Fifth Circuit Court of Appeal
State of Louisiana

No. 25-CA-453

ALLISON STANLEY ANGELICA

versus

DAVID MICHAEL ANGELICA

ON APPEAL FROM THE TWENTY-NINTH JUDICIAL DISTRICT COURT
PARISH OF ST. CHARLES, STATE OF LOUISIANA
NO. 89,928, DIVISION "C"
HONORABLE CONNIE M. AUCOIN, JUDGE PRESIDING

April 01, 2026

FREDERICKA HOMBERG WICKER

JUDGE

Panel composed of Judges Fredericka Homberg Wicker,
Stephen J. Windhorst, and John J. Molaison, Jr.

JUDGMENT VACATED AND JUDGMENT RENDERED

FHW
SJW
JJM

TRUE COPY

MORGAN NAQUIN
DEPUTY CLERK

COUNSEL FOR DEFENDANT/APPELLANT,
DAVID MICHAEL ANGELICA

Marc D. Winsberg
William S. Ercole

COUNSEL FOR PLAINTIFF/APPELLEE,
ALLISON STANLEY ANGELICA

Arita M. L. Bohannan
Caitlyn L. Mayer

WICKER, J.

Defendant-Appellant, David Angelica, appeals the trial court's June 27, 2025 judgment granting Plaintiff-Appellee Allison Angelica's Motion to Modify Custody. For the reasons thoroughly discussed herein, upon *de novo* review we vacate the judgment of the trial court and reinstate the custody arrangement set by the October 19, 2022 judgment.[1]

FACTUAL AND PROCEDURAL BACKGROUND

David and Allison Angelica[2] married on March 4, 2005. During their seventeen-year marriage they had six children together: twins: Brielle and Michael (born September 14, 2012); Julian (born February 23, 2015); and triplets: Gemma, Roman, and Dominic (born January 17, 2017). On December 22, 2021, Allison filed for divorce and a Judgment of Divorce was rendered on April 19, 2023. Incidental to the divorce proceedings, Allison moved the court to award the parties joint custody of the children, with her designated as domiciliary parent. In response, David filed a reconventional demand moving the court to award the parties shared physical custody of the children, rather than joint custody. On June 23, 2022, following a hearing on custody, the trial court rendered a stipulated (or consent) judgment awarding the parties joint custody of the children and designating Allison as domiciliary parent.[3]

On August 1, 2022, David moved to modify the June 23, 2022 custody judgment, asserting a material change in circumstances based on his revised work

[1] The April 12, 2023 custody judgment states that judgment was "*rendered* on October 19, 2022." Although the trial court orally rendered its ruling in open court on that date, the written judgment was not signed until April 12, 2023. In subsequent proceedings, both parties and the trial court referred to the judgment using the October 19, 2022 trial date rather than the signature date. For clarity and consistency, we likewise refer to this custody judgment as the "October 19, 2022 judgment."

[2] Because the parties share a surname, we refer to them by their first names to avoid confusion.

[3] The Honorable Judge Lauren Lemmon presided over the case during its initial phase, with the Honorable Judge Connie Aucoin presiding over the case in later proceedings.

schedule, which he claimed would allow him to exercise shared physical custody of the children on a 2-2-3 basis.[4] On October 19, 2022, a trial was held before the Honorable Judge Lauren Lemmon on David's motion to modify custody. During trial, the court heard testimony from three witnesses and evidence was taken regarding whether there had occurred a material change in circumstances warranting a modification. In a judgment signed April 12, 2023, Judge Lemmon granted David's motion, modifying custody from joint to shared physical custody, with no domiciliary parent, on a rotating 2-2-3 schedule.[5] In granting the motion, Judge Lemmon found a material change in circumstances based on David's work schedule. The court minute entry reflects Allison's objection to the ruling.

On January 5, 2024, Allison filed a *Motion to Modify Custody, Establish Domiciliary Parent, Re-calculate Child Support and Arrears, Determine Percentage Portion of Education, Medical and Extracurricular Expenses*, seeking—among other things—a modification of the custody arrangement "rendered [via] a Considered Decree" on October 19, 2022 and "subsequently executed on [April 12, 2023], therein finding a material change in circumstances based on [David's] schedule and grant[ing] the parties shared physical custody with no designation of domiciliary parent due to the parties' conflict." (hereinafter, the "October 19, 2022 judgment"). In her motion she alleged that, following the October 19, 2022 judgment, there had been a change in circumstances which required a modification of custody from shared physical custody to joint custody, and her re-designation as domiciliary parent.

[4] A 2-2-3 custody arrangement is a 50/50 rotating schedule in which the child spends two days with Parent A, the next two days with Parent B, and then returns to Parent A for the final three days of the week. The schedule alternates the following week, beginning with Parent B.

[5] The judgment established a 2-2-3 shared physical custody beginning on November 2, 2022, with the children spending Monday and Tuesday with David, Wednesday and Thursday with Allison, and alternating weekends (Friday–Sunday), starting with David on November 4, 2022 and Allison on November 11, 2022.

In support of her motion, Allison identified the material changes in circumstances, as follows:

> [David] is unable to properly care and see to the day-to-day needs of the children. He frequently gives [Allison] physical custody of the children on his custody day when they are sick or off of school as he often has to work. Since Custody has changed, [Allison] has taken care of the children 80% of the days they were off of school or sick on his Custody days due to his work schedule. [David] is presently employed and due to his work schedule, the daily personal needs of the children are such that he cannot reasonably provide personally for the care and oversight of the minor children. In order for the minor children's normal and customary school and personal routines to continue, it is necessary that physical custody be modified.

She further asserted that David's actions had created a change in circumstances "so deleterious to the children, that it warrants immediate and necessary change," pursuant to *Bergeron*. Specifically, she alleged that David: (1) failed to adequately supervise the children; (2) allowed the children unrestricted access to the Internet and social media; (3) reduced the amount of time he exercises custody due to his current work schedule; and (4) contributed to a decline in the children's mental health, conduct, and academic performance.

On October 15, 2024, trial was held on Allison's motion to modify custody before the Honorable Judge Connie Aucoin, who succeeded Judge Lemmon in presiding over the case. During trial, the court heard testimony from both parties and evidence was taken regarding whether the custody arrangement should be modified. Allison offered nineteen exhibits in support of her motion and David offered two exhibits in opposition to the motion. The trial court admitted all exhibits offered by the parties into evidence. At the conclusion of trial, Judge Aucoin instructed the parties to submit post-trial briefs within thirty days.

On June 27, 2025, Judge Aucoin issued a written judgment granting Allison's motion, modifying custody from shared to joint custody and designating Allison as domiciliary parent. Judge Aucoin also issued written reasons for judgment explaining her determination. According to Judge Aucoin, she declined to apply the

heightened *Bergeron* standard[6] for modifying considered decrees of custody, finding instead that the October 19, 2022 judgment constituted a stipulated judgment, the modification of which is governed by the less demanding *Evans* standard.[7] Judge Aucoin explained that she came to this determination because Judge Lemmon failed to include any findings of fact or reasons for judgment in the October 19, 2022 judgment or on the record following the trial. Judge Aucoin further explained that a review of the trial transcript revealed that Judge Lemmon had "failed to articulate any findings pursuant to [La. C.C. art. 134] regarding how this disposition was in the best interests of the children." For these reasons, Judge Aucoin concluded that, although the October 19, 2022 judgment followed a trial on the merits, it was not a considered decree of permanent custody. Consequently, Judge Aucoin decided that, instead of applying the *Bergeron* standard, she would apply the *Evans* standard in determining Allison's motion to modify custody.

In her written reasons for the June 27, 2025 judgment, Judge Aucoin also detailed the evidence she considered as a basis for her judgment. Notably, she discussed letters the court received after the trial had concluded from therapists for two of the children. The trial judge stated that she "[took] judicial notice of the record that due to behavioral issues that had become increasingly alarming under the shared custody arrangement, the Court referred the children to therapy in the May and June 2024 Interim Judgments." The trial judge indicated in her reasons that she

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[6] The standard established in *Bergeron v. Bergeron*, 492 So.2d 1193 (La. 1986) governs the modification of considered decrees (permanent custody award issued after trial). To modify a considered decree, the moving party must first show that a material change in circumstances since the original custody decree has occurred. Then, that party bears the "heavy burden" of proving by clear and convincing evidence either that keeping the current custody order would be "so deleterious" to the child, or that changing custody would result in benefits to the child that substantially outweigh any potential harm.

[7] The standard established in *Evans v. Lungrin*, 97-541 (La. 2/6/98), 708 So.2d 731 governs the modification of stipulated/consent judgments (made by mutual agreement of parties). To modify a stipulated judgment, the moving party must establish both a material change in circumstances since the original custody decree and that the proposed modification is in the best interest of the child.

was "in receipt of letters from counselors for two of the children (Julian & Brielle)" and that "[a]s of March 2025, both children reported 'stability, acclimation, and enjoyment in home, school, and after school activities." The trial judge further explained that these letters were entered into the record under seal. The trial judge did not give notice to either party of her intent to take judicial notice of these documents, nor did she give the parties the opportunity to be heard on the matter. Moreover, the letters are not part of the record on appeal, despite the trial judge acknowledging them as forming part of the basis for her judgment.

David timely appealed the trial court's June 27, 2025 judgment.

LAW AND ANALYSIS

Assignments of Error

On appeal, David raises three assignments of error: (1) the trial court legally erred in applying the *Evans v. Lungrin* standard to the modification of a considered custody decree; (2) the trial court erred in taking judicial notice of communications received from the minor children's therapists following the trial; and (3) the trial court abused her discretion in determining that the joint custody schedule is in the best interest of the minor children.

Standard of Review

Ordinarily, child custody determinations are reviewed under the abuse of discretion standard. *Cook v. Sullivan*, 20-1471 (La. 9/30/21), 330 So.3d 152, 157 (citing *Leard v. Schenker*, 06-1116 (La. 6/16/06), 931 So.2d 355, 357). However, when one or more legal errors by the trial court interdict the fact-finding process, the manifest error/abuse of discretion standard no longer governs. *Id.* A legal error occurs when the trial court applies incorrect principles of law and the error is prejudicial, *i.e.,* it materially affects the outcome of the proceeding and deprives a party of substantial rights. *Id.* (citing *Tracie F. v. Francisco D.*, 15-1812 (La. 3/15/16), 188 So.3d 231, 247). "Prejudicial error is reversible error." *Nielsen v.*

Nielsen, 55,447 (La. App. 2 Cir. 11/22/23), 375 So.3d 1042, 1048. In such circumstances, and when "the record is otherwise complete, the appellate court should make its own independent *de novo* review of the record and determine the sufficiency of the evidence." *Id.*[8]

Assignment No. 1: Custody Modification Standard (*Bergeron*/*Evans*)

In Appellant's first assignment of error, he asserts that the trial court legally erred in applying the *Evans v. Lungrin* standard to the modification of a considered custody decree. In Louisiana, two types of custody awards exist—considered decrees and stipulated judgments—and different burdens of proof govern the modification of each. A considered decree is a permanent custody award issued by the trial court after a merits trial during which the court receives evidence of parental fitness. *Tracie F.*, 188 So.3d at 239. The standard established in *Bergeron v. Bergeron*, 492 So.2d 1193 (La. 1986) governs the modification of considered decrees. In contrast, a stipulated judgment[9] results from the parties' mutual agreement to a custodial arrangement, without a trial and with no evidence of parental fitness being taken. *Tracie F.*, 188 So.3d at 239. The standard established in *Evans v. Lungrin*, 97-541 (La. 2/6/98), 708 So.2d 731 governs the modification of stipulated judgments.

To modify a considered decree, the moving party must first show that "a change of circumstances materially affecting the welfare of the child has occurred since the prior order respecting custody." *Bergeron*, 492 So.2d at 1195. Second, the moving party bears the "heavy burden" of proving by clear and convincing

[8] "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, to render judgment on the record by applying the correct law and determining the essential material facts *de novo*." *Cook*, 330 So.3d at 157 (citing *Tracie F.*, 188 So.3d at 247).

[9] In *Tracie F.*, the Louisiana Supreme Court clarified that "the terms 'consent judgment,' 'consent agreement,' or 'consent decrees' are sometimes used synonymously with 'stipulated judgment.'" 188 So.3d at 240 n.6. This opinion predominately uses "stipulated judgment," but may use these terms interchangeably when necessary to best fit the context of the discussion.

evidence either that the continuation of the current custody order "is so deleterious to the child as to justify a modification," or that a change in custody would provide advantages to the child that substantially outweigh any harm likely to be caused by a change of environment. *Id*. at 1200. In contrast, to modify a stipulated judgment, the moving party must establish both a material change in circumstances since the original custody decree and that the proposed modification is in the best interest of the child. *Evans*, 708 So.2d at 738. Accordingly, a party seeking to modify a custody arrangement established through a considered decree following a trial on the merits must satisfy the heightened *Bergeron* standard rather than the less demanding *Evans* standard governing stipulated judgments.

Here, the trial court undertook an independent review of the custody judgment previously rendered by Judge Lemmon, and summarized her conclusions in the written reasons for judgment, stating in relevant part:

> On October 19, 2022, a trial was held in front of Judge Lauren Lemmon who rendered a judgment on October 19, 2022, which stated as follows:
>
> **"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court finds that there is a material change in circumstances based on Mr. Angelica's schedule and hereby grants Mr. Angelica's Motion to Modify Custody to shared custody. There will be no domiciliary parent due to the parties' conflict.**
>
> **IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties are awarded physical custody on a rotating 2-2-3 schedule beginning on November 2, 2022, with Mr. Angelica having Monday and Tuesday, Mrs. Angelica having Wednesday and Thursday, with the parties rotating every Friday, Saturday, and Sunday . . . ."**
>
> No "Findings of Fact / Reasons for Judgment" were provided by Judge Lemmon in connection with this (or any) Judgment. Further, a review of the transcript following the trial reflects Judge Lemmon failed to articulate any fundamental findings pursuant to LA Civil Code Art. 134 regarding how this disposition was in the best interests of the children. The words "best interest" do not even appear in the transcript of her ruling nor the Judgment rendered . . . ."
>
> This custody agreement was in effect from November 2, 2022, through April 8, 2024. Ms. Angelica filed a *Motion to Modify Custody* on January 5, 2024, requesting that custody be modified from shared to

> joint alleging that Mr. Angelica is unable to properly care and see to the day-to-day needs of the children on a 2-2-3 schedule. The motion refers to the October 19, 2022 Judgment as a "Considered Decree . . . ."
>
> Here, the Judgment rendered on October 19, 2022, was not a "Considered Decree." Though the Judgment followed a trial on the merits, the Court found only that there was a "material change in circumstances" in the Judgment with respect to Mr. Angelica's work schedule and provided no written reasons for the Judgment. Judge Lemmon failed to make *any* LA Civil Code Art. 134 "best interest" findings as required by law. As such, this Court will apply the "material change in circumstances" and "best interest" standard to this Motion to Modify and trial.

(Internal footnotes omitted) (emphasis in original).

On appeal, David argues that the trial court committed legal error by applying the *Evans* standard, which governs modification of stipulated judgments, rather than the heightened *Bergeron* standard applicable to considered decrees. He maintains the October 19, 2022 judgment followed a trial at which evidence was taken, making it a considered decree subject to modification only upon satisfaction of *Bergeron*. He further contends that the trial court's misapplication of the governing standard was prejudicial and requires vacatur of the June 27, 2025 judgment and *de novo* review under *Bergeron*.

Allison responds that *Evans* controls because the June 27, 2025 ruling modified a stipulated (or consent) custody judgment rendered on June 26, 2024,[10] not the October 19, 2022 judgment. She asserts that the June 26, 2024 consent judgment was the one at issue during the trial on her motion to modify custody. Alternatively, she argues that, even if the October 19, 2022 judgment was the operative judgment at issue, the trial court correctly found that the judgment was not a considered decree because it contained no La. C.C. art. 134 findings; thus, the

[10] The court minute entry indicates that the interim judgment referred to was rendered orally by the trial court on June 26, 2024, but not signed by the judge until September 26, 2024. Although it would be more appropriately labeled the September 26, 2024 judgment, the parties refer to it as the June 26, 2024 consent judgment (or agreement). For clarity and consistency, we likewise refer to it as the "June 26, 2024 consent judgment."

Evans standard would still apply. She raises both arguments for the first time on appeal.

David replies that the June 26, 2024 consent judgment was an interim agreement, not a final custody decree, and that no party moved to modify that agreement. In her motion, Allison sought modification of the October 19, 2022 judgment specifically. Moreover, the June 26, 2024 consent judgment post-dated her January 5, 2024 motion to modify and therefore could not have been the judgment at issue. David further points to Allison's reliance on *Bergeron* in her post-trial memorandum, undermining her present claim that *Evans* controls.

In considering whether to grant Allison's motion to modify custody, Judge Aucoin independently reviewed the prior custody judgment rendered by Judge Lemmon and decided to "reclassify" it as a stipulated judgment because Judge Lemmon did not provide written reasons or issue La. C.C. art. 134 findings substantiating the judgment. In doing so, Judge Aucoin effectively reviewed the validity of another trial judge's final judgment as if sitting in appellate review. Judge Aucoin has cited neither jurisprudential nor statutory authority to support such an exercise of authority. Moreover, Judge Aucoin cites no case law or codal provision supporting the proposition that a custody judgment rendered after a trial where evidence is taken creates a stipulated judgment, rather than a considered decree, in the absence of written reasons or La. C.C. art. 134 findings.

The Louisiana Supreme Court has opined that a custody judgment is a considered decree when rendered after the taking of evidence concerning parental fitness—no written reasons or La. C.C. art. 134 findings are required. *See Tracie F.*, 188 So.3d at 239. Moreover, appellate courts review judgments, not written reasons for judgment. *See* La. C.C.P. art. 1918; *State v. Alexander*, 22-12 (La. App. 5 Cir. 6/21/23), 367 So.3d 867, 876, *writ denied*, 23-17 (La. 11/8/23), 373 So.3d 46. Here, the October 19, 2022 judgment is a considered decree of permanent custody because

it was rendered following a trial on the merits, during which the trial court received evidence relevant to parental fitness.

Despite the October 19, 2022 judgment being a considered decree, the trial court applied the *Evans* "material change/best interest" standard instead of the heightened *Bergeron* standard that governs modifications of considered decrees. By applying the wrong legal standard, the trial court committed legal error. The error was prejudicial because it materially affected the outcome and deprived David of substantial rights. Accordingly, because the trial court's legal error interdicted the fact-finding process, and the record is otherwise complete, we vacate the trial court's June 27, 2025 judgment and review the matter *de novo* to determine whether Allison's motion to modify custody should be granted. Before undertaking that review, however, we first address the second and third assignments of error, as their resolution bear on our analysis.

Assignment No. 2: Judicial Notice of Post-Trial Therapist Letters

In Appellant's second assignment of error, he asserts that the trial court erred in taking judicial notice of communications received from the minor children's therapists following the trial. While trial courts have broad discretion over evidentiary rulings, such rulings may be reversed upon a showing of abuse. *See Ramos v. Alexander*, 18-355 (La. App. 5 Cir. 12/19/18), 262 So.3d 1000, 1003 ("The standard of review for a trial court's evidentiary ruling is abuse of discretion, meaning the trial court's ruling will not be disturbed unless it is clearly erroneous.") (citing *Gorman v. Miller*, 12-0412 (La. App. 1 Cir. 11/13/13), 136 So.3d 834, 840, *writ denied*, 13-2909 (La. 3/21/14), 135 So.3d 620)). Here, the trial court published written reasons for judgment detailing the evidence the judge considered as a basis for her judgment. Specifically, the trial judge stated that she "[took] judicial notice of the record that due to behavioral issues that had become increasingly alarming under the shared custody arrangement, the Court referred the children to therapy in

the May and June 2024 Interim Judgments." Then, the trial judge stated that she was "in receipt of letters from counselors for two of the children (Julian & Brielle)" and that "[a]s of March 2025, both children reported 'stability, acclimation, and enjoyment in home, school, and after school activities."

On appeal, David argues that the trial judge abused her discretion by taking judicial notice of, and relying upon, post-trial letters from the children's therapists to support its ruling. The letters were received months after the conclusion of trial and were entered into the trial court record under seal. David contends that the therapists' conclusions are not adjudicative facts subject to judicial notice under La. C.E. art. 201(B), as they are neither generally known nor readily and accurately determinable. Rather, he asserts that they constitute expert opinions that must be properly introduced into evidence, with notice to the parties and an opportunity for examination and cross-examination. David emphasizes that neither party was notified of the court's intent to take judicial notice of the letters, nor afforded an opportunity to challenge their contents, conduct discovery, or question the counselors. According to David, the trial court's consideration of these materials effectively circumvented established evidentiary rules and due process safeguards. He relies for his assertion upon *Dufresne v. Dufresne*, 10-963 (La. App. 5 Cir. 5/10/11), 65 So.3d 749, wherein this Court held that a trial court erred in relying on post-trial materials not admitted into evidence.

Allison responds that the trial court did not err because the therapists were court-appointed experts and the letters were merely updates regarding the children's progress. She contends that the court was already aware of the children's behavioral challenges and that other admitted evidence reflected improvement in the children's school performance and overall demeanor. Relying on La. C.E. art. 202(C), Allison argues that the trial court was permitted to consider information from its own expert, and that the letters were relevant to the court's determination of the children's best

interests. She further asserts that any flaw in the reasons for judgment does not undermine the validity of the judgment itself.

In reply, David maintains that La. C.E. art. 202 does not authorize a trial court to receive or rely upon post-trial expert communications without disclosure to the parties or an opportunity to be heard. He further argues that the consent judgment appointing the therapists did not permit *ex parte* communications or post-trial submissions to be relied upon by the court. David points to statutory schemes, including La. R.S. 9:331[11] and La. R.S. 9:358.6,[12] governing custody evaluators and parenting coordinators, which require disclosure of reports and afford parties the right to discovery and cross-examination, as reflective of a broader principle that expert opinions may not be considered without procedural safeguards.

The record reflects that the therapists' letters were submitted to the trial court *ex parte* and after the conclusion of trial. The trial court did not notify the parties of its intent to take judicial notice of these communications and did not provide the parties with an opportunity to be heard. Additionally, the letters themselves are not contained in the appellate record, despite the trial court expressly stating that they formed part of the basis for the judgment. We find that the therapists' letters do not constitute adjudicative facts subject to judicial notice under La. C.E. art. 201, but instead represent expert opinions that were required to be properly admitted into evidence. The trial court's consideration of these post-trial, *ex parte* communications—without notice to the parties, without an opportunity for

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[11] La. R.S. 9:33l(B) provides that: "The court may order a party or the child to submit to and cooperate in the mental health evaluation, testing, or interview by the licensed mental health professional. The licensed mental health professional shall provide the parties with a written report. The licensed mental health professional shall serve as a witness, subject to cross-examination by a party." Moreover, La. R.S. 9:331(F)(4) provides that: "All parties shall have the right to full pretrial discovery of the entire file of the licensed mental health professional regarding the case, including the right to depose the licensed mental health professional."

[12] La. R.S. 9:358.6 provides that: "The parenting coordinator shall not communicate *ex parte* with the court, except in an emergency situation."

examination, and without inclusion in the appellate record—was clearly erroneous and constituted an abuse of discretion. Accordingly, the trial court erred in considering the therapists' letters, and we will not consider those materials in conducting our *de novo* review.

Assignment No. 3: Best-Interest Finding for Joint Custody

Appellant, in his third and final assignment of error argues that the trial court abused its discretion in finding that the joint custody schedule is in the children's best interest. David argues that, even if Allison met her burden under *Bergeron*, the trial court nevertheless erred in awarding joint custody. Having found legal error in the trial court's application of the *Evans* consent judgment custody modification standard, we pretermit further discussion of this assignment of error. We therefore turn to our *de novo* review of the record to determine whether custody modification is warranted under *Bergeron*.

De Novo* Review of Custody Modification Under *Bergeron

Turning now to our *de novo* review of the record, we determine whether Allison's motion to modify custody should be granted.

Findings of Fact

Allison and David are the parents of six minor children. A considered custody judgment was rendered on October 19, 2022, establishing joint custody with a shared physical custody arrangement commonly referred to as a 2-2-3 rotation. Both parties exercised substantial physical custody under that judgment for a significant period of time. The children range in age from elementary to middle school age and are at differing academic and developmental stages. Most (if not all) of the children have ongoing medical conditions, including severe allergies requiring EpiPens, asthma, immune-related issues, and other health concerns requiring regular medical supervision. As the children have grown older, their academic responsibilities, extracurricular involvement, and medical care needs have increased. Starting around

April 2024, the children began residing primarily with Allison during the school week, with David exercising physical custody primarily on weekends and through extracurricular activities. This change occurred pursuant to interim custody arrangements entered while the motion to modify custody was pending. Under the current schedule, the children attend school from Allison's residence during the week while maintaining regular contact with David through weekends and activities.

With respect to academics, the evidence showed that under the original shared custody schedule, the children earned generally satisfactory grades consisting largely of A's and B's, with one child (Julian) experiencing academic difficulty. Allison testified that following the shift to the current arrangement, the children's grades improved, with most children earning straight A's and with fewer behavioral reports from school. David testified that the children were academically successful under shared custody and that any improvements were attributable to maturation, tutoring, and assistance provided by extended family members, including his sister.

Allison introduced evidence documenting multiple instances of school tardiness occurring predominantly on mornings following David's custodial days under the prior schedule. David disputed the significance of this evidence and attributed tardiness to traffic conditions and bridge construction, pointing out that academic instruction time was not materially missed. No testimony from school administrators or attendance officials was presented regarding the impact of tardiness.

Regarding medical care, Allison testified that she schedules, coordinates, and transports the children to the majority of their medical and specialist appointments and has done so consistently since the separation. David testified that he was rarely asked to attend medical appointments after the separation and that Allison preferred to handle the children's medical care. David further testified that he maintains

medications and EpiPens at his home and that no child has suffered a serious allergic reaction while in his custody.

Allison and David's testimony reveal that the parties experience significant difficulty communicating and cooperating regarding parenting matters, including scheduling, extracurricular decisions, medical care, and technology supervision. Each party testified that the other excludes them from decision making and undermines co-parenting efforts. The parties also presented conflicting testimony regarding extracurricular activities. Allison testified that under the prior shared custody schedule, the children sometimes missed activities on David's custodial days and that she now ensures consistent participation through carpools when necessary. David testified that he was frequently informed of extracurricular enrollments and events only after the fact and that the volume of activities interfered with family time and academic responsibilities. Both parties attend the children's extracurricular events and remain involved in their activities.

The record reflects significant disagreement regarding supervision of the children's use of digital devices, gaming platforms, and social media. Evidence established that some children accessed age-inappropriate platforms using accounts verified through David's email address or phone number. David testified that he employs parental monitoring software, internet shutoff timers, and device restrictions in his home. Allison testified that David has refused to share passwords or cooperate fully in technology monitoring.

Additionally, photographs admitted into evidence depicted cluttered conditions in David's home, including laundry baskets and personal items on the floors. David testified that the photographs reflected routine household activity and temporary disorganization rather than unsafe or unsanitary conditions. No evidence of hazardous living conditions or official complaints was introduced. Allison testified that she works from home and relies on her parents and extended family for

assistance with childcare and transportation. David relies on his sister, parents, and other relatives for assistance, particularly due to his work schedule. Both parties maintain extended family support networks with whom the children have strong relationships.

Having made the foregoing findings of fact based upon the evidence and testimony presented, the Court now turns to the applicable legal principles governing modification of custody. Because the October 19, 2022 judgment constituted a considered custody decree, the motion to modify is subject to the heightened standard articulated in *Bergeron*, requiring both a threshold showing of a material change in circumstances and satisfaction of the movant's heavy burden of proof. The Court's analysis of these legal issues follows.

Modification of Custody Analysis

To modify a considered custody decree, the moving party must first show that "a change of circumstances materially affecting the welfare of the child has occurred since the prior order respecting custody." *Bergeron*, 492 So.2d at 1195. Second, the moving party bears the "heavy burden" of proving by clear and convincing evidence either that the continuation of the current custody order "is so deleterious to the child as to justify a modification," or that a change in custody would provide advantages to the child that substantially outweigh any harm likely to be caused by a change of environment. *Id*. at 1200.[13]

It is well settled that the paramount consideration in any determination of child custody is the best interest of the child. *E. R. v. T. S.*, 18-286 (La. App. 5 Cir.

[13] The "clear and convincing" standard denotes a burden of proof more demanding than the usual civil case standard of "preponderance of the evidence," but less burdensome than the "beyond a reasonable doubt" standard of a criminal prosecution. *Talbot v. Talbot*, 03-814 (La. 12/12/03), 864 So.2d 590, 606 (Traylor, J., concurring in part); *see also In re L.M.M., Jr.*, 17-1988 (La. 6/27/18), 319 So.3d 231, 245 n.13 (citing *Louisiana State Bar Ass'n v. Edwins*, 329 So.2d 437, 442 (La. 1976)). Under this standard, the existence of the disputed fact must be shown to be highly probable, or much more probable than not. *Talbot*, 864 So.2d at 598 (citing *McCormick on Evidence* § 339, at 421 (5th ed. 1999)).

10/11/18), 256 So.3d 551, 557, *writ denied*, 18-1843 (La. 2/18/19), 264 So.3d 451 (citing *Tracie F.*, 188 So.3d at 238–39). This applies not only in actions setting custody initially, but also in actions to change custody. *Tracie F.*, 188 So.3d at 238–39. Citing to the legislative comments to La. C.C. arts. 131 and 134 as "greatly instructive," the Louisiana Supreme Court explained:

> According to 1993 Revision Comment (a), "the best interest of the child [is] the overriding test to be applied *in all child custody determinations.* The primacy of that test has been statutorily mandated in Louisiana since 1979, and the best interest principle itself has been jurisprudentially and legislatively recognized at least since 1921." Leaving no room for doubt that the best interest of the child is the test for "all child custody determinations," a later comment to Article 131 stresses that "[t]his Article should be followed *in actions to change custody* as well as in those to initially set it." La. C.C. art. 131, 1993 Revision Comment (d). Similarly, the comments to La. C.C. art. 134, which lists factors for determining the best interest of the child, indicates: "Article [134] should be followed *in actions to change custody,* as well as in those to fix it initially." La. C.C. art. 134, 1993 Revision Comment (d).

Id. (internal citations and omitted).

La. C.C. art. 134 lists fourteen factors for determining the best interest of the child, including:

> (1) The potential for the child to be abused, as defined by Children's Code Article 603, which shall be the primary consideration.
>
> (2) The love, affection, and other emotional ties between each party and the child.
>
> (3) The capacity and disposition of each party to give the child love, affection, and spiritual guidance and to continue the education and rearing of the child.
>
> (4) The capacity and disposition of each party to provide the child with food, clothing, medical care, and other material needs.
>
> (5) The length of time the child has lived in a stable, adequate environment, and the desirability of maintaining continuity of that environment.
>
> (6) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> (7) The moral fitness of each party, insofar as it affects the welfare of the child.

(8) The history of substance abuse, violence, or criminal activity of any party.

(9) The mental and physical health of each party. Evidence that an abused parent suffers from the effects of past abuse by the other parent shall not be grounds for denying that parent custody.

(10) The home, school, and community history of the child.

(11) The reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference.

(12) The willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party, except when objectively substantial evidence of specific abusive, reckless, or illegal conduct has caused one party to have reasonable concerns for the child's safety or well-being while in the care of the other party.

(13) The distance between the respective residences of the parties.

(14) The responsibility for the care and rearing of the child previously exercised by each party.

La. C.C. art. 134(A)(1)–(14).

In addressing the issue of custody modification, "The Louisiana Supreme Court has recognized that this *Bergeron* standard has been sparingly applied to upset considered custody arrangements and is reserved for the most egregious offenses." *E. R.*, 256 So.3d at 559 (citing *Gray v. Gray*, 11-548 (La. 7/1/11), 65 So.3d 1247 n.16). In *Gray*, the Louisiana Supreme Court explained that "the *Bergeron* standard, requiring proof that the continuation of the present custody is so deleterious to the child as to justify a modification of the custody decree, has been applied to upset considered custody arrangements sparingly, as one of the opinions below observed, and is reserved for the most egregious offenses." 65 So.3d at 1261 n.16. (citing *AEB v. JBE*, 99-2668 (La. 11/30/99), 752 So.2d 756 (sexual molestation by stepbrother); *Howard v. Oden*, 44,191 (La. App. 2 Cir. 2/25/09), 5 So.3d 989, *writ denied*, 09-0965 (La. 6/26/09), 11 So.3d 496 (abuse by parent's subsequent spouse); *Ard v. Ard*, 628 So.2d 1221 (La. App. 3 Cir. 1993) (punishment methods reflected an insensitivity and lack of awareness of the deepening problems that the children were

experiencing and extremely severe "parent bashing"); *Hull v. Hull*, 542 So.2d 205 (La. App. 3 Cir. 1989), *writ denied*, 546 So.2d 1216 (La. 1989) (mother repeatedly giving birth to children out of wedlock in total disregard for the moral well-being of her adolescent children)).[14]

Similarly, Louisiana courts have found that parties met the *Bergeron* burden by proving through clear and convincing evidence that the advantages of modifying a considered custody decree substantially outweighed the harm caused by changed environment in specific serious instances, including *Mulkey v. Mulkey*, 12-2709 (La. 5/7/13), 118 So.3d 357, where the Louisiana Supreme Court found that a father's stable family environment, the child's mature preference, and the mother's night work schedule satisfied the burden; *Freeman v. Johnson*, 51,550 (La. App. 2 Cir. 6/21/17), 225 So.3d 524, where financial stability and permanent housing outweighed environmental harm; *Gutierrez v. Bruno*, 19-1537 (La. App. 1 Cir. 8/5/20), 310 So.3d 560, involving educational consistency and speech therapy needs; *Granger v. Granger*, 09-272 (La. App. 3 Cir. 11/10/09), 25 So.3d 162, *writ denied*, 09-2687 (La. 12/8/09), 23 So.3d 941, addressing unworkable custody arrangements; and *Mercer v. Mercer*, 52,101 (La. App. 2 Cir. 4/11/18), 249 So.3d 924, *writ denied*,

[14] In *Gray*, the Supreme Court further stated: "As detailed by one of the opinions below, our courts have wisely been hesitant even in relocation settings to change custody once a considered decree has been entered. *See Johnson v. Johnson*, 93,1015 (La. App. 1 Cir. 3/11/94), 634 So.2d 31 (father's removal of child to another state without notice to mother was not so deleterious as to mandate change in custody); *Weems v. Weems*, 548 So.2d 108 (La. App. 2 Cir. 1989) (evidence that mother had remarried, moved with her children to Texas, and had refused to transfer custody to father during summer months as required by joint custody order was insufficient to warrant amendment of order to make father primary domiciliary parent). *See also Knowlton v. Knowlton*, 40,931 (La. App. 2 Cir. 4/12/06), 927 So.2d 640 (no deleterious circumstances found despite daughter's disciplinary problems and expressed desire to live with other parent); *Rome v. Bruce*, 09–155 (La. App. 5 Cir. 10/13/09), 27 So.3d 885 (no cause of action when father's petition, complaining of child failing kindergarten and first grade and mother living with another man out of wedlock, did not allege facts so deleterious as to warrant change in custody); *Lee v. Lee*, 34,025 (La. App. 2 Cir. 8/25/00), 766 So.2d 723, writ denied, 00–2680 (La. 11/13/00), 774 So.2d 150 (despite the fact that mother made significant improvements in her emotional and physical well-being by maintaining steady employment and establishing a stable home, trial court abused its discretion in changing custody when evidence showed children had strong bonds with both parents and children were thriving under current custody arrangement); *Plunkett v. Plunkett*, 576 So.2d 100 (La. App. 2 Cir. 1991) (no modification of considered decree based on divorced wife's evidence that husband committed adultery)." *Gray*, 65 So.3d at 1261 n.16,

18-808 (La. 6/15/18), 257 So.3d 681, where superior financial stability and family structure justified modification.

We turn now to whether Allison's motion to modify custody should be granted. To reiterate, as thoroughly discussed above, because the custody ruling that Allison sought to have modified was a considered decree, the burden of proof is considerably higher, requiring showing for a change in custody by clear and convincing evidence as opposed to a preponderance of the evidence. Accordingly, the movant bears the heavy burden of proof.

Under *Bergeron*, the moving party must first show that a change in circumstances materially affecting the welfare of the child has occurred since the prior custody decree. The record reflects that since October 2022 the children's physical custody arrangement has shifted, particularly during the school week; academic demands have increased with age, as children transitioned into higher grades; and day-to-day logistical responsibility, including school transportation and scheduling, has been centralized primarily with Allison. We find that these developments constitute a material change in circumstances, albeit one largely driven by interim custodial arrangements and evolving needs rather than an abrupt or external disruption. Having found a material change, we next examine whether Allison proved by clear and convincing evidence either: (1) that continuation of the prior custody arrangement was so deleterious to the children as to justify modification; or (2) that the advantages of the proposed modification substantially outweigh any harm likely to result from a change in custody.

The record does not support a finding that the prior shared custody arrangement was so deleterious as to justify modification. The children were academically successful under the prior judgment. School attendance issues, while present, were not shown to be chronic or injurious. No expert testimony, medical provider testimony, or school administrator testimony established harm attributable

to the custody structure itself. Allegations of medical neglect or unsafe conditions were disputed and not shown to have resulted in actual injury. Accordingly, Allison fails to meet this prong of *Bergeron*.

We therefore turn to whether the advantages of modification substantially outweigh the harm of disruption. The record supports certain advantages to the present arrangement, including increased predictability during school weeks; consolidated management of medical care for children with complex needs; and some evidence of improved academic performance and reduced daily stress. However, the record also reflects tangible countervailing "harmful" considerations, including a reduction in David's day-to-day parental involvement; diminished sibling unity during the week; escalation of parental conflict tied to gatekeeping and exclusion from decisions; and emotional impact on the children associated with reduced access to one parent. Importantly, *Bergeron* requires not merely a showing that one arrangement may be better, but that its advantages substantially outweigh the harm inherent in altering a considered custody decree. We do not find as much on this record.

Applying the best-interest factors (La. C.C. art. 134) reinforces our conclusion here. Both parents love their children and are capable of meeting their needs. Both homes are stable and supported by extended family. Differences between the parties concern parenting style and control, not parental fitness. The children's emotional bonds with both parents remain strong. The evidence does not establish that continuity with one parent as primary domiciliary is so clearly superior as to overcome the jurisprudential presumption favoring custodial stability. In summary, while Allison demonstrated that the circumstances surrounding the children's care have evolved since October 2022, she has not proven by clear and convincing evidence that the prior custody arrangement was deleterious or that the advantages

of modification substantially outweigh the harm caused by altering a considered decree. Under the *Bergeron* standard, that failure is dispositive.

Allison failed to carry her burden of proof, as there was no evidence that the continuation of the present custody is so deleterious to the child as to justify a modification of the custody decree, or proof by clear and convincing evidence that the harm likely to be caused by a change of environment is substantially outweighed by its advantages to the child. The record does not contain any evidence to support a finding that a modification of child custody would be in the best interest of the minor children and that the current custody decree adversely affects the welfare of the children. Therefore, we are unable to infer that the present custody is so deleterious to the children as to justify a modification of the custody decree or that the harm likely to be caused by a change of environment is substantially outweighed by its advantages to the children.

We have reviewed the record in this case in its entirety, including the pleadings, the testimony, and the evidence admitted at the custody hearing. For the reasons set forth in this opinion, we hereby vacate in its entirety the trial court judgment that is being appealed, and we hereby reinstate the October 19, 2022 judgment and the custody arrangement established therein. This judgment is being rendered based on our review of the entire record. We find that Allison did not meet her burden of proof under *Bergeron* to warrant a modification of the custody decree. Accordingly, the motion to modify custody must be denied and the custody arrangement set by the October 19, 2022 judgment must be reinstated.

CONCLUSION

For the foregoing reasons, upon *de novo* review we vacate the June 27, 2025 judgment of the trial court, and reinstate the custody arrangement set by the October 19, 2022 judgment.

JUDGMENT VACATED AND JUDGMENT RENDERED

FIFTH CIRCUIT
101 DERBIGNY STREET (70053)
POST OFFICE BOX 489
GRETNA, LOUISIANA 70054
www.fifthcircuit.org

(504) 376-1400
(504) 376-1498 FAX

NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **APRIL 1, 2026** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

Curtis B. Pursell

CURTIS B. PURSELL
CLERK OF COURT

25-CA-453

E-NOTIFIED
29TH JUDICIAL DISTRICT COURT (CLERK)
HONORABLE CONNIE M. AUCOIN (DISTRICT JUDGE)
MARC D. WINSBERG (APPELLANT)
ARITA M. L. BOHANNAN (APPELLEE)
CAITLYN L. MAYER (APPELLEE)
WILLIAM S. ERCOLE (APPELLANT)

MAILED
NO ATTORNEYS WERE MAILED