NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 CU 0403

SHELDON MELTON

VERSUS

JARI JOHNSON

Judgment Rendered: DEC 1 2 2018

* * * * * *

On Appeal from The Family Court
In and for the Parish of East Baton Rouge
State of Louisiana
No. F202105

Honorable Hunter V. Greene, Judge Presiding

* * * * * *

Erika L. Greene Baton Rouge, Louisiana	Counsel for Defendant/Appellant Jari Johnson
Sheldon Melton Baton Rouge, Louisiana	Plaintiff/Appellee *Pro Se*

* * * * * *

BEFORE: WHIPPLE, C.J., McCLENDON, and HIGGINBOTHAM, JJ.

Higginbotham, J. Concurs with the result.

WHIPPLE, C.J.

In this custody proceeding, the mother, Jari Johnson, appeals from a judgment of the family court denying her motion to modify custody, motion to transfer venue, and motion to reduce or the terminate the compliance bond. For the following reasons, we affirm the judgment in part, reverse the judgment in part, and remand the matter to the family court with instructions.

FACTS AND PROCEDURAL HISTORY

Jari Johnson and Sheldon Melton were married on April 19, 2013, in Houston, Texas, and thereafter established their matrimonial domicile in East Baton Rouge Parish. One child, M.M., was born of this marriage on July 10, 2014. On October 29, 2015, Mr. Melton filed a "Petition for Divorce Pursuant to Article 102, Child Custody, Use of the Family Home, and Use of Movables" with The Family Court for East Baton Rouge Parish ("the family court"), requesting that he be granted the use of the family home, the movables located therein, and the vehicle in his possession, that the parties be granted joint custody of M.M., and that he be designated as the domiciliary parent, subject to "reasonable visitation" in Ms. Johnson's favor or, alternatively, that he be given equal physical custody.

Thereafter, Ms. Johnson moved to Jacksonville, Florida with the child.[1] On January 12, 2016, the parties appeared with counsel and entered into a stipulated interim custody arrangement, providing for Mr. Melton to have physical custody of M.M. for certain specified time periods beginning the weekend of January 15,

[1]It is unclear from the record of these proceedings who left the matrimonial domicile or exactly when Ms. Johnson relocated to Florida with M.M. after the parties separated.

2016, with exchanges to take place in Slidell, Louisiana.[2] A judgment was eventually signed on February 16, 2016, in conformity with the parties' stipulation, but further provided that Mr. Melton be cast for all costs. However, contending that the allocation of travel expenses remained at issue, and noting that neither Mr. Melton nor his counsel had appeared at the scheduled status conference on February 16, 2016, Ms. Johnson filed a request for a hearing on her claim that travel expenses should be split or allocated proportionately and for other relief in her favor as previously agreed upon by the parties. In response to her motion filed on March 9, 2016, the family court ordered that a rule to show cause issue and set the matter for March 29, 2016.

Shortly thereafter, on March 17, 2016, Mr. Melton filed a "Petition for Civil Warrant for the Return of a Child Kept in Violation of Custody and Visitation Order." In this petition, Mr. Melton alleged that on his first and only visit with M.M., on the weekend of January 15, 2016, Ms. Johnson brought the child to him in Baton Rouge, struck him during the exchange, and refused to allow him to commence his scheduled physical custody time with M.M. He further alleged that Ms. Johnson had failed to communicate with him since this incident, and that she failed to comply with any of the other stipulated custodial times in January, February, and March, 2016. The family court denied Mr. Melton's petition, noting

[2]Specifically, the judgment rendered in accordance with the stipulation accepted by the trial court provided that Mr. Melton shall exercise custodial times with M.M. on the date of:

the weekend of January 15, 2016, with Mr. Melton picking up the child in Tallahassee, Florida; January 24-January 30; February 7-February 17; March 13-March 27; and April 10-April 24.

As the child was living in Florida with Ms. Johnson at this time, the stipulated judgment provided that Ms. Johnson was to bring the child to Slidell to execute these exchanges and specifically ordered that all issues were pretermitted to the trial date of May 6, 2016.

that it "does not comply with [LSA-R.S.] 9:343."[3] On March 29, 2016, another status conference or hearing took place[4] and another interim order issued, ordering Mr. Melton to deposit funds to pay Ms. Johnson certain stipulated travel expenses, and further ordering both parties to allow frequent contact with M.M.

Thereafter, on April 13, 2016, Mr. Melton filed a "Motion for Contempt and Other Remedies for Failure to Allow Visitation Rights," re-urging his allegation that Ms. Johnson had continuously failed to comply with the January 12, 2016 stipulated judgment, which set forth specific physical custody times for Mr. Melton.

Prior to a hearing on Mr. Melton's motion for contempt, the parties appeared before the family court on April 26, 2016, for a status conference, wherein they entered into another stipulated judgment, which provided, in pertinent part, that they were to equally share physical custody of M.M. on a fourteen/fourteen day basis and that all exchanges were to take place in Biloxi, Mississippi.

Subsequently, on May 10, 2016, Mr. Melton, his attorney, and Ms. Johnson's attorney appeared before the family court for a hearing on the contempt motion Mr. Melton had filed. Following this hearing, the family court found Ms.

---

[3]Louisiana Revised Statute 9:343, governing the return of a child kept in violation of a custody and visitation order, provides:

> A. Upon presentation of a certified copy of a custody and visitation rights order rendered by a court of this state, together with the sworn affidavit of the custodial parent, the judge, who shall have jurisdiction for the limited purpose of effectuating the remedy provided by this Section by virtue of either the presence of the child or litigation pending before the court, may issue a civil warrant directed to law enforcement authorities to return the child to the custodial parent pending further order of the court having jurisdiction over the matter.
>
> B. The sworn affidavit of the custodial parent shall include all of the following:
> (1) A statement that the custody and visitation rights order is true and correct.
> (2) A summary of the status of any pending custody proceeding.
> (3) The fact of the removal of or failure to return the child in violation of the custody and visitation rights order.
> (4) A declaration that the custodial parent desires the child returned.

[4]Although her counsel appeared, Ms. Johnson was not present.

Johnson in contempt of court and ordered her to pay $500.00 in attorney's fees, $175.00 for court costs, and $245.00 for travel expenses to Mr. Melton.[5] The court further ordered that Ms. Johnson post a compliance bond, pursuant to LSA-R.S. 9:342, in the amount of $3,500.00. On June 23, 2016, Ms. Johnson filed a "Motion to Terminate or Reduce Bond."

While not entirely clear from the record of these proceedings, it appears that the parties appeared before the family court again on June 13, 2016, pursuant to regular assignment, for a trial on the custody claims. According to the minute entry, the parties and their respective attorneys were present, testimony was taken, evidence "was produced," and the court ordered post-trial memoranda, which were respectively submitted on June 22 and 28, 2016.[6]

On November 28, 2016, the family court signed a judgment regarding the matters tried on June 13, 2016,[7] ordering, in pertinent part, that:

(1) The parties were to have joint custody of the child;
(2) The child shall reside in East Baton Rouge Parish until further orders of the court;
(3) Mr. Melton was the designated domiciliary parent;
(4) The parties were to alternate custody on a fourteen/fourteen day schedule commencing immediately until October 31, 2016 so Ms. Johnson could complete her education curriculum;
(5) Thereafter, commencing November 1, 2016, the parties were to have week to week custody, exercised in Louisiana only;
(6) The previously issued bond was to remain in place;
(7) Exchanges were to take place at the fire station on Lobdell Avenue and Government Street in Baton Rouge at each party's cost; and
(8) The parties were to alternate the 48-hour Christmas and New Year holiday, and each party was to have a two-week uninterrupted custodial period during the summer.

---

[5]The record of these proceedings does not contain a transcript from this hearing, and the minute entry does not indicate that the family court heard testimony from Mr. Melton or any other witnesses at this hearing. The record does contain an exhibit envelope from this hearing date, but the only exhibit therein is a copy of bank statements.

[6]The record of these proceedings likewise does not contain a transcript from the June 13, 2016 trial, although there is a minute entry from this date.

[7]While the judgment references a June 14, 2016 trial date, this appears to be a typographical error, as the minute entries reflect that the trial date was June 13, 2016.

Approximately seven months later, on June 19, 2017, Mr. Melton filed an *ex parte* custody petition with the family court, alleging that in February 2017, Ms. Johnson blocked all communications from him, he had to hire a private investigator to locate M.M., and he obtained an "emergency pickup order" in Florida to get the child back.[8] Based on the *ex parte* custody petition filed in Louisiana, the family court in Louisiana granted Mr. Melton's *ex parte* custody petition and awarded him temporary custody of M.M. until July 18, 2017. The family court further ordered that Ms. Johnson show cause on July 18, 2017, why she should not immediately post the previously ordered compliance bond and why Mr. Melton should not be granted custody of M.M. with supervised visitation to Ms. Johnson. On July 18, 2017, the parties appeared before the family court and entered into a written stipulation, which provided, *inter alia*, that Ms. Johnson was to exercise custodial time with the child as agreed upon by the parties and that this visitation was to be supervised by Mr. Melton or his mother, **pending the next court date**.

Additionally, on July 18, 2017, Ms. Johnson filed a "Motion to Modify Custody, Transfer, and Reset." In this pleading, Ms. Johnson alleged that there had been a material change in circumstances since the rendition of the judgment providing for the fourteen/fourteen day custody schedule that was to be exercised until October 31, 2016, and the week-to-week custody schedule that was to be exercised commencing November 1, 2016 in Louisiana only. Specifically, Ms. Johnson alleged: (1) Mr. Melton is now employed and domiciled in Houston; (2) the parties have exercised custodial periods contrary to the judgment; (3) Mr.

[8]Attached to this pleading is a "NOTICE OF HEARING" issued by the Circuit Court for Duval County, Florida, on June 14, 2017, providing that because the court was presented with an out-of-state custody decree, the sheriff was directed to "place M.M. in the physical custody of [Mr. Melton]" without prior notice to Ms. Johnson, and further ordering that Mr. Melton not remove the child from the Florida court's jurisdiction. Further, the parties were ordered to appear and testify at a hearing in Jacksonville, Florida, to be held on June 16, 2017. The record of these proceedings does not reflect the final outcome of the Florida proceedings.

Melton's mother has been caring for the child during his custodial times while he works in Texas; and (4) their communications have become sporadic despite her best efforts.[9] Ms. Johnson further requested that, in view of the parties' relocation, the matter be transferred to another court pursuant to LSA-C.C.P. art. 74.2(E).[10] Additionally, Ms. Johnson requested that the family court reset a hearing on her motion to terminate and reduce the compliance bond, which was previously passed without date.

The parties appeared before the family court on September 5, 2017, for a hearing on Ms. Johnson's motion to modify custody, motion to transfer, and motion to terminate or reduce the compliance bond.[11] After hearing testimony of the parties, the family court denied the motion to modify custody, denied the motion to transfer venue and further ordered that the compliance bond shall not be terminated or reduced. A judgment reflecting this ruling was signed by the family court on October 24, 2017. This judgment further provided that Ms. Johnson shall pay $675.52 (representing travel and attorney's fees awarded to Mr. Melton in connection with his *ex parte* custody petition) within sixty days.

Ms. Johnson now appeals the October 24, 2017 judgment of the family court, asserting in her assignments of error that the family court erred in denying her motion for modification of custody and in failing to terminate and/or reduce the compliance bond.

---

[9]Ms. Johnson does not specify in the pleading what she seeks to modify regarding the original custody decree; rather, she simply seeks a modification of "custody," which is discussed below.

[10]Louisiana Code of Civil Procedure article 74.2(E) provides:

> For the convenience of the parties and the witnesses and in the interest of justice, a court, upon contradictory motion or upon its own motion after notice and hearing, may transfer the custody or support proceeding to another court where the proceeding might have been brought.

[11]Although Ms. Johnson was represented by counsel at this hearing, Mr. Melton appeared *pro se*.

DISCUSSION

Denial of Motion for Modification of Custody (Assignment of Error Number One)

It is a well-recognized tenet of Louisiana jurisprudence that an award of child custody is not a tool to regulate human behavior. Cleeton v. Cleeton, 383 So. 2d 1231, 1236 (La. 1979) (on rehearing). Instead, every child custody case must be reviewed within its own peculiar set of facts. Connelly v. Connelly, 94-0527 (La. App. 1st Cir. 10/7/94), 644 So. 2d 789, 793. A family 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. Thompson v. Thompson, 532 So. 2d 101, 101 (La. 1988) (*per curiam*); Bercegeay v. Bercegeay, 96-0516 (La. App. 1st Cir. 2/14/97), 689 So. 2d 674, 676. As an appellate court, we cannot set aside the family court's factual findings unless we determine that there is no reasonable factual basis for the findings and the findings are clearly wrong (manifestly erroneous). Stobart v. State, Through Department of Transportation and Development, 617 So. 2d 880, 882 (La. 1993). When the court of appeal finds that a reversible error of law or manifest error of material fact was made in the lower court, it is required to redetermine the facts *de novo* from the entire record and render a judgment on the merits. Rossell v. ESCO, 549 So. 2d 840, 844 (La. 1989).

The term "custody" is broken down into two components: legal custody and physical or actual custody. Hodges v. Hodges, 2015-0585 (La. 11/23/15), 181 So. 3d 700, 705. Each award of custody provides for both legal and physical custody. LSA-R.S. 9:335. Since the motion to modify sought simply to modify "custody," we address both the modification of legal custody and modification of physical custody, each in turn.

The paramount consideration in any determination of child custody is the consideration of the best interest of the child. LSA-C.C. art. 131. The burden of

proof on a party seeking to modify a prior permanent custody award is dependent on the nature of the original custody award. Evans v. Lungrin, 97-0541, 97-0577 (La. 2/6/98), 708 So. 2d 731, 738. Custody may be awarded either through a stipulated judgment or a considered decree. In a stipulated judgment, the parties consent to a custodial arrangement. In a considered decree, the family court receives evidence of parental fitness to exercise care, custody, and control of a child. D'Aquilla v. D'Aquilla, 2003-2212 (La. App. 1st Cir. 4/2/04), 879 So. 2d 145, 148, writ denied, 2014-1083 (La. 6/24/04), 876 So. 2d 838. Once a considered decree of permanent custody has been rendered by a court, the proponent of the change bears a heavy burden of proving that the continuation of the present custody is so deleterious to the child as to justify a modification of the custody decree, or of proving 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. Bergeron v. Bergeron, 492 So. 2d 1193, 1200 (La. 1986). However, in cases where the original custody decree is a stipulated judgment, and no evidence of parental fitness is taken, the heavy burden of proof enunciated in Bergeron is inapplicable. Instead, where the original custody decree is a stipulated judgment, the party seeking modification must only prove (1) that there has been a material change of circumstances since the original custody decree was entered, and (2) that the proposed modification is in the best interest of the child. Evans, 708 So. 2d at 738.

In the instant case, the burden enunciated in Bergeron, supra, is applicable, as the underlying custody decree was rendered by the family court on November 28, 2016, after hearing testimony of the parties and evidence of parental fitness at

the June 13, 2016 trial in this matter.[12] As stated above, the November 28, 2016 judgment, which the family court declined to modify, addressed and provided for legal custody, in that the parties are to have joint custody of the child, with Mr. Melton named as the domiciliary parent, and for physical custody, in that commencing November 1, 2016, the parties are to have week-to-week physical custody of the child, to be exercised in Louisiana only. In denying the motion to modify custody, the family court found that the burden enunciated in Bergeron was not met.[13]

The heightened standard stated in Bergeron is applicable to both changes in legal and physical custody. Howze v. Howze, 2017-0358 (La. App. 1st Cir. 9/28/17), 232 So. 3d 606, 610-611; see also Davenport v. Manning, 95-2349 (La. App. 4th Cir. 6/5/96), 675 So. 2d 1230, 1232. With respect to modification of legal and physical custody, as the party seeking a modification of custody, Ms. Johnson bore the heavy burden of proving that continuation of the existing custody is so deleterious to the child as to justify a modification of the custody decree, or of proving 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. See Howze, 232 So. 2d at 609. Rather than addressing the entirety of the factors

[12]The transcript of the June 13, 2016 trial is not contained in the record before us. However, from the minutes and the language of the judgment, stating "pursuant to the trial [and] ... considering the pleadings, the testimony, and the law," it is evident that both parties put on testimony and evidence at the trial as to parental fitness. Therefore, the November 28, 2016 judgment was a considered decree and the heavy burden enunciated in Bergeron for a change of legal custody applies. See Howze v. Howze, 2017-0358 (La. App. 1st Cir. 9/28/17), 232 So. 3d 606, 609.

[13]Although an interim judgment and a stipulated judgment were issued between the time the original custody decree was entered and the hearing on the motion to modify was held, these interim judgments are not before us. The interim judgment and stipulated judgment were both temporary in nature and did not abrogate the original custody decree. According to the record before us, the November 28, 2016 custody decree has never been modified. The interim judgments were temporary solutions to a problem, namely the unworkable physical custody decree, which is discussed below. Further, the motion to modify specifically sought to modify the original **November 28, 2016** custody decree, and in reasons for judgment, the family court specifically recognized that it was refusing to modify the November 28, 2016 custody decree.

enunciated in Bergeron, the family court focused on whether or not there has been a material change in circumstances and concluded that "very little has changed since the last time other than Ms. Johnson now works in the field which is not related to her education which was the reason why she was in Florida."

With respect to legal custody, we find the following facts relevant. The testimony presented at the hearing primarily concerned Ms. Johnson's allegations that Mr. Melton was living and working in Houston, Texas since the last judgment, and that M.M. was primarily living with Mr. Melton's mother while he worked in Houston. However, there was conflicting evidence presented to the family court regarding this allegation. Specifically, Mr. Melton testified that at one time, he was living in Houston for contract work, and he admitted that he still had an apartment in Texas for another six months; however, he testified that he was no longer working there and he is now living in the Baton Rouge area again with his mother and M.M. Given the conflicting testimony as to this allegation, and the deference owed to the trier of fact in resolving credibility issues when there is conflicting testimony, we are unable to find that the family court erred in finding that this allegation was not established or did not warrant modifying the **legal custody** of the child.

However, with regard to **physical custody**[14] of the child, the pertinent testimony at the hearing reveals that both parents expressed concerns that enrolling

[14]Some of the pleadings reference "visitation" instead of physical custody. However, as noted herein, the motion sought to modify the original custody decree, which provided for joint custody and was the permanent custody decree in effect at the time the motion to modify was filed. The sharing of time between the parents and the child under a joint custody decree is properly termed, "physical custody," not "visitation." Visitation may be "tweaked" without proving the heightened standard required by Bergeron, but visitation and physical custody are wholly separate things, which are often, unfortunately, confused. This court's jurisprudence is clear that there is no such thing as visitation for a parent under a joint custody arrangement. Instead, the proper term for this is "physical custody." Cedotal v. Cedotal, 2005-1524 (La. App. 1st Cir. 11/4/05), 927 So. 2d 433, 436; Howze, 232 So. 3d at 610. Physical custody that was awarded via a considered decree may only be altered by proving the heightened standard stated in Bergeron. See Howze, 232 So. 2d at 610-611; see also Davenport, 675 So. 2d at 1232.

M.M. in school is unfeasible under the week-to-week physical custody plan in place, due to the distance between the parties and the amount of school that the child would have to miss to accommodate this physical custody schedule. Mr. Melton and Ms. Johnson both presented testimony at the hearing regarding M.M. being three years old (at the time of the hearing) and the need to enroll M.M. in a pre-kindergarten program. The week-to-week physical custody arrangement, which Ms. Johnson sought to modify, renders enrolling M.M. in school virtually impossible, as recognized by the parents, due to the distance between the parties and the amount of school that the child would have to miss to accommodate this physical custody schedule.

Courts of this state have recognized that the coming of school-age, or in this case pre-school-age, may constitute a material change in circumstances for purposes of modifying physical custody. In Freeman v. Johnson, 51,550 (La. App. 2nd Cir. 6/21/17), 225 So. 3d 524, 532-533, the Second Circuit Court of Appeal held that a material change in circumstances existed because the child had reached school age and "the existing custody order [had] become unworkable." Freeman, 225 So. 3d at 532-533 citing **Shaffer v. Shaffer**, 2000-1251 (La. App. 1st Cir. 9/13/00), 808 So. 2d 354, writ denied, 2000-2838 (La. 11/13/00), 774 So. 2d 151 (wherein a child's coming of school age was considered a material change of circumstances warranting a modification of the prior custody arrangement, which was provided for in a *stipulated judgment*). A considered decree was at issue in Freeman. Similar to the case at bar, Freeman dealt with a custody decree that provided for week-to-week custody, but the parents lived hours apart, one in Rayville, Louisiana and one in Baton Rouge, Louisiana. The Second Circuit Court of Appeal recognized that it was not feasible for the child to attend school alternating weeks of school in Rayville and Baton Rouge. Freeman, 225 So. 3d at 532. Here, the same problem is presented. It is not feasible for M.M. to attend

alternating weeks of a pre-kindergarten program in Florida and Louisiana. In addition, the parents admitted at the hearing that it may be impossible to find pre-kindergarten programs that would work with this type of schedule.[15] Based on the foregoing, we find that there has been a material change in circumstances and that leaving in place the custody decree providing for week-to-week physical custody of M.M. is now unworkable and deleterious to the child. Accordingly, we remand this matter to the family court with instructions to expeditiously set a hearing for the purpose of rendering a joint custody implementation order in accordance with LSA-R.S. 9:335.[16]

Denial of Motion to Terminate or Reduce Compliance Bond
(Assignment of Error Number Two)

Louisiana Revised Statute 9:342 provides:

> For good cause shown, a court may, on its own motion or upon the motion of any party, require the posting of a bond or other security by a party to insure compliance with a child visitation order and to indemnify the other party for the payment of any costs incurred.

---

[15]We also note the fact that an interim judgment was ordered serves as an indication that the current custody decree is unworkable. See Rooney v. Becnel, 2011-288 (La. App. 5th Cir. 12/13/11), 81 So. 3d 882, 886-887.

[16]See LSA-R.S. 9:335, stating in pertinent part:

A. (1) In a proceeding in which joint custody is decreed, the court shall render a joint custody implementation order except for good cause shown.
(2)(a) The implementation order shall allocate the time periods during which each parent shall have physical custody of the child so that the child is assured of frequent and continuing contact with both parents.
(b) To the extent it is feasible and in the best interest of the child, physical custody of the children should be shared equally.
(c) The implementation order shall include a provision that when either party is required to evacuate this state with M.M. because of an emergency or disaster declared under the provisions of R.S. 29:721 et seq., or declared by federal authority and it becomes impossible for the parties to exercise custody as provided in the judgment, the parties shall engage in continuous communication regarding the safe evacuation of the child, the location of the child during and after the emergency or disaster, and an interim custody plan for the child until the custody provisions of the judgment can be resumed.
(3) The implementation order shall allocate the legal authority and responsibility of the parents.

As noted above, on multiple previous occasions, Ms. Johnson failed to comply with orders of the family court. Considering Ms. Johnson's numerous prior failures, including prior violation of the November 28, 2016 judgment which, on its face, required that visitation be exercised in Louisiana, her prior refusal to return the child, and her failure to communicate with Mr. Melton regarding the child's whereabouts, we are unable to say the trial court erred in refusing to terminate or reduce the bond, which has the exact purpose of enforcing compliance with the custody decree.

CONCLUSION

For the above and foregoing reasons, we affirm those portions of the October 24, 2017 judgment of the family court denying the motion to transfer venue, stipulating that Ms. Johnson will pay $675.52 within sixty days, and denying the motion to terminate or reduce bond.[17] Further, we affirm that portion of the October 24, 2017 judgment, denying Ms. Johnson's motion to modify **legal** custody. However, we reverse that portion of the judgment denying her motion to modify **physical** custody, and we hereby remand this matter to the family court with instructions to expeditiously set a hearing for the purpose of rendering a specific modified **physical** joint custody implementation plan for the parties in accordance with LSA-R.S. 9:335. Costs are assessed equally to the parties.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART; REMANDED WITH INSTRUCTIONS.

---

[17]On appeal, Ms. Johnson did not assign error to the merits of the rulings on the motion to transfer venue or the payment of expenses provided in the October 24, 2017 judgment.