

NOT DESIGNATED FOR PUBLICATION

JAMES SCHIRO, II

NO. 01-CA-813 C/W
NO. 01-CA-1423

VERSUS

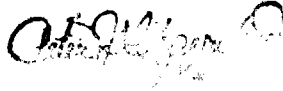
**COURT OF APPEAL;
FIFTH CIRCUIT**

FIFTH CIRCUIT

DANA M. GRISAFFE

FILED APR 30 2002

COURT OF APPEAL



STATE OF LOUISIANA

APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
FOR THE PARISH OF JEFFERSON, NO. 432-090, DIVISION "L",
HONORABLE CHARLES V. CUSIMANO, II, JUDGE

: : :

**EDWARD A. DUFRESNE, JR.
CHIEF JUDGE**

APRIL 30, 2002

: : :

(Panel composed of Judges Edward A. Dufresne, Jr., Sol Gothard and
Marion F. Edwards)

PAT M. FRANZ, For Plaintiff-Appellee
4421 Conlin St., Suite 102
Metairie, LA 70006

KEVIN D. SHEARMAN, For Defendant-Appellant
2031 Metairie Road
Metairie, LA 70005

CASE NO.01-CA-813 - AFFIRMED
CASE NO. 01-CA-1423-APPEAL DISMISSED.

EADK
[Signature]
MPC

These are consolidated appeals taken by Dana M. Grisaffe from two judgments involving custody of and visitation with her minor child. For the following reasons we affirm the award of joint custody made in the first judgment; however, because the second judgment was a consent judgment it is not appealable and we therefore must dismiss it.

Because of our disposition of this matter we need not repeat the facts in detail as they are well known to the parties. We do note the following particulars as they are essential to understanding our resolution of the two appeals.

Dana Grisaffe is the mother of Julie Schiro, the child at issue here. The child's father, to whom the mother was never married, was Jack Schiro, II, who drowned in a scuba diving accident on July 11, 1999. Julie was born on October 7, 1991, and lived with her mother until she was four. By then Jack had married Tricia Hosch and they had one child. Jack sought joint custody of Julie, whom he had acknowledged as his child, and

that was ordered in March of 1997. Jack became the domiciliary parent of the child and Dana was given visitation on alternating weekends and Wednesdays. By the time of Jack's death he and Tricia had had a second child.

The present dispute began at Jack's death. After some initial confusion, Julie was temporarily ordered to remain domiciled with Tricia and her two half-siblings, with Dana having the same visitation rights. Over a year later, on March 15, 2001, a final judgment was issued in the case which awarded joint custody to Dana and Tricia, with Tricia being made the domiciliary custodian. Visitation with Dana was expanded to include a week every other month during the school year and more time during the summer, with alternating holidays.

This March 15, 2001, judgment was appealed by Dana. However, prior to that appeal being heard in this court the parties returned to the district court and a consent judgment was entered vacating the prior visitation schedule and replacing it with a more restricted supervised visitation schedule. Dana appealed that judgment as well, and the matters have been consolidated here.

A number of people testified at the several hearings held in the case, and there was general agreement that Dana's lifestyle was unsettled. Gail Pesses, the social worker appointed by the court to assess the entire situation was more forceful and stated that there was "chronic and pervasive instability in Dana's life." She noted that Dana has not had steady employment and has not consistently had a safe place to live. Neither has she always provided a healthy environment for Julie. She also noted that her choice of boyfriends has been "at best unwise and presents

potential dangers nor only to her but also to others who are around her.”

One of these boyfriends, Kevin Ross, was alleged by other people interviewed by Ms. Pesses as having assaulted Dana. Her recommendation was to award joint custody to Dana and Tricia, with Tricia being the domiciliary custodian. She also recommended that Dana not have anyone of the opposite sex in the home during visitation.

The provisions of the Civil Code pertinent here are Articles 131-137. Taken together these provisions provide that in custody disputes between parents the paramount consideration is the best interest of the child in light of the factors set forth in Art. 134. Article 133 deals with situations in which a parent is divested of custody of a child and it is granted to a non-parent. In those cases there must be a showing that custody by the parent would result in substantial harm to the child and also that the child has been, or will be, living with the non-parent in a stable and wholesome environment.

In the present case, the situation is somewhat unusual in that joint custody has been given to a parent and a step-parent. The mother has thus not been divested of custody of her child, as contemplated in Art. 133. In this court's opinion, there was therefore no requirement that there be a showing that sole custody in favor of the mother would be substantially harmful to the child, but rather only a showing that the joint custody arrangement would be in the best interest of the child. (*But see Schloegel v. Schloegel*, 584 So.2d 344 (La. App. 4th Cir. 1991), *interpreting prior version of Art. 133*.) On review of such an arrangement an appellate court will set aside a custody decree only when the trial judge has manifestly abused his wide discretion, *Kiefer v. Yellon*, 94-218 (La. App. 5th Cir. 11/16/94), 646 So.2d 1073. On the facts before us we find no such abuse,

and therefore affirm the award of joint custody.

We also note that even were a showing of substantial harm necessary here under Art. 133, we would still affirm the joint custody judgment. Although not specifically cited by the trial judge as a reason for his decision, there was evidence to show that the mother had not always lived in safe places and that her choice of companions was potentially dangerous to people around her. This evidence was adequate to support a finding of possible substantial harm to the child and to justify not awarding sole custody to the mother. Similarly, there was substantial evidence to show that Tricia had provided a stable and wholesome environment for Julie since the death of Jack, and that the award of joint custody to Tricia was also proper.

The second matter here relates to an amended visitation schedule. After the March 15, 2001, judgment was issued, Tricia learned that Dana was again seeing Kevin Ross, and perhaps living with him. Tricia brought a rule to amend the visitation schedule because of this change of circumstance. By way of a consent judgment, the visitation schedule of the March 15, 2001, judgment was vacated and a new supervised visitation schedule was agreed to. Visitation was to be supervised by Dana's mother and stepfather.

As a general rule, consent judgments are not appealable, unless there is an alleged vice of consent, La. Code Civ. Pro., Art. 2085; *Polk v. Polk*, 98-1788 (3rd Cir. 3/31/99), 735 So.2d 737. Here, the only allegation of error being raised on appeal by Dana is that subsequent to the judgment her mother refused to supervise visitation with Julie thus effectively depriving her of any contact with her daughter. Because the alleged

problem is not of record in the matter before us there is nothing to review. The proper course for Dana is to raise this issue in the district court and pray for relief there. We therefore must dismiss this second appeal for want of jurisdiction.

For the foregoing reasons, the judgment appealed in our Docket No. 01-CA-813 is hereby affirmed as to the award of joint custody of the minor child Julie Schiro to Dana Grisaffe and Tricia Schiro. The appeal of the judgment in our Docket No. 01-CA-1423 is hereby dismissed.

CASE NO. 01-CA-813 - AFFIRMED
CASE NO. 01-CA-1423 - APPEAL DISMISSED.



EDWARD A. DUFRESNE, JR.
CHIEF JUDGE

SOL GOTHARD
JAMES L. CANNELLA
THOMAS F. DALEY
MARION F. EDWARDS
SUSAN M. CHEHARDY
CLARENCE E. MCMANUS
WALTER J. ROTHSCHILD

JUDGES

Court of Appeal

FIFTH CIRCUIT
STATE OF LOUISIANA
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PETER J. FITZGERALD, JR.
CLERK OF COURT

GENEVIEVE L. VERRETTE
CHIEF DEPUTY CLERK

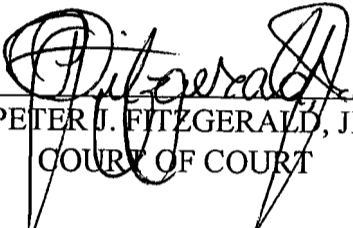
GLYN RAE WAGUESPACK
FIRST DEPUTY CLERK

JERROLD B. PETERSON
DIRECTOR OF CENTRAL STAFF

(504) 376-1400
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CERTIFICATE

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED OR DELIVERED THIS DAY APRIL 30, 2002 TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:


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