

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CU 0505

HARRY A. CICERO, JR.

VERSUS

SUNNY AULL LEBLANC

Judgment rendered: JUN 11 2010

**On Appeal from the 32nd Judicial District Court
Parish of Terrebonne, State of Louisiana
Number: 145,384
The Honorable David W. Arceneaux, Judge Presiding**

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**Counsel for Defendant/Appellee
Sunny Aull LeBlanc**

BEFORE: DOWNING, GAIDRY AND McCLENDON, JJ.

DOWNING, J.

Harry Cicero, Jr., appeals a custody judgment in favor of Sunny LeBlanc that entered a new Joint Custody Plan giving Mr. Cicero less exercise of physical custody over their minor child, Keegan Michael. For the following reasons, we affirm the trial court judgment.

PERTINENT FACTS AND PROCEDURAL HISTORY

Mr. Cicero's and Ms. LeBlanc's child, Keegan, was born in July 2004. In July 2005 Mr. Cicero and Ms. LeBlanc agreed to joint custody of Keegan, with Ms. LeBlanc being the "primary custodial parent." Mr. Cicero was to exercise physical custody every other weekend. Judgment was signed to this effect in December 2005.

In November 2006, Mr. Cicero filed a Rule to Show Cause primarily seeking equal shared physical custody of Keegan. Ms. LeBlanc also filed a rule in which she primarily sought the dependent child exemption for tax purposes. After the hearing in January 2007, the trial court rendered judgment that continued Ms. LeBlanc as the "primary domiciliary parent," modified the joint custody implementation plan primarily to grant Mr. Cicero equal exercise of physical custody in alternating seven day periods, and granted Mr. Cicero the "income tax dependency exemption." The judgment ordered that all other provisions of the prior consent judgment and Joint Custody Implementation Plan were to remain in full force and effect.

Because Keegan was to begin kindergarten in August 2009 and the parties could not agree on a school, in May 2009 Mr. Cicero filed another Rule to Show Cause. He sought to be named "primary domiciliary parent" and asked for "reasonable visitation privileges" for Ms. LeBlanc. Ms. LeBlanc also filed a rule seeking changes in the times for exercise of physical custody to accommodate Keegan's needs due to his enrolling in school. She sought to have the holiday

schedule amended; sought arrearages in child support; and again sought the income tax dependency exemption. She also filed an exception of no cause of action, asserting that Mr. Cicero did not allege a material change in circumstances as required by **Bergeron v. Bergeron**, 492 So.2d 1193, 1200 (La. 1986), for a considered custody decree. Mr. Cicero amended his rule.¹

After a hearing over three days, the trial court entered judgment in August 2009 that continued joint custody, designated Ms. LeBlanc as the domiciliary parent, ordered a new Joint Custody Plan reflecting Keegan's enrollment in a school near Ms. LeBlanc's parents' home, and ordered that all prior judgment provisions remain in effect except as modified by this judgment.

Mr. Cicero now appeals, asserting two assignments of error:

1. The trial court committed manifest error in finding that the [January 2007] custody judgment was a considered decree instead of a consent decree, and requiring that Mr. Cicero meet the burden of proof set out in *Bergeron v. Bergeron* in order to modify the previous custody order;
2. The trial court committed manifest error when it kept Appellee as domiciliary parent for the minor child.

DISCUSSION

Considered Decree

Regarding Mr. Cicero's first assignment of error, we observe that the record does not support his contention that the trial court did not consider the issue of which party should be the domiciliary parent at the January 2007 hearing. The January 2007 judgment naming Ms. LeBlanc as domiciliary parent recites that it is based on consideration of the evidence presented. Further, it specifically continues all provisions of the prior consent judgment not in conflict with the current judgment. Therefore, the specification of domiciliary parent would have been unnecessary and redundant if not considered in the judgment. At the hearing on the rule at issue in this appeal, the trial court stated regarding the January 2007

¹ The trial court orally dismissed the exception of no cause of action on the first day of the hearing.

judgment, “As far as I’m concerned it was a considered decree, the entire thing was a considered decree So, the burden of proof will be the heavier burden for Mr. Cicero if he intends to try to change domiciliary status.” Additionally, Ms. LeBlanc argues and maintains that the January 2007 decree was a considered decree on all issues, and not a consent decree. Accordingly, while the record does not contain a transcript of the January 2007 hearing to provide the actual issues litigated, it appears from the record that the January 2007 judgment was a considered decree on all issues, including domiciliary status.

And while Mr. Cicero did not expressly raise the issue of domiciliary status in his rule in connection with the January 2007 hearing, La. C.C.P. art. 1154 provides that “[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised by the pleading.” The trial court, therefore, did not err in considering and ruling on this issue. Mr. Cicero’s first assignment of error is without merit.

“Visitation”

Throughout his argument, Mr. Cicero refers to the exercise of physical custody as visitation. For example, Mr. Cicero argues that “[w]hen a judgment maintains a prior judgment and merely modifies the **visitation** schedule, the prior judgment determines which standard is to be applied to the proposed modification.” (Emphasis added.) As this court discussed in **Cedotal v. Cedotal**, 05-1524, p. 5 (La.App. 1 Cir. 11/4/05), 927 So.2d 433, 436, however, “[t]he time that parents with joint legal custody share with their child is more properly described as a physical custody allocation of a joint custody plan, rather than as visitation.” Physical custody is actual custody. **Id.** Accordingly, the standards of proof applying to consensual or considered decrees apply to modifications of physical custody. See **Id.**, 05-1542 at pp. 5-6, 927 So.2d at 436.

Visitation is governed by La. C.C. art. 136, which grants visitation to a parent not granted custody or joint custody of a child and, under extraordinary circumstances, to relatives, former step-parents and step-grandparents, when in the best interest of the child.

Domiciliary Parent

In his second assignment of error, Mr. Cicero asserts that the trial court was clearly wrong in keeping Ms. LeBlanc as domiciliary parent. We disagree.

It is well settled that an appellate court cannot set aside a trial court's findings of fact in the absence of manifest error or unless those findings are clearly wrong. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). If the findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse those findings even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. **Id.** In order to reverse a fact finder's determination of fact, an appellate court must review the record in its entirety and (1) find that a reasonable factual basis does not exist for the finding, and (2) further determine that the record establishes that the fact finder is clearly wrong. **Stobart v. State**, 617 So.2d 880, 882 (La. 1993).

Here, evidence showed the strengths and weaknesses of both Mr. Cicero and Ms. LeBlanc as parents. In its oral reasons the trial court stated that he found the decision of which parent to be domiciliary parent to be a very close one. Ultimately, the trial court concluded as follows on this issue: "But after considering all of the evidence, considering the length of time that the child has lived in Terrebonne Parish before the court established the shared custody arrangement between Ms. LeBlanc and Mr. Cicero, the court feels that the evidence slightly weighs in favor of maintaining custody, the domiciliary status of the child with the mother here in Houma."

The trial court's finding in regard to domiciliary status is reasonable and supported by the evidence under the burden of proof required to modify either a consent decree or a considered decree. We, therefore, cannot substitute our judgment for that of the trial court. Mr. Cicero's second assignment of error is without merit.

DECREE

For the foregoing reasons, we affirm the judgment of the trial court. Costs of this appeal are assessed against Mr. Harry Cicero, Jr.

AFFIRMED