cyrus, and Cyrell. Although some of the details of Anjelita's testimony differ from
5 Cyrus and Cyrell's statements, the differences are insignificant.

6 Mary Lou Aguirre, Danielle's mother, testified about another incident of domestic
7 violence between Jessica and Jaime. It occurred February 2008 or 2009. It was at a birthday
8 party for her grandson Elijah. Jaime and Jessica were invited. Danielle and Mary Lou were
9 standing outside as Jaime and Jessica arrived with Cyrus, Cyrell, and Jessica's daughter, Abigail,
10 in a Jeep. The boys quickly got out of the Jeep and went inside. Jaime and Jessica remained
11 seated. Mary Lou testified that she looked at Jessica and saw fear in her eyes.

12 Apparently, Jessica had forgotten a birthday gift for Elijah and Jaime was upset. Jaime
13 wanted to leave the party and go to Target to get a gift for Elijah but Mary Lou pleaded with
14 them to stay. Suddenly, Jessica jumped out of the Jeep and grabbed her daughter. After jumping
15 out of the Jeep, Jessica went and stood next to Mary Lou and Danielle. Mary Lou testified that
16 Jessica was crying and crying, while holding her daughter tightly in her arms. Jaime jumped out
17 of the Jeep and approached Jessica with clenched teeth in an angry manner. Jaime yelled at
18 Jessica to get back in the Jeep. Jaime rolled up his sleeves, pulled back his fist as if he was going
19 to hit Jessica. Mary Lou jumped between them and pleaded with Jaime "please don't do this;
20 don't hurt her." Eventually Jaime calmed down and everyone went inside to join the birthday
21 party. However, Jessica didn't talk for forty minutes, because she was scared. Mary Lou
22 testified that the same fear she saw in Jessica's face was the same fear she observed previously in
23 Danielle during her marriage to Jaime.

1 Danielle also testified essentially similar to Mary Lou about the domestic violence
2 incident between Jaime and Jessica that occurred at Elijah's birthday. Jaime and Jessica deny
3 that this event ever happened.

4 Danielle also testified that Jessica confided in her that Jaime was abusing her. Jessica
5 told her that Jaime had heated up a knife and burned her arm. Jessica testified that she never
6 confided in Danielle. The burn on her arm was her fault as a result of a cooking accident.
7 However, Danielle was so concerned for Jessica's safety, she called the police. Jessica testified
8 when the police arrived at their apartment, Jessica and Jaime said nothing had happened.

9 In her declaration filed August 30, 2010, Danielle stated that on July 24, 2010, Jaime was
10 arguing with Jessica and shoved Jessica out of her house. In addition to Danielle, the people
11 present on that day were Mary Estrada, Jaslisa (Jaime's sister), Cyrus and Cyrell.

12 Marvin testified he was concerned about an event that happened in 2009. Jessica told
13 him that she and Jaime got into an argument when they were at Wal-Mart. Jaime became angry
14 and drove away in the car and left Jessica and the kids with the groceries to walk home. Danielle
15 drove to Wal-Mart and picked Jessica and her children up and drove them back to the apartment
16 she shared with Marvin. Jessica and her children stayed for dinner. Jaime and Jessica denied
17 this event happened.

18 **ii. Jaime's Domestic Violence Against Danielle - Jaime**

19 denied that he committed any domestic violence against Danielle. Danielle testified there were a
20 number of domestic violence incidents throughout the history of their marriage. She placed the
21 domestic violence incidents into minor and major categories. The minor events were pushing
22 her out of a car, slamming her foot in a door, shoving, and grabbing her arm hard. The major
23 incidents were choking, hitting, and kicking. Many of the major incidents were choking.
24 Danielle testified there were at least four choking incidents that she could recall.

1 The first choking incident was when she and Jaime were first married. They were living
2 in a trailer on Jaime's parent's property in Morgan Hill. She was 15 years old and nine months
3 pregnant with Cyrus. She would rarely talk back or say anything when there was a disagreement
4 with Jaime. But when there was a disagreement and she did say anything, Jaime would lash out.
5 She could not recall many of the details of the first choking incident or why Jaime was upset or if
6 there was an argument. However, Danielle testified it happened near the end of 2001. Jaime
7 was upset. He put his arm around her neck and placed her in a choke hold. She testified that
8 when he was choking her, it was hard to catch her breath. Eventually she was released. She did
9 not call the police. Danielle testified she didn't call because she loved Jaime and didn't want to
10 get him in trouble.

11 The second choking incident Danielle recalled was around December 2003. Danielle and
12 Jaime were living with her mother and stepfather in Salinas. Danielle testified she was about
13 seven months pregnant with Cyrell. They were in the bedroom together. Jaime kept the
14 bedroom door locked. Danielle testified that she told Jaime she needed a pregnancy bra. Jaime
15 became angry. Jaime pulled out a drawer and started throwing bras at Danielle and the bras were
16 hitting her in the face. Danielle yelled at him. All of sudden, before she knew what happened;
17 she was on the bed on her stomach. Danielle testified that Jaime straddled her legs and started
18 choking her with his arms across her neck. Danielle testified she was more frightened because of
19 the pressure on her stomach then she was about the choking. She started to scream.

20 Jaime was interrupted when Danielle's mother (Mary Lou Aguirre) and sister broke into
21 the locked bedroom. Mary Lou testified that when she broke into the bedroom after hearing her
22 daughter scream, she saw Jaime straddling her daughter, looking angry. She didn't see the actual
23 choking. She threatened to call the police. Jaime yelled at Mary Lou to "shut up, get the hell out
24 of here, and mind your own business." Mary Lou testified that Danielle begged her not to call
25 the police. The police were not called. Jaime eventually left the residence and returned a day

1 later. Danielle testified she didn't want her mother to call the police because she didn't want to
2 get Jaime in trouble.

3 Danielle also testified about a third choking incident that happened Thanksgiving 2003.
4 Jaime, Danielle, and Cyrus were preparing to go to Danielle's mother home for Thanksgiving.
5 Jaime decided he did not want to go. Danielle disagreed and wanted to join her family. Jaime
6 became upset. Danielle testified that Jaime pushed her on the ground near the fireplace. He put
7 his arms around her neck and started choking. Eventually she was released. Cyrus was present
8 during this attack. Danielle testified that she does not know how it happened, but she dialed 9-1-
9 1. After she dialed, she quickly hung up. Jaime discovered she called and told her to make them
10 go away. When the police responded to their home, she told the police officer she was okay.

11 Danielle testified about a fourth choking incident that occurred around the end of
12 November 2005. Danielle testified that this attack was the worst of all Jaime's violent attacks.
13 She was violently choked, hit, kicked, and beat by Jaime. This attack was so bad she finally
14 decided to end the relationship in December of 2005. In January 2006, she filed for custody of
15 the children alleging domestic violence.

16 Danielle also testified to what she refers to as minor incidents. One minor incident
17 occurred when Jaime pushed her out of a car. She and Jaime had just left Wal-Mart near
18 Monterey Road. Cyrus and Cyrell were also in the car. Jaime was driving, and they were some
19 distance from Wal-Mart. Jaime was about to enter the freeway near the on ramp. Danielle was
20 complaining about her shoes. Jaime got upset and pulled over to the side of the road. Danielle
21 testified that Jaime opened the door and pushed her out of the car. He then told her to go buy
22 some shoes at Wal-Mart. She testified that Jaime drove off, leaving her to walk home. Danielle
23 testified that she telephoned Jaime's dad. Jaime's dad arrived and gave Danielle a ride home.

24 Another minor incident was "flipping plates." Danielle testified that Jaime would have
25 his meals in their bedroom. After the meals were prepared, she would bring Jaime his dinner

1 while he was laying or sitting in bed. Danielle testified she would hand him his plate of food. If
2 he didn't like the food or the way it was prepared (or some other reason) he would get upset.
3 And if he was upset, he would hit the bottom of the plate out of Danielle's hand and food would
4 fly up into Danielle's face. She testified that Jaime would get out of the bed and begin to throw
5 items around the room, because he was upset. Both Jaime and Danielle testified that this
6 happened multiple times. Jaime also admitted that this was a violent act. Cyrus and Cyrell were
7 present during these violent outbursts.

8 Mary Lou testified that when Jaime and Danielle were living with her in Salinas, Jaime
9 was always yelling and threatening Danielle. When he wanted something done and she didn't do
10 it his way, he would angrily yell at her with a closed fist. Mary Lou testified he would yell at
11 Danielle to "shut up, shut the hell up, you better do it now or else." Mary Lou testified she
12 wanted to talk to him and tell him to stop. But Danielle begged her not to talk to him, not to say
13 anything. Mary Lou testified that she would just be quiet so that Jaime would not hurt her
14 daughter.

15 Mary Lou also testified that Jaime's angry outbursts were in the presence of Cyrus who
16 was an infant at the time. She testified that Jaime would not care if his son was there or not. The
17 baby would look at Danielle and Mary Lou would just look at Jaime. Danielle would beg her
18 mother not to interfere or call the police.

19 **f. History of Child Abuse** – There is no evidence of child abuse as
20 defined in Penal Code section 11165.6. However, some experts believe that a child witnessing
21 violence against a caretaker is a form of child abuse.

22 **g. Health, Safety, and Welfare of the Children** – Family Code
23 section 3020 (a) states in part that "The Legislature finds and declares that it is the public policy
24 of this state to assure that the health, safety and welfare of children shall be the court's primary
25 concern in determining the best interests of children when making any orders regarding the

1 physical or legal custody or visitation of children. The Legislature further finds and declares that
2 the perpetration of child abuse or domestic violence in a household where a child resides is
3 detrimental to the child.”

4 It is clear from the legislative findings that intimate partner violence has serious
5 negative consequences for children and impacts the health, safety, and welfare of children even
6 when they are not, themselves, physically abused but witness the abuse.

7 **C. Factors to Consider From *Burgess* and *LaMusga* and Other Factors**

8 When there is not a permanent custody order in place, as in this case, the Court must
9 look to all the circumstances bearing on the child’s best interest in determining whether to allow
10 the move away. (*Burgess, supra, 13 Cal.4th at 31-32; see Ragghanti v. Reyes (2004) 123*
11 *Cal.App.4th 989, 996.*) The noncustodial parent does not have a burden to show the move would
12 be detrimental to the child. (*See Ragghanti, supra, 123 Cal.App.4th at 997-998.*) The Court
13 only evaluates what would be in the best interests of the child.

14 The factors the Court should consider in evaluating the child’s best interest include the
15 following: the children's interest in stability and continuity in the custodial arrangement; the
16 distance of the move; the age of the children; the children's relationship with both parents; the
17 relationship between the parents including, but not limited to, their ability to communicate and
18 cooperate effectively and their willingness to put the interests of the children above their
19 individual interests; the wishes of the children if they are mature enough for such an inquiry to
20 be appropriate; the reasons for the proposed move; and the extent to which the parents currently
21 are sharing custody. (*LaMusga, supra, 32 Cal.4th at 1101; see also Burgess, supra, 13 Cal.4th at*
22 *p. 39.*)

23 Other factors the Court will also consider include the following: the children’s
24 relationship with siblings; both parents’ significant others’ relationship with the children; the
25

1 financial ability of the parents to pay for travel for the purpose of visitation; and the criminal
2 record of both parents and their significant others.

3 The Court considers the following additional factors:

4 **1. Child's Age/Wishes** – At the time of the trial, Cyrus was 9 years old and Cyrell was 8
5 years old. The children and Danielle have not visited North Carolina. No evidence was offered as
6 to where the children would like to live. Ms. Huggins asked the children to list the positive and
7 negatives about moving and staying. Ms. Huggins testified that the boys put some thought into
8 making a list. The list was never introduced into evidence.

9 **2. Distance** - The distance from North Carolina to California is considerable, and Cyrus
10 and Cyrell will, obviously, have to go to school in either North Carolina or California and spend
11 liberal amounts of time with the non-custodial parent on school breaks and summers. The Court
12 recognizes that whether the boys stay in California or move to North Carolina both the children
13 and non-custodial parent's relationship will be severely impacted compared to the current
14 custody and visitation arrangement. However, that result simply cannot be avoided under these
15 circumstances. Ms. Huggins testified that both boys had good coping skills and will be able to
16 adjust with the transition if allowed to move to North Carolina.

17 **3. Parents Communication** - The Court is concerned about the poor communication
18 between the parents. Ms. Huggins testified that Jaime admits he communicates to Danielle
19 through the children. Ms. Huggins testified that this had a negative impact on the children.
20 because they were starting to feel the pressure of the conflict. Ms. Huggins testified that
21 Danielle is afraid to talk to Jaime, because she doesn't want to trigger him and set him off and
22 get him angry.

23 **4. Parents' Relationship** - Notwithstanding the evidence of poor communication, the
24 relationship between Danielle and Jaime appears to be fairly amicable nonetheless. The parents
25 have a history of sharing parental duties successfully from both educational and medical

1 providers. Ms. Huggins testified that both parents reported to her that they got along well in
2 sharing custody.

3 **5. Parents' Relationship With the Children** – Both parents appear to have a caring and
4 loving relationship with their children and actively participate in their children's lives. However,
5 the Court is concerned that several violent acts against both Jessica and Danielle have occurred
6 in front of the children. And Ms. Huggins testified that the boys were concerned about their
7 dad's behavior.

8 **6. Jessica's Relationship With the Children** – Jessica appear to have a loving and
9 caring relationship with the boys. The Court is concerned that two of Jaime's violent acts
10 against Jessica occurred in the presence of their children. At least one was in the presence of
11 Cyrus and Cyrell. And Jessica and Jaime's continual denial of what the Court has found to be
12 credible domestic violent acts also greatly concerns the Court.

13 **7. Marvin's Relationship With the Children** - Danielle testified that Marvin has a
14 loving, joyful, educational, peaceful, and safe relationship with the boys. He is a good role
15 model. In discussing his discipline philosophy with the evaluator, Ms. Huggins testified that
16 Marvin indicates he just talks to the boys. He has good boundaries in terms of his role with
17 Cyrus and Cyrell. The boys call him Marv. And he made it very clear to the boys that he will
18 never replace their dad. He seems very dedicated to Danielle, to their daughter, and to the boys.
19 Ms. Huggins testified that Marvin was reliable and stable, and she has no concerns about his
20 treatment of the boys.

21 **8. Children's Relationship With Siblings** – Jaime has a son with Jessica and Jessica
22 has a daughter from a previous relationship. Danielle has a daughter with Marvin. In her August
23 30, 2010 Family Court Order to Show Cause declaration, Danielle stated she noticed some
24 dramatic changes in Cyrus. He had become violent with his siblings. She enrolled him in
25

1 therapy at Rebekah's Children Services. In his September 1, 2010 Response declaration, Jaime
2 stated that he had never seen Cyrus exhibit any violent behavior.

3 The sibling relationships will be impacted whether the boys move to North Carolina or
4 stay in California. The parents can facilitate those relationships through Skype and other
5 creative means that will help maintain those relationships.

6 **9. Financial Ability to Pay for Travel** - Danielle and Marvin have agreed to pay for
7 airline costs for the children to visit with their father two times a year. There was no evidence
8 presented that Jaime would not be able to reciprocate those offers, because he did not have the
9 financial ability to do so. At the time of trial, both Jessica and Jaime had full time jobs.

10 **10. Criminal Record of Parents:** Both parents have criminal records. Jaime was
11 convicted of a sexual assault misdemeanor. And Danielle was convicted of prostitution,
12 possession of controlled substance, child endangerment, and failure to appear. Both parents have
13 successfully completed required programs and are moving forward in their lives.

14 **D. Evaluator's Report**

15 The Court appointed Lynn Huggins, LMFT, of Family Court Services, to conduct the
16 Evidence Code section 730 evaluation. Ms. Huggins conducted her evaluation and
17 recommended the Court consider allowing the children to relocate to North Carolina to live with
18 Danielle. She also recommended a visitation schedule. Jaime will get spring vacation and a lot
19 of summer vacation and the parents would split Christmas. Jaime would get every Thanksgiving
20 and has the option of having visits one weekend every month.

21 The Court is aware that in this case, more than nine months elapsed from the time of the
22 evaluation to the time of trial and some key circumstances, unknown to the evaluator at the time
23 of the evaluation, changed. Jaime and Jessica now have full-time jobs. And Jaime and Jessica
24 also have moved into their own spacious home with the children. The Court has considered this
25 additional information in evaluating Ms. Huggins recommendations.

1 **B. Credibility of the Following Witnesses**

2 **1. Jaime Estrada** - The Court gives little weight to the testimony of Jaime. Jaime attempted
3 to convince the Court that he was credible and honest at the beginning of his testimony while on
4 direct. However, Jaime’s lack of credibility was obvious throughout his testimony. His
5 testimony change as need dictated. His answers were sometimes contradictory or inconsistent
6 with prior statements. He often answered “I don’t know” and “I don’t remember” when asked
7 questions by opposing counsel to questions in which he should have had some recall.

8 **a. Jaime’s Capacity to Recollect Significant Events** – In 2004, Jaime was charged
9 with raping his 14 year old cousin. Although the rape was eventually reduced to a misdemeanor
10 attempted sexual assault, this is a life-altering, significant event. It is reasonable to believe that
11 when someone is confronted with a written statement about a significant event, they would
12 remember. However, Jaime’s inability to remember when he was confronted multiple times by
13 opposing counsel with the police report to refresh his recollection involving the sexual assault
14 conviction against his 14-year-old cousin appear to be convenient. He frequently responded
15 “no” when confronted with statements in the police report concerning the location of the crime
16 (his apartment) and whether there was a pretext call between him and the victim. When asked
17 whether the victim was babysitting his kids, he responded, “I don’t know.” When asked
18 whether “your children were present when the victim was staying at your home?” He answered,
19 “My children were always there.” And when he was asked again on the date of the sexual
20 assault if his children were present, he responded, “I don’t recall.” And when there was a
21 follow-up question indicating that the crime alleged to have occurred at 9:00 p.m. Jaime
22 responded, “They were probably home.” There is an important distinction between convenient
23 memory, poor memory, and nuanced memory. Jaime’s memory appeared to be convenient on a
24 number of occasions

1 **b. Jaime's Testimony was Inconsistent With the Testimony of Other Witnesses**

2 **and Other Evidence** - Jaime denied committing any domestic violence against Jessica or
3 Danielle. But an independent, unbiased, credible witness, Anjelita Gonzalez, described a
4 domestic violent event that occurred on March 28, 2010, when Jaime's children were present.
5 Cyrus and Cyrell both described the same incident on two different occasions to the evaluator,
6 Ms. Huggins, and on another occasion to the Family Court Services' Mary Rolison. Ms.
7 Huggins testified that she found both boys to be very credible and had not been coached. Jaime
8 denies it happened.

9 Mary Lou and Danielle also described a domestic violent event between Jessica and Jaime
10 that occurred in 2008-2009 where they were celebrating Elijah's birthday. Jaime testified that it
11 never happened.

12 Veronica Diaz – Veronica has known Jaime for 15 years and considers him a friend. She
13 described an event that happened in church when Jaime kicked Dominic's baby seat. Jaime
14 denies it happened.

15 Marvin testified about an event that concerned him in 2009 with Jaime left Jessica and the
16 children at Wal-Mart to walk home. Jaime denied this event happened.

17 The Court finds all the witnesses listed, (Anjelita, Mary Lou, Danielle, Veronica, and
18 Marvin,) and the statements of Cyrus and Cyrell to be highly credible.

19 **c. Jaime's Character for Honesty or Veracity** - In his September 1, 2010 declaration
20 to the Court, Jaime denied that he ever had any contact with Child Protective Services (CPS),
21 including receiving a phone call. Ms. Huggins testified when she reviewed the CPS report, the
22 CPS worker stated that they had contact with Jaime, and he yelled at them over the phone. When
23 the social worker went to his house, Jaime was extremely aggressive with her, and he refused to
24 cooperate with her investigation. Interestingly enough, during his testimony, Jaime still insisted
25 that he had no contact with CPS. He later changed his testimony and indicated he was confused

1 about contact, and he did receive a phone call. But he never admitted to any personal contact by
2 CPS. In the same declaration, Jaime declared “I am not now nor have I in the past ever abused
3 drugs.” And, of course, he subsequently tested positive for methamphetamine. And his lack of
4 veracity in denying his domestic violence has been discussed elsewhere in this document. The
5 Court finds that these falsehoods are material facts.

6 **2. Danielle Estrada** - While Danielle was slightly guarded in some of her
7 answers, as the trial progressed, she did not evade questions posed to her; rather, she responded
8 clearly. Indeed, even when she knew that answers to certain questions posed to her were not
9 favorable to her position (prostitution, drug use, drug possession, and child endangerment),
10 Danielle answered honestly. When confronted with whether police reports or other documents
11 (about prostitution, drug possession, failures to appear, or child endangerment) refreshed her
12 recollection, she readily agreed her memory was refreshed about specific dates or other details.
13 Danielle’s lack of memory was honest and the dates and details she forgot were of no
14 significance. Danielle’s testimony regarding the domestic violence events against her and
15 Jessica was clear, credible, and without embellishment or exaggeration. The Court gives
16 significant weight to Danielle’s testimony and considers her to be a credible witness.

17 **3. Previous Criminal Convictions and Criminal Conduct of Both Parents** - The
18 Court did consider the previous convictions and previous criminal conduct of each parent and to
19 what extent and whether their criminal conviction(s) or conduct affected the truthfulness of their
20 testimony. The Court gave little weight to the criminal convictions or criminal conduct as to the
21 truthfulness of their testimony. The Court used other criteria to evaluate the parents’ credibility.

22 **4. Jessica Gallardo** – Jessica has no criminal history and no history of drug use, aside
23 from her admission that she tried methamphetamines once with Danielle. Jessica loves Jaime
24 and supports him. They now share a child together. Jessica denied any domestic violence
25 occurred between her and Jaime. During her interview with Lynn Huggins, the evaluator, in

1 January 2011, Jessica's memory of the domestic violence event on March 28, 2010, was vague,
2 and she could not give Ms. Huggins any details. Yet during her testimony at trial on December
3 16, 2011, she gave very specific details, and her description of the events on March 28, 2010,
4 was similar to Jaime's. It is reasonable and logical for her to have remembered those details
5 closer to the time of the event. Her testimony is also a direct contradiction of Cyrus, Cyrell, and
6 Anjelita. The Court gives little weight to Jessica's testimony because of her bias and her
7 unwillingness to be forthright.

8 **5. Marvin Jones** – Marvin has no criminal history and no history of drug use. While
9 he could have been biased due his personal relationship with Danielle, he did not show any bias
10 whatsoever and made every attempt to answer all questions honestly and to the best of his
11 ability. The Court found him to be a very credible witness and gave great weight to his
12 testimony.

13 **6. Mary Estrada** - Mary Estrada is the mother of Jaime and no doubt loves her son
14 very much. She has supported Jaime his whole life and is paying for the current litigation. She
15 and her husband have also moved out of the home they have lived in since 1999 and allowed
16 Jessica and Jaime to move in to help them have a stable living environment. Whether she did
17 this to help her son look more favorable to the Court if he was actually living in a home with
18 Jessica and his children rather than with his parents is not relevant. In her declaration filed
19 August 30, 2010, Danielle stated that on July 24, 2010, Jaime was arguing with Jessica and
20 shoved Jessica out of her house. In addition to Danielle, the people presence on that day was
21 Mary Estrada, Jaslisa (Jaime's sister), Cyrus and Cyrell. However, Mary testified that she was
22 not aware of any domestic violence against Danielle or Jessica. Some loving mother would take
23 the same approach. Overall, Mary Estrada's testimony is credible, and the Court gives weight to
24 some of her testimony and little weight to others.

1 **7. Mary Lou Aguirre** – Despite the potential for bias as the mother of Danielle, the
2 Court found her to be credible. Both the tenor of her testimony and her demeanor (crying) while
3 describing the domestic violence she observed against Jessica and Danielle was sincere and
4 credible. Although she doesn't like the violence Jaime perpetrated against Jessica and Danielle,
5 she testified that she still loves him. The Court finds her a credible witness and gives great
6 weight to her testimony.

7 **8. Johnny Estrada** - Jaime's brother Johnny answered questions truthfully, but it was
8 clear he was trying to protect his brother. When asked by Jaime's counsel if he "ever seen your
9 brother become extremely angry to a level that it is inconsistent with the circumstances?" (form
10 of the question was very interesting), he readily answered no. He went on to say that that "I have
11 never known Jaime to act outrageously to whatever event has occurred." But when later
12 questioned by Danielle's counsel, he grudgingly admitted that when they were teenagers, he and
13 Jaime got into a fight and Jaime had his arm around Johnny's neck. Their mother (Mary
14 Estrada) was so concerned that Johnny couldn't breathe that she called 9-1-1 for help. Johnny
15 downplayed the fight and testified he did not really need any help. Johnny, a police officer
16 trained in domestic violence, also testified that he was unaware of any domestic violence against
17 Danielle or Jessica. The Court finds him a credible witness but gives some, but not significant,
18 weight to his testimony

19 **9. Anjelita Gonzalez**. – Anjelita was an independent witness. She knew all the parties,
20 because they all attended the same church. She did not know their names but she recognized
21 their faces. They were not personal friends. She attended a birthday party on, what has later
22 been identified as, March 28, 2010. She saw a man and a woman standing next to an SUV. She
23 testified she heard the woman (later identified as Jessica) crying and pleading. She saw the man
24 (later identified as Jaime) pulling the woman's hair and hitting her two times in the face with a
25 closed fist. She also saw four children in the van and two of the children were later identified as

1 Cyrus and Cyrell. Seven months later, Anjelita approached Danielle and described to her what
2 she saw Jaime do to Jessica on March 28, 2010. Although Jaime's counsel raised the possibility
3 of bias in Anjelita's testimony, Anjelita remained neutral and answered questions directly and
4 truthfully. The Court finds her to be a very credible, unbiased witness, and gives significant
5 weight to her testimony.

6 **10. Veronica Diaz** –Veronica was a mutual friend of both Jaime and Danielle. She has
7 known Jaime for 15 years and Danielle for 9. She testified that she observed Jaime sitting in
8 church and his son Dominic (4- 5months old) sitting in an infant car seat on the floor next to him.
9 Jaime appeared to become frustrated and using his foot violently shoved Dominic's infant car
10 seat. Veronica was so concerned about Jaime's behavior, she contact Danielle and inquired
11 whether Jaime was being mean to her boys. Both Jaime and Jessica denied this event happened.
12 Jaime's counsel also raised the possibility of bias in Veronica's testimony, but the Court found
13 Veronica to be an unbiased and credible witness and give great weight to her testimony.

14 **11. John Salas** - John was a colleague of Jessica's (she was his boss). He testified that
15 Jessica did not have any bruises, cuts on her face when she came to work on March 29, 2010, the
16 day after the alleged domestic violence event. When questioned by the Court, he admitted he
17 was not familiar enough with women's make-up that he could tell whether Jessica was wearing
18 make-up to cover any bruising. When questioned by Jaime's counsel on redirect, if it appeared
19 that Jessica was using make-up to cover bruises, he responded "no." Jessica also denied wearing
20 make-up on that day. John's testimony was not very helpful and the Court gives little weight to
21 his testimony.

22 **V. FINDINGS AND CONCLUSIONS**

23 In determining what is in the best interest of the children, the Court has weighed and
24 evaluated all the evidence presented by the parties. The Court has weighed and considered the
25 Evaluator's recommendations. The Court has weighed and evaluated the credibility of the

1 witnesses. The Court has weighed and evaluated the factors pursuant to *Family Code section*
2 *3011* and the factors recommended pursuant to *Burgess* and *LaMusga*. And the Court has
3 weighed and evaluated the paramount need for continuity and stability in custody arrangements.

4 In making a determination of the best interest of the child in a proceeding described in
5 *Family Code section 3021*, the Court shall, among other factors it finds relevant, consider the
6 following: (1) health, safety, and welfare of the child; and (2) any history of abuse by the parent
7 seeking custody against the other parent or the person seeking custody has against a dating or
8 engagement relationship. (*Fam. Code, § 3011(a)-(b) 1-3.*) As a prerequisite to the consideration
9 of the allegation of abuse, the Court may require substantial independent corroboration,
10 including but not limited to, written reports by law enforcement agencies, courts, Child
11 Protective Services, medical facilities, or other public agencies or private nonprofits
12 organizations providing services for victims of sexual assault or domestic violence.

13 In determining whether there is substantial independent corroboration to make a finding
14 of domestic violence against Jaime, the Court has, among other relevant evidence, considered the
15 following evidence: (1) Anjelita, Cyrus, and Cyrell on March 28, 2010, observed Jaime attacking
16 Jessica; (2) Mary Lou testified in 2003 she saw Jaime angrily straddling Danielle, and Jaime
17 has threatened Danielle many times in the presence of Cyrus; (3) Mary Lou testified that in
18 2008 or 2009, she observed Jaime attempting to assault Jessica while Jessica held her daughter in
19 her arms; (4) Danielle testified that when Jaime choked her on Thanksgiving 2003, Cyrus was
20 present, she call 9-1-1, but she hung up. Jaime told her to make them go away. When the
21 police arrived, she said nothing happened; (5) In 2006, Danielle filed an Order to Show Cause in
22 Family Court alleging domestic violence; (6) In 2006, Danielle reported allegations of domestic
23 violence to Family Court Services; (7) In 2010, Danielle filed an Order to Show Cause in Family
24 Court alleging Jaime was abusing Jessica and using drugs; (8) In 2010, Danielle reported
25 allegations of domestic violence to Family Court Services of Jaime's history of domestic

1 violence against her and his current abuse of Jessica; (9) In July 2010, after Jessica confided in
2 Danielle that Jaime was abusing her, Danielle contacted the police because she was concerned
3 for Jessica's safety. When police arrived, Jessica and Jaime said everything was fine; and (10)
4 In 2010, Danielle called Child Protective Services (CPS) alleging Jaime was abusing Jessica and
5 using drugs, and when CPS tried to contact Jaime, he threatened them on the phone and was
6 aggressive when they tried to contact him at his home.

7 The Court finds there is substantial independent corroborating evidence that Jaime has
8 perpetrated domestic violence against Danielle and Jessica. This evidence includes, among other
9 evidence, the testimony of credible witnesses, evidence in the Family Court Services file,
10 evidence in the Family Court file, evidence in a Child Protective Service report, and contacts
11 Danielle made to law enforcement.

12 In weighing and evaluating the substantial evidence of domestic violence perpetrated
13 by Jaime, the Court finds (1) there was a history of domestic violence between Jaime and
14 Danielle during their marriage (2) Cyrus and Cyrell were present in many of those violent
15 events; (3) one of Jaime's violent choking attacks occurred when Danielle was 15 years old and
16 nine months pregnant with Cyrus and another violent choking attack was when she was seven months
17 pregnant with Cyrell ; (4) domestic violence during pregnancy is a focused attack that puts not
18 just one, but two lives at risk and these children have been exposed to Jaime's violence since
19 they were in their mother's womb; (5) Jaime has continued his abusive behavior toward another
20 significant other, his fiancée, Jessica Gallardo; (6) Cyrus and Cyrell were present at least two of
21 those violent events; and (7) Jaime has an explosive temper, and he has absolutely no
22 reservation with displaying his anger and attacking his children's primary caretaker in the
23 presence of those children. While the physical and psychological toll on adult victims of
24 domestic violence is obvious, its impact on children, *even when they are not, themselves, direct*
25

1 recipients of the violence, is no less devastating and is detrimental to the health, safety, and
2 welfare of the child.

3 When a Court makes a finding of domestic violence against a parent seeking custody,
4 there arises a rebuttable presumption that “an award of sole or joint physical or legal custody of a
5 child to a person that has perpetrated domestic violence is detrimental to the best interest of the
6 child... . This presumption may only be rebutted by a preponderance of the evidence.” (*Fam.*
7 *Code, § 3044(a).*) In determining whether Jaime has rebutted the presumption by the
8 preponderance of evidence, the Court has, among other relevant evidence, considered the
9 following: (1) Jaime has successfully completed his Family Court drug treatment requirements;
10 (2) he is attending self-help groups; (3) at the time of trial, Jaime was testing negative for drug
11 use; (4) he has taken and completed a 16-week Conflict Accountability class; (5) he has
12 completed his second parenting without violence class; and (6) he successfully completed his
13 probation for attempted sexual assault.

14 In determining whether Jaime has rebutted the presumption of section 3044 by a
15 preponderance of evidence, the Court has weighed and balanced Jaime’s favorable factors listed
16 above against the following factors (1) that Jaime, in the presence of children, has a history of
17 domestic violence against Danielle; (2) within the last five years, in the presence of children,
18 Jaime has been physically violent against Jessica; and (3) Jaime has continued to deny his
19 violence against Danielle and Jessica. To ensure the health, safety, and welfare of these children
20 and to expressly ensure these children are free from domestic violence in their home, Court finds
21 that Jaime has not rebutted the presumption, by a preponderance of the evidence, that an award
22 of joint physical or legal custody of the children to him is detrimental to the children’s best
23 interest.

24 The Court has also weighed and evaluated the paramount need for continuity and stability
25 in custody arrangements and the harm that may result from disruption of established patterns of

1 care and emotional bonds with the primary caretaker. (*Burgess, supra, 13 Cal.App.4th 25.*)
2 Whether the children are allowed to move to North Carolina or stay in California, it will be
3 disruptive to the long-established pattern of care for these children and the bonds that have been
4 built with each parent.

5 In recognition of the importance of continuity and stability and frequent and continuing
6 contact for children in custody arrangements, the Court has weighed and evaluated, among
7 other relevant evidence, the following factors: (1) the parents primarily have had a 50 percent
8 time share throughout the history of their relationship after separation; (2) Jaime testified that he
9 was the de facto primary caretaker between 2006-2008, and Danielle saw the children once a
10 month; (3) Danielle has been the primary custodial parent for the last 15 months; (4) both
11 parents have been active, and equal partners in raising these children; (5) both parents have a
12 loving relationship with the children; (6) Danielle has a very supportive partner in her husband
13 who lives in North Carolina; and (7) all the relevant factors the Court made in a finding of
14 domestic violence in this case.

15 In addition to the seven factors listed above regarding continuity, stability and frequent
16 and continuing contact, there has been much emphasis during the trial placed on the value of
17 Jaime's extended supportive family as one of the reasons the children should remain in
18 California. Two key members of the extended family (Mary Estrada/paternal grandmother and
19 Johnny Estrada/uncle) testified at trial. Mary Estrada testified that she has a very close
20 relationship with her son Jaime. She also testified that she has a very close bonding relationship
21 with Cyrus and Cyrell. Her grandsons have their own bedroom in her home. She was very
22 involved in their lives. She would dress them, take and pick them up from school, help with
23 their homework and cook for them. Yet, she is unaware of Jaime's violent behavior against
24 Danielle or Jessica in the presence of these children.

1 Johnny, a sworn police officer, testified he has been trained in domestic violence and
2 recognizes the signs. But he is unaware of Jaime's abusive behavior against Danielle or Jessica
3 in the presence of his nephews. And Jaime and Jessica have denied that any violence exists in
4 their relationship.

5 If the people who are closest to these children are unaware or deny that violence exists,
6 the Court is concerned about who will protect these children and provide for their health, safety
7 and welfare and ensure they are free from domestic violence in their home if the Court orders
8 them to stay in California.

9 The California state legislature has declared it is the public policy of this state that a
10 Court's primary concern in determining the child's best interest when making legal or physical
11 custody and visitation orders is the health, safety, and welfare of each child and expressly to
12 ensure that each child is free from child abuse and domestic violence in the child's residence
13 (*Fam. Code, § 3020(a).*) When this policy conflicts with the public policy in favor of frequent
14 and continuing contact with both parents, any physical or legal custody visitation order must be
15 made in a manner that ensures the child's health, safety, and welfare and the safety of all family
16 members. (*Fam. Code, § 3020(c).*)

17 The Court has weighed and balanced the conflict between the public policies of *Family*
18 *Code section 3020 (a) and 3020 (b)*, and the Court finds that to ensure the health, safety, and
19 welfare of these children and to expressly ensure that these children are free from domestic
20 violence in their home, the public policy of *Family Code section 3020(a)* far outweighs the
21 public policy enumerated in *Family Code section 3020(b)*. It also should be noted that in
22 determining the best interest of the child, the preference for frequent and continuing contact with
23 both parents, as set forth in *Family Code section 3020 (b)*, may not be used to rebut the
24 presumption of domestic violence in whole or in part. (*Fam. Code, § 3044(b)(1).*)

1 To help assure that the health, safety, and welfare of children are preserved, it is
2 sometimes in the best interest of the child to create geographic distance from an abusing parent,
3 *not* to weaken the child's connection with that parent, but to allow for less frequent, though
4 perhaps longer visits that are less dangerous and less traumatic to the child.

5 The Court finds, among other reasons, that granting Danielle's request to relocate to
6 North Carolina is in the best interests of the children for the following reasons: (1) it will
7 enhance the health, safety, and welfare of the children; (2) enhance their ability to recover and
8 stabilize; and, finally, (3) the move will decrease the likelihood that Jaime will re-expose the
9 children to future domestic violence, either with Jessica or with a new intimate partner.

10 Based upon the Court's consideration of all of the foregoing, the Court's finds that Cyrus
11 and Cyrell's best interests will be served by moving to North Carolina with their mother.

12 Danielle will have to follow through on the representations she made to the Court at trial and
13 will have to pay for two trips for the boys' airline flights to California when they visit with their
14 father. Danielle or another appropriate adult must accompany the boys on those flights. Liberal
15 visitations must be given to Jaime. Jaime should have the opportunity to spend summers with
16 Cyrus and Cyrell and on school holiday breaks. The parties are ordered back into court to
17 discuss these issues. They must meet and confer beforehand and come up with tentative holiday
18 and vacation schedules.

19 V. ORDERS

20 1. Danielle's request for permission to move with Cyrus and Cyrell to North Carolina is
21 GRANTED. Danielle shall have sole legal and sole physical custody of the children.

22 2. Jaime shall have reasonable and liberal right of visitation with the children. The
23 parties are ordered to meet and confer to discuss an appropriate visitation schedule. If they
24 cannot agree, the current Family Court All-Purpose Judge in Department 71 will hold a hearing
25 to determine a visitation schedule that will be in the children's best interest.

1 3. Pursuant to her agreement, Danielle shall pay airfare for both boys to visit their father
2 in California twice a year.

3 4. Both parents were given notice and an opportunity to be heard, as provided by the
4 laws of the state of California.

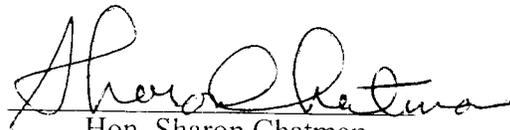
5 5. The Court has jurisdiction to make child custody orders in this case under the Uniform
6 Child Custody Jurisdiction and Enforcement Act (part 3 of the Family Code, commencing with
7 section 3400).

8 6. The United States of America is the children's country of habitual residence.

9 7. The orders from this decision are intended to be a long term custody/visitation plan
10 which may be modified only upon the written stipulation of the parties or a showing of a
11 significant change of circumstances.

12 8. All exhibits are released to the party who proffered them.

13
14 Dated: 5/18/12

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16 
17 Hon. Sharon Chatman
18 Judge of the Superior Court
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