

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CU 1164

MELISSA RATCLIFF NETTLES

VERSUS

JAMIE DAVIS NETTLES

Judgment Rendered: December 27, 2013

**Appealed from the
Family Court**

**In and for the Parish of East Baton Rouge, Louisiana
Docket Number 165,034**

Honorable Pamela J. Baker, Judge Presiding

**Kristy E. Griffin
Zachary, LA**

**Counsel for Plaintiff/Appellant,
Melissa Ratcliff Nettles**

**Heidi M. Vessel
Zachary, LA**

**Counsel for Defendant/Appellee,
Jamie Davis Nettles**

BEFORE: WHIPPLE, C.J., WELCH AND CRAIN, JJ.

WBW
JEW
WJ

WHIPPLE, C.J.

Melissa Ratcliff appeals the family court's November 13, 2012 judgment, modifying the previous stipulated custody judgment to designate Jamie Nettles as the domiciliary parent of the parties' two children and to set a schedule for Melissa's physical custody of the children. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

The parties, Melissa Ratcliff and Jamie Davis Nettles, were married on July 22, 2000, and were subsequently divorced by judgment dated June 17, 2009.¹ While the divorce proceedings were pending, the parties entered into a stipulated custody judgment on December 19, 2008, wherein they were awarded joint custody of their daughter K.N., born on February 13, 2003, and their son D.N., born September 22, 2006, with Melissa designated as the domiciliary parent and with Jamie having physical custody of the children every other weekend and on holidays as set forth in the judgment. The stipulated judgment further provided that "this judgment is without prejudice and either party may bring any and all matters herein before the court without having to show a change in circumstances."

Thereafter, on November 29, 2011, Jamie filed a petition to modify custody, alleging that there had been a change in circumstances materially affecting the welfare of the children, requiring a modification of the previous stipulated judgment of custody. Specifically, Jamie averred that: Melissa's boyfriend had been arrested on November 8, 2011 for molestation of K.N., which had allegedly occurred on October 10, 2011, at the alleged perpetrator's home; that K.N. was in need of immediate therapy or

¹The divorce judgment ordered that Melissa Ratcliff Nettles "shall hereinafter be known by her maiden name, RATCLIFF."

counseling, but that Melissa refused to cooperate in providing the needed counseling; that Jamie had attempted to obtain therapy or counseling for K.N., but that the counselors would not provide therapy because Melissa refused to give her permission as domiciliary parent; that Melissa continued her relationship with her boyfriend who was arrested for molesting K.N.; and, thus, that the children were not safe in Melissa's custody. Accordingly, in addition to requesting that he be named the immediate temporary domiciliary parent with authority to obtain counseling for K.N., Jamie sought a change in the previous stipulated custody judgment, i.e., to designate him as the domiciliary parent and grant Melissa supervised visitation with the children.

Following a hearing on December 13, 2011, the family court rendered judgment designating Jamie as the temporary domiciliary parent of the children pending trial of the matter, with Melissa to have physical custody of the children every other weekend. The judgment further prohibited Melissa's boyfriend from being in the presence of the children and from speaking to them and prohibited Melissa from communicating with her boyfriend when the children were in her physical custody.

Trial of the matter was conducted on October 10, 11, 12 and 19, 2012. Thereafter, by judgment dated November 13, 2012, the family court ordered that the parties be granted joint custody with Jamie designated as the domiciliary parent of the two children and with Melissa having physical custody of the children on alternating weekends, and a holiday and summer schedule as set forth by the court. The judgment further provided that Melissa's boyfriend could not be in the presence of K.N. or D.N., nor was Melissa to speak to him in the children's presence.

From this judgment, Melissa appeals.

DISCUSSION

In her first assignment of error, Melissa argues that the family court erred in failing to apply the provisions of the Post-Separation Family Violence Relief Act (PSFVRA), LSA-R.S. 9:361 et seq., in making its determination to designate Jamie as the domiciliary parent, where there was a history of family violence by Jamie.² In her second assignment of error, Melissa argues that the family court erred by not applying the factors set forth in LSA-C.C. art. 134 for determining the children's best interests, where the evidence presented at trial established that she should have remained the domiciliary parent.

The time that parents with joint legal custody share with their children is a physical custody allocation of a joint custody plan. Lunney v. Lunney,

²At the outset, we note that Melissa did not specifically plead or argue the applicability of the PSFVRA in the proceedings below, nor did she file any pleadings seeking the protections offered therein with regard to custody and visitation. See generally Nguyen v. Le, 07-81 (La. App. 5th Cir. 5/15/07), 960 So. 2d 261, 263-264. Undeniably, she did allege in her petition for divorce, in one or two other pleadings, and at the trial of this matter that Jamie had a history of violent behavior toward her during their marriage. However, she did not seek the specific protections with regard to custody and visitation set forth in the PSFVRA.

Indeed, Melissa consented in the December 19, 2008 stipulated judgment to joint custody with Jamie exercising unsupervised physical custody on alternating weekends and holidays, an arrangement under which the parties operated until a temporary change of domiciliary status was ordered due to the allegations of sexual abuse of K.N. by Melissa's boyfriend. And, at the trial of this matter, she sought only that she "be given her children back," presumably as the domiciliary parent, and alternatively that she not "be subjected to supervised visitation" with her children.

Thus, Melissa has asserted the applicability of the PSFVRA for the first time on appeal. See Nguyen, 960 So. 2d at 263-265. However, even in brief on appeal, while contending that Jamie did not establish that he had completed an anger management program, she nonetheless does not seek the protections of LSA-R.S. 9:364(A), prohibiting an abusive spouse from sharing joint custody or having a custodial role, or 9:364(C), allowing only supervised visitation until the offending parent has completed a treatment program, instead seeking only a reversal of the judgment naming Jamie as domiciliary parent.

Nonetheless, Melissa did allege physical abuse in the proceedings below, testimony of that abuse was presented at trial without objection, and the abuse against Melissa was admitted to by Jamie. See generally Dufresne v. Dufresne, 08-215, 08-216 (La. App. 5th Cir. 9/16/08), 992 So. 2d 579, 587, writ denied, 2008-2843 (La. 12/17/08), 996 So. 2d 1123. Thus, we will address her argument that the family court's custody judgment is contrary to the provisions of the PSFVRA.

2011-1891 (La. App. 1st Cir. 2/10/12), 91 So. 3d 350, 353, writ denied, 2012-0610 (La. 4/4/12), 85 So. 3d 130. A party seeking modification of a physical custody decree set forth in a stipulated or consensual judgment must meet the two-prong test of proving: (1) that there has been a change in circumstances materially affecting the welfare of the child since the original decree,³ and (2) that the proposed modification is in the best interest of the child. Lunney, 91 So. 3d at 353.

The PSFVRA was enacted in 1992 to address the problem of family violence. It applies only if there is a history of “family violence,” which is defined as “physical or sexual abuse and any offense against the person as defined in the Criminal Code of Louisiana, except negligent injuring and defamation, committed by one parent against the other parent or against any of the children.” LSA-R.S. 9:362(3). Where a history of family violence exists, LSA-R.S. 9:364(A) provides that “[t]here is created a presumption that no parent who has a history of perpetrating family violence shall be awarded sole or joint custody of children.” However, LSA-R.S. 9:364(A) further provides that this presumption can be overcome, as follows:

The presumption shall be overcome only by a preponderance of the evidence that the perpetrating parent has successfully completed a treatment program as defined in R.S. 9:362, is not abusing alcohol and the illegal use of drugs scheduled in R.S. 40:964, and that the best interest of the child or children requires that parent’s participation as a custodial parent because of the other parent’s absence, mental illness, or substance abuse, or such other circumstances which affect the best interest of the child or children.^[4]

³While the December 19, 2008 stipulated custody judgment provided that the parties could bring all matters provided for therein before the court “without having to show a change in circumstances,” a change in circumstances was clearly established herein by the circumstances resulting in the arrest of Melissa’s boyfriend for his sexual abuse of K.N. and Melissa’s continued relationship with him.

⁴A “treatment program” is defined in LSA-R.S. 9:362(7) as “a course of evaluation and psychotherapy designed specifically for perpetrators of family violence, and conducted by licensed mental health professionals.”

Thus, once the PSFVRA has been triggered by a finding of a history of family violence, an additional burden of proof is imposed upon the parent who has been found to have a history of perpetrating family violence. That parent must overcome the presumption that he cannot be awarded sole or joint custody of the children by proving that he has completed a treatment program as defined by the PSFVRA, that he is not abusing alcohol or using illegal drugs, and that the best interests of the children require him to be the custodial parent because of the other parent's absence, mental illness, or substance abuse, or such other circumstances which affects the best interests of the children.⁵ D.O.H. v. T.L.H., 2001-174 (La. App. 3rd Cir. 10/31/01), 799 So. 2d 714, 719.

The trial judge is in the best position to ascertain the best interest of the child given each unique set of circumstances. Accordingly, a trial court's determination of custody is entitled to great weight and will not be reversed on appeal unless an abuse of discretion is clearly shown. Raney v. Wren, 98-0869 (La. App. 1st Cir. 11/6/98), 722 So. 2d 54, 56.

In the instant case, Melissa testified at trial that during their marriage,

⁵Similarly, pursuant to LSA-R.S. 9:364(C), if the court finds that a parent has a history of perpetrating family violence, the court shall allow only supervised visitation with that parent conditioned on the parent participating in and completing a treatment program. "Unsupervised visitation shall be allowed only if it is shown by a preponderance of the evidence that the violent parent has completed a treatment program, is not abusing alcohol and psychoactive drugs, and poses no danger to the child, and that such visitation is in the child's best interest." LSA-R.S. 9:364(C).

Jamie physically abused her.⁶ Regarding specific incidents of abuse, she contended that Jamie had beaten her in the face with his fist, had choked her to the point where she passed out, had hit her while she was holding the children, and had hit her on the head with a roll of caution tape. Melissa also contended that on one occasion, Jamie grabbed her by the hair when they were sitting on the couch, threw her to the floor and starting beating her and that on another occasion, he threatened her with a knife, resulting in his arrest. In reasons for judgment, the family court judge stated that she believed Melissa's testimony regarding the abuse.

Moreover, Jamie acknowledged that there was physical abuse in his relationship with Melissa, stating that there were "a lot of open hand slaps and hair pulling and objects thrown and things of that nature" and admitting that the abuse occurred over an extended period of time. He candidly acknowledged that he was arrested as a result of an altercation he had with Melissa involving a knife, although he denied that he had "used the knife on Melissa."

Considering the foregoing and the record as a whole, a history of family violence by Jamie against Melissa was established herein. Compare Michelli v. Michelli, 93-2128 (La. App. 1st Cir. 5/5/95), 655 So. 2d 1342, 1346-1349. Accordingly, the presumption that Jamie should not be awarded

⁶Clearly, events occurring during the marriage predate the December 19, 2008 stipulated judgment wherein Melissa agreed to a joint custody arrangement with Jamie exercising unsupervised physical custody of the children on alternating weekends and holidays. However, as mentioned above, the stipulated judgment provided that the judgment was "without prejudice and either party may bring any and all matters herein before the court without having to show a change in circumstances." Moreover, this court has held that where a stipulated judgment of custody has been rendered, application of the change in circumstances rule does not automatically preclude the introduction of all evidence of facts occurring prior to the stipulated custody judgment. To the contrary, "[t]he trial court should not exclude evidence in a custody modification proceeding if that evidence is relevant and material to an issue which the parties have not previously had 'a full and fair opportunity to litigate.'" Smith v. Smith, 615 So. 2d 926, 931 (La. App. 1st Cir.), writ denied, 617 So. 2d 916 (La. 1993) (quoting Bergeron v. Bergeron, 492 So. 2d 1193, 1195 (La. 1986)).

joint custody of the children applied, and he had the burden of overcoming that presumption by establishing by a preponderance of the evidence that: (1) he had successfully completed a treatment program, (2) he was not abusing alcohol or using illegal drugs, and (3) the best interest of the children required that Jamie participate as a custodial parent due to some circumstances affecting their best interests. LSA-R.S. 9:364(A).

Regarding a treatment program, the record establishes that Jamie attended anger management classes as a result of his arrest for the incident with the knife, and the charges were eventually dismissed and expunged. The anger management classes were one-on-one sessions with the therapist. Jamie estimated that he attended between five to ten sessions over a period of three to four months to complete the program, and he testified that program really benefited him and that he is not the same person today.⁷ Additionally, with regard to the second requirement, there was no evidence or suggestion at trial that Jamie abuses alcohol or uses illegal drugs.

Moreover, regarding the best interests of the children, in reasons for judgment, the family court judge noted that she had considered all the factors listed in LSA-C.C. art. 134⁸ in determining the best interests of the

⁷When asked on cross-examination if he had any proof that he had completed the program, Jamie testified that he had received a certificate, but that he had misplaced it. He further explained that when he attempted to return to the facility to obtain paperwork to establish his completion of the class, the business was no longer in service.

⁸Louisiana Civil Code article 134 provides that the court shall consider all relevant factors in determining the best interest of the child and that:

Such factors **may** include:

- (1) The love, affection, and other emotional ties between each party and the child.
- (2) 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.
- (3) The capacity and disposition of each party to provide the child with food, clothing, medical care, and other material needs.

children, and the record amply supports the conclusion that there are other circumstances herein affecting the best interests of the children that require Jamie's participation as a custodial parent. See LSA-R.S. 9:364(A). In particular, the overriding concern herein was the alleged sexual abuse of K.N. by Melissa's boyfriend, with whom Melissa was still in a relationship at the time of trial of this matter, and Melissa's refusal to believe, or even consider, that her daughter had been sexually abused by him despite K.N. having reported such abuse and despite the opinions of K.N.'s therapist and the court-appointed custody evaluator that the abuse did in fact occur.

As noted by the family court, the incident that led to Jamie's request for modification of custody was K.N. reporting to her paternal grandmother and her stepmother that she had been molested by Melissa's boyfriend, a revelation that led to the arrest of the alleged perpetrator. When Jamie learned of K.N.'s report of the abuse, he attempted to set up counseling sessions for her at the Baton Rouge Children's Advocacy Center, but, as further noted by the family court, Melissa, as domiciliary parent, thwarted Jamie's attempts by refusing to allow the counselor to speak to K.N. Only after the family court's December 2011 judgment temporarily designating

(4) The length of time the child has lived in a stable, adequate environment, and the desirability of maintaining continuity of that environment.

(5) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(6) The moral fitness of each party, insofar as it affects the welfare of the child.

(7) The mental and physical health of each party.

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

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

(10) The willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party.

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

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

(Emphasis added).

Jamie as domiciliary parent was he able to arrange counseling sessions for K.N. with Chris Huff at the McComb Children's Advocacy Center.

Huff, a licensed clinical social worker, testified at trial regarding his counseling sessions with K.N. Huff began treating K.N. in January 2012 and last saw her in September 2012, one month before trial. During the course of his treatment of K.N., she revealed that on numerous occasions, her mother's boyfriend had sexually molested her.⁹

Huff described K.N. as a very shy child who, in their early counseling sessions, was more comfortable responding to questions by writing her answers on a tablet rather than speaking aloud. However, as their therapy sessions continued and K.N. became more comfortable with him, she was able to communicate more openly, and her level of disclosure increased. When asked whether, in his opinion, K.N. had created this story, Huff stated that he did not believe she had. He explained that K.N. had been very consistent in her attitude and avoidance of her mother's boyfriend, which was an indication of trauma. Also, Huff described K.N. as exhibiting "hypersensitivity" about her mother's boyfriend, as evidenced by her not wanting him to be present at her ballgames or on visits and not being able to say a single positive thing about him, which is another indication of trauma and is consistent with a child who has been abused. Huff testified at trial that there was no doubt in his mind that Melissa's boyfriend molested K.N.

With regard to Melissa's refusal to believe K.N.'s claims of abuse, Huff testified that he met with Melissa at one counseling session and that on that occasion, Melissa indicated to him that she believed that Jamie had "put [K.N.] up to" making these allegations in order to hurt Melissa. Huff also

⁹Although not set forth herein, we note that during counseling sessions, she described the specific behavior and acts that had occurred.

testified that at a later session, K.N. related that at a recent visit with Melissa, Melissa had told K.N. that her boyfriend "would never do that," which made K.N. feel sad that her mother did not believe her.

Dr. Beverly Howze, a psychologist appointed by the court to perform a custody evaluation, also testified at trial and rendered an opinion as to the custody arrangement that would be in the children's best interests. With regard to K.N.'s allegations of sexual abuse by her mother's boyfriend, Dr. Howze, who has worked in the area of trauma for over twenty years and has examined thousands of trauma victims over the years, testified that she believed that K.N. was telling the truth. Dr. Howze noted that the emotional reactions are the most telling and convincing part in a session, and when K.N. first began talking about the abuse, she was "emotionally riveting," and her face was "quivering" as she tried not to cry. K.N. had a look on her face that Dr. Howze interpreted as a "look of shame," and she buried her face in her hands. She noted that K.N. went back and forth from being overwhelmed and hiding her face to talking in a robot fashion. In Dr. Howze's opinion, K.N.'s reactions were that of a trauma victim and not the reactions of someone who has rehearsed, is playing games, or has a false memory. Dr. Howze stated, "This is a memory that is real. It is real."

Regarding Melissa, Dr. Howze noted that Melissa was very defensive of her boyfriend and had formulated a point of view with regard to him that was "unalterable," "hardened and impervious to other information that might be counter" to that view. Melissa is convinced that Jamie is making up the charges against her boyfriend and indicated that her boyfriend is a kind and generous man who would never do anything immoral.

With regard to why Melissa was so dismissive of external information that may present a contrary view of her boyfriend, Dr. Howze noted that

Melissa's relationship with her boyfriend appeared to be the most emotional and intensive relationship she had ever had and that the relationship provided her with many of her material needs. As noted by both Dr. Howze and the family court in reasons for judgment, Melissa's boyfriend, who is married to someone else, has been financially generous to Melissa, offering her a standard of living well beyond what she could afford. Melissa acknowledged at trial that her boyfriend had purchased her car for her as well as the home in which she now lives, had taken her on yearly trips to British Virgin Islands, had taken her to the Bahamas, and had given her approximately twenty thousand dollars for attorney's fees for this matter. Moreover, in Dr. Howze's opinion, Melissa is "emotionally wedded" to her boyfriend and is reluctant to tarnish her view of him in any way, and in such a situation, a parent's capacity to make the best possible decisions relative to her children can become impaired. Indeed, the family court found that Melissa's refusal to believe her daughter was clouding her judgment when it came to protecting K.N. from potentially harmful situations.

At trial, Melissa acknowledged that she does not believe that her boyfriend abused K.N. When asked how she could justify that belief in light of the fact that K.N. had reported the abuse and the fact that two mental health professionals opined that the abuse did occur, Melissa repeatedly stated that she did not believe it because K.N. had not told Melissa "the story." However, as noted by the family court in reasons for judgment, when both K.N. and D.N. had previously reported to Melissa that her boyfriend had grabbed D.N. and that he hit his shoulder on the doorframe, Melissa's response had been to ask her boyfriend if he had done this. When he denied that he had, Melissa believed her boyfriend rather than her children, telling K.N. that her boyfriend had not done that. Thus, when the

children had reported something much less significant to Melissa, her response had been not to believe them. Considering this, the family court judge could not “even conceive of how [Melissa] would think that her children would feel comfortable reporting something as serious as being molested and expect her to believe them” and doubted that Melissa would have believed K.N. even if K.N. had told Melissa about the abuse.

Indeed, Dr. Howze testified that when a child is not believed, this creates a great deal of emotional harm. The fact that Melissa does not believe her daughter’s allegations and is carrying on an extended relationship with the man K.N. has accused of molesting her is very harmful to K.N.’s relationship with her mother. Dr. Howze explained that such a situation teaches the child that the world is not to be trusted and that she cannot trust her family. Also, it interferes with future relationships due to a lack of trust. According to Dr. Howze, K.N. needs to feel believed and protected and that her parents will act as a barrier between her and the world that might do harm. In this regard, the family court found that K.N. was “not only abused by [Melissa’s boyfriend,] but now continues to be abused by her mother for not believing her and it’s going to cause her a lot of problems unless and until [Melissa] can talk to her and let her know that she believes her and she will protect her.”

With regard to Jamie, Dr. Howze noted that Jamie was forthright in admitting that he had been a batterer, but that he had gotten help through the anger management program. When asked if it is possible for a person with that type of history as a batterer to change significantly to become a non-batterer, Dr. Howze stated that it was possible, noting that “the facts end up being the best evidence.” In that regard, she noted that Jamie’s present relationship with his new wife was not characterized in the way that his

relationship with Melissa had been.¹⁰ Additionally, Dr. Howze stated that there was no indication that this kind of abusive behavior is part of Jamie's personality makeup. Thus, based on her evaluation of the family, Dr. Howze recommended that Jamie be designated as the domiciliary parent of the parties' minor children.

In reasons for judgment, the family court likewise noted Jamie's history of abuse toward Melissa and poor judgment in the past, but found that Jamie had "stepped up to the plate" and had "done the things that a good and concerned father would do to take care of his children." Indeed, as noted by the family court, upon being designated as the temporary domiciliary parent following the allegations of abuse, Jamie immediately set up counseling for K.N. and immediately began looking for another job so he would not be traveling. Jamie took another job at an extremely large cut in pay so that he could be home every evening and also arranged with his new employer to take off early on the days that K.N. has counseling sessions.

In addition to Jamie demonstrating his willingness to protect the children from harm, the record also establishes that the children have adjusted well to their new living arrangement with Jamie, his wife and the children's younger half sibling. The children are involved in sports, with Jamie coaching their teams, and K.N. is involved in cheering. The family also attends church regularly. With regard to school, when Melissa was domiciliary parent, the children had numerous absences from school, and D.N. had discipline problems at school. However, at the new school where Jamie has enrolled

¹⁰When questioned about an incident with his present wife where Jamie threw hot chocolate on her in reaction to his belief that she was throwing hot chocolate at him when she tripped and spilled hers on him, Dr. Howze characterized this as an impulsive act. However, this one incident did not change her opinion that there was no indication that Jamie was abusive toward his current wife or her opinion of what was in the best interests of the children.

the children, they have not had any absences, are doing well academically, and are benefitting from the smaller class sizes. Moreover, K.N. was thriving in her new environment, reporting that she had made many friends.

Accordingly, considering the foregoing and the record as a whole, we conclude that the presumption that Jamie should not be awarded joint custody of the children was clearly overcome in the instant case, and the family court's finding that designating Jamie as the domiciliary parent of K.N. and D.N. was in the best interest of the children was well within its discretion. Thus, we find no merit to Melissa's assignments of error on appeal.

CONCLUSION

For the above and foregoing reasons, the family court's November 13, 2012 judgment, designating Jamie Nettles as the domiciliary parent of K.N. and D.N. and setting forth a schedule during which Melissa Ratcliff will exercise physical custody of the children, is hereby affirmed. Costs of this appeal are assessed against appellant, Melissa Ratcliff.

AFFIRMED.