NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CU 0846

THOMAS ALLEN HANSBROUGH, JR.

VERSUS

LEKESHIA ANN HANSBROUGH

Judgment Rendered: SEP 2 4 2010

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Appealed from
The Family Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. 158857

The Honorable Annette M. Lassalle, Judge Presiding

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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

GAIDRY, J.

In this custody matter, a father appeals a trial court ruling that a modification of the physical custody plan was not in the child's best interest. We affirm in part, reverse in part, and render judgment ordering a change in the physical custody plan.

FACTS AND PROCEDURAL HISTORY

Thomas Hansbrough, Jr. and Lekeshia Hansbrough were married on May 4, 2003. The Hansbroughs had one son, Thomas Hansbrough III, who was born on December 19, 2003. Thomas, Jr. filed a petition for divorce on June 23, 2006, and the parties were divorced on January 5, 2007.

The parties entered a consent judgment regarding child custody and other matters, which was signed by the court on November 13, 2006. The consent judgment provided for joint custody of the child and directed that the parties would have equal physical custody of the child on a "2-2-3" schedule.[1] The consent judgment did not designate a domiciliary parent, but did give Thomas, Jr. authority to choose a school for the child in the event of a dispute.

On December 10, 2008, Thomas, Jr. filed a rule alleging that there had been a material change in circumstances affecting the welfare of the child since the consent judgment and seeking to have himself designated as the child's domiciliary parent. He also sought to have the physical custody plan changed for the child to spend more time with him, as he believed the current physical custody plan was disruptive and damaging to the child. Thomas, Jr. alleged that Lekeshia's home life was unstable, that she had moved several times in the past few years to live with boyfriends, and that it

[1] According to the agreement, the parents would alternate custody each week, with the child spending Monday and Tuesday with the custodial parent, Wednesday and Thursday with the non-custodial parent, and then Friday, Saturday, and Sunday with the custodial parent.

was frequently impossible to get in touch with her because her cell phone was disconnected. He alleged that Lekeshia was irresponsible both financially and in her care of the child and that the child had been injured while in Lekeshia's care as a result. Thomas, Jr. alleged that since beginning school, the child had been disruptive and aggressive in school and defiant to his teacher. The child began seeing a child psychologist for this reason, and although it was recommended that the parties each meet with the psychologist along with the child, Lekeshia failed to ever meet with the psychologist. Lekeshia also refused to participate in suggested mediation to address the issues and concerns regarding the child.

A trial was held on the issues of the designation of a domiciliary parent and the proposed change to the physical custody plan. At the close of the trial, the court found that it was in the best interest of the child for Thomas, Jr. to be named domiciliary parent. After allowing the parties to submit post-trial memoranda on the proposed change to the physical custody plan, the court ruled on Thomas, Jr.'s request to change the physical custody plan. Because the physical custody plan was part of a consent judgment, the court noted that in order for it to be changed, the party seeking to modify the custody arrangement must prove both that a material change in circumstances affecting the welfare of the child has occurred since the original decree and also that the proposed modification is in the best interest of the child. Noting that the child, who was two years old at the time of the consent judgment, was now school-aged, that Lekeshia had exhibited an inability to maintain a long-term stable home for the child, and that the child needed more stability and routine to be successful in school, the court found that there had been a material change in circumstances. However, considering the evidence presented by the parties, the court held that

Thomas, Jr. did not present sufficient facts to prove that the proposed modification to the physical custody plan was in the child's best interest. The court's written reasons for judgment stated:

> The Court finds that both parents love the child and that the child has a bond with each parent. This Court also finds that both parties have the capacity and disposition to give the child love and affection.
>
> Testimony was offered regarding the child's disruptive behavior in school, Ms. Hansbrough's inability to maintain a long-term residence, her irresponsible behavior regarding the child's medical needs, and that the child is now school age as opposed to when the stipulated judgment was agreed to, but no testimony was offered to show the court how changing the current plan would benefit the child. The court heard no testimony to show that the child is not developing well and succeeding under the current custody plan, and will not change an existing plan when no evidence has been presented to show that the child's best interest would be served with a new plan.

Finding that Thomas, Jr. failed to meet his burden of proof, the court refused to modify the physical custody plan contained in the prior consent judgment. This appeal by Thomas, Jr. followed, in which he designated the following trial court errors:

1. The trial court committed legal error by requiring a higher burden of proof to modify a consent decree of custody than provided by Louisiana law.

2. The trial court committed legal error in its failure to apply the "Best Interest of the Child" factors to modify a consent decree of custody as required by Louisiana law.

3. The trial court committed legal error by not altering the physical custody plan to allow for the child to primarily reside with the domiciliary parent as mandated by La. R.S. 9:335(B)(2).

4. The trial court committed legal error when it ruled that its own findings were sufficient to name a domiciliary parent, but the same findings were insufficient to modify the physical custody plan; thereby warranting a de novo review of the modification of the physical access plan to increase the time with the father and the child.

DISCUSSION

Each child custody case must be viewed in light of its own particular set of facts and circumstances. *Perry v. Monistere*, 08-1629, p. 3 (La.App. 1 Cir. 12/23/08), 4 So.3d 850, 852. There is a distinction between the burden of proof required to change a custody plan ordered pursuant to a considered decree and the burden of proof required to change a custody plan ordered pursuant to a non-considered decree (or stipulated judgment). A "considered decree" is an award of permanent custody in which the trial court receives evidence of parental fitness to exercise care, custody, and control of children. By contrast, a non-considered decree or stipulated judgment is one in which no evidence is presented as to the fitness of the parents, such as one that is entered by stipulation or consent of the parties, or that is otherwise not contested. *Id.*, 08-1629 at p. 4, 4 So.3d at 853.

Once a considered decree of permanent custody has been rendered by a court, the proponent of a change of custody bears the heavy burden of proving that a change of circumstances has occurred, such that the continuation of the present custody arrangement is so deleterious to the child 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 child. *Id.*, 08-1629 at pp. 4-5, 4 So.3d at 853 (citing *Bergeron v. Bergeron*, 492 So.2d 1193, 1200 (La.1986)). In cases such as this one where the underlying custody decree is a stipulated judgment and the parties have consented to a custodial arrangement with no evidence as to parental fitness, the heavy burden of proof rule enunciated in *Bergeron* is inapplicable. Rather, a party seeking a modification of a consent decree must prove that there has been a material change of circumstances affecting the welfare of the child since the original (or previous) custody decree was

entered and that the proposed modification is in the best interest of the child. *Id.*, 08-1629 at p. 5, 4 So.3d at 853.

The best-interest-of-the-child test is a fact-intensive inquiry, requiring the weighing and balancing of factors favoring or opposing custody in the competing parties on the basis of the evidence presented in each case. *Martello v. Martello*, 06-0594, p. 5 (La.App. 1 Cir.3/23/07), 960 So.2d 186, 191. Every child custody case is to be viewed on its own peculiar set of facts and the relationships involved, with the paramount goal of reaching a decision which is in the best interest of the child. *Id.*

The trial court is vested with broad discretion in deciding child custody cases. Because of the trial court's better opportunity to evaluate witnesses, and taking into account the proper allocation of trial and appellate court functions, great deference is accorded to the decision of the trial court. A trial court's determination regarding child custody will not be disturbed absent a clear abuse of discretion. *Id.*, 06-0594 at p. 5, 960 So.2d at 191-92.

In his brief to this court, Thomas, Jr. alleges that the trial court erroneously required a higher burden of proof than that provided by law. The basis for his argument is that in the court's written reasons for judgment, the Court stated:

> Although the Court heard evidence proving a change in circumstances, the Court did not hear significant facts proving that a change in the current custody plan would be in the best interest of the child.

Thomas, Jr. argues that the court's reference to "significant facts" indicated that it was applying a higher burden of proof than required by law to his case. He argues that the term "significant facts" is unclear and is not found in the jurisprudence, and the trial court should have instead examined the "best interest of the child" factors set forth in La. C.C. art. 134.

Initially, we note that the trial court's reasons for judgment are not part of the judgment. It is the judgment itself that is controlling, not the reasons for judgment. *Tate v. Tate*, 09-2034 p. 3 (La.App. 1 Cir. 6/11/10); ____ So.3d ____. The trial court's February 3, 2010 judgment does not use the phrase "significant facts;" it simply states that the court found that there had been a material change in circumstances since the consent judgment, that Thomas, Jr. would be designated as the domiciliary parent, and that the physical custody plan would not be modified.

Furthermore, the trial court's use of the term "significant facts" in its reasons for judgment does not indicate that the court applied a stricter standard. Prior to stating that it did not hear significant facts proving that a change was in the best interest of the child, the court discussed the difference in the burdens of proof applicable to considered decrees and to consent decrees. The court explained the burden of proof applicable to the Hansbroughs' situation:

> In this case, the parties have agreed to the custodial plan. 'When a party is seeking to modify a consent decree of custody, the party seeking to modify the custody arrangement must still prove that a change in circumstances materially affecting the welfare of the child has occurred since the original decree and that the modification proposed is in the best interest of the child.' (Case citations omitted.)

After finding that there had been a material change in circumstances in this case, the court stated:

> Since there has been a material change in circumstances since the rendition of the last judgment, the present custody plan may be changed if this Court finds that the proposed modification is in the child's best interest. Mr. Hansbrough has asked to be named the domiciliary parent and that Ms. Hansbrough's visitation be limited.
>
> In determining the best interest of the children, this Court should consider the relevant factors contained in La. C.C. art. 134, which provides:

> The court shall consider all relevant factors in determining the best interest of the child. 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.
>
> (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.

This list of factors is non-exclusive and is intended only 'to provide guidance for the courts.' The trial court is not bound to give more weight to one factor over another, and when determining the best interest of the child, the factors must be weighed and balanced in view of the evidence presented. (Case citations omitted.)

Thus, it is clear that the trial court understood and applied the appropriate burden of proof in this case and that the court's use of the words "significant facts" had no significance. This assignment of error is without merit.

Thomas, Jr. next alleges on appeal that the trial court erred in ruling that the same set of facts was sufficient proof that it was in the best interest of the child for him to be named the domiciliary parent, but was insufficient proof that modification of the physical custody plan was in the best interest of the child. In making this argument, Thomas, Jr. presupposes that his designation as domiciliary parent requires that the child spend more time with him. This is not the case.

Naming of a domiciliary parent produces three legal results: (i) the child primarily resides with that parent; (ii) the other parent has physical custody during time periods that assure that the child has frequent and continuing contact with both parents; and (iii) the domiciliary parent has statutory authority to make decisions affecting child. La. R.S. 9:335(B); *Rogers v. Stockmon*, 34,327, p. 4 (La.App. 2 Cir. 11/01/00); 780 So.2d 386, 388-389. Despite the fact that La. R.S. 9:335(B)(2) provides that the domiciliary parent is the parent with whom the child shall primarily reside, La. R.S. 9:335(A)(2)(b) provides that to the extent that it is feasible and in the best interest of the child, physical custody of the child should be shared equally. Thus, the fact that a parent is the domiciliary parent does not necessarily mean that the parent has physical custody of the child for a greater percentage of time. Likewise, in this case, the fact that the court found that there was a material change in circumstances and it was in the best interest of the child to name Thomas, Jr. the domiciliary parent, does not necessarily require a finding by the court that it was in the best interest of the child to spend a greater percentage of his time with Thomas, Jr. The

evidence in the record supports the conclusion by the court that it was in the best interest of the child for Thomas, Jr. to be the domiciliary parent so that he would be the parent with statutory authority to make decisions regarding the child in the event of a dispute. The court obviously concluded that it was not in the best interest of the child to spend less time with Lekeshia and more time with Thomas, Jr.

While, as explained above, the court was not required to find that it was in the child's best interest to spend more time with his father simply because he was the domiciliary parent, based on the evidence in the record, we believe that the trial court abused the discretion afforded it in concluding that the evidence was insufficient to prove that a change in the physical custody plan was in the best interest of the child. Given the evidence presented at trial regarding Lekeshia's unstable lifestyle and the behavioral problems already exhibited by the child in school, we find that it is in the best interest of the child to spend more time with his father during the school year. For this reason, we amend the trial court judgment to provide that the physical custody plan will be changed so that during weeks when school is in session, the child will reside with Thomas, Jr. and Lekeshia will have physical custody of the child every other weekend from Friday after school until Monday morning before school. The physical custody plan contained in the consent judgment will remain in effect during the summer vacation and school holidays.

DECREE

The judgment of the trial court is reversed only insofar as it denies Thomas, Jr.'s request to alter the physical custody plan; judgment is hereby rendered modifying the physical custody plan while school is in session as

outlined above. The judgment is affirmed in all other respects. Costs of this appeal are to be borne by appellee, Lekeshia Hansbrough.

AFFIRMED IN PART, REVERSED IN PART AND RENDERED.