

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 CU 0097

MISTY HERNANDEZ

VERSUS

BRANDON JENKINS

Judgment Rendered: NOV 30 2012

On Appeal from
The Family Court,
In and for the Parish of East Baton Rouge,
State of Louisiana
Trial Court No. 151,645

Honorable Lisa Woodruff White, Judge Presiding

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BEFORE: CARTER, C.J., PARRO, GUIDRY, McDONALD, AND
HIGGINBOTHAM, JJ.

*Carter, C.J. dissents for reasons assigned
by Judge Parro
Parro, J. dissents with reasons by C.J.
Guidry, J. concurs.*

*T.M.H.
J.M.H.*

HIGGINBOTHAM, J.

In this child custody case, a mother appeals a trial court judgment that denied her request for relocation. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

Misty Hernandez¹ and Brandon Jenkins are the parents of M.H., who was born on April 19, 2004. The parties were never married and never resided together after M.H.'s birth. In a stipulated judgment signed on October 12, 2004, the parties were granted joint custody of M.H. with Jenkins enjoying custody every other weekend with extended custody during the summer and holidays. On March 21, 2011, Jenkins filed a "Petition to Amend Custody," alleging that a change of circumstances had occurred since the original judgment because the parties had voluntarily changed the terms of the judgment. Hernandez filed a rule for past due child support and contempt on April 12, 2011, and a motion for court authorization to relocate to Enterprise, Alabama, on May 2, 2011. In Hernandez's request to relocate she alleged that she was engaged to be married, that she was recently laid off, that the job opportunities were better in Alabama, and that the relocation would enhance the quality of life for her and M.H. She further alleged that Jenkins failed to timely pay the amount of child support he owed. After a hearing on the rule for past due support and contempt, the trial court did not find Jenkins in contempt, but did find him \$1,424.40 in arrears for his failure to pay the amount of child support set forth in the judgment, and ~~\$5,44.20~~ ^{#5,445.20 PD - 12/4/12} in arrears for his failure to pay his percentage of child care cost.

On August 1, 2011, the matter came before the court on Hernandez's request to relocate. The court signed a judgment on October 5, 2011, denying Hernandez's request to permanently relocate the residence of M.H. It is from this judgment that

¹ On May 7, 2011, Misty married Gary Ray and is now know as Misty Hernandez Ray.

Hernandez appeals, contending that the trial court abused its discretion in denying Hernandez's motion to relocate.

LAW AND ANALYSIS

The relocating parent has the burden of proving that the proposed relocation is made in good faith and is in the best interest of the child. La. R.S. 9:355.13. The court shall consider the benefits the child will derive either directly or indirectly from an enhancement in the relocating parent's general quality of life. **Id.** Louisiana Revised Statute 9:355.12 provides a non-exclusive list of factors the court shall consider in reaching its decision regarding the proposed relocation. The factors include:

- (1) The nature, quality, extent of involvement, and duration of the child's relationship with the parent proposing to relocate and with the nonrelocating parent, siblings, and other significant persons in the child's life.
- (2) The age, developmental stage, needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child.
- (3) The feasibility of preserving a good relationship between the nonrelocating parent and the child through suitable visitation arrangements, considering the logistics and financial circumstances of the parties.
- (4) The child's preference, taking into consideration the age and maturity of the child.
- (5) Whether there is an established pattern of conduct of the parent seeking the relocation, either to promote or thwart the relationship of the child and the nonrelocating party.
- (6) Whether the relocation of the child will enhance the general quality of life for both the custodial parent seeking the relocation and the child, including but not limited to financial or emotional benefit or educational opportunity.
- (7) The reasons of each parent for seeking or opposing the relocation.
- (8) The current employment and economic circumstances of each parent and whether or not the proposed relocation is necessary to improve the circumstances of the parent seeking relocation of the child.

(9) The extent to which the objecting parent has fulfilled his or her financial obligations to the parent seeking relocation, including child support, spousal support, and community property obligations.

(10) The feasibility of a relocation by the objecting parent.

(11) Any history of substance abuse or violence by either parent, including a consideration of the severity of such conduct and the failure or success of any attempts at rehabilitation.

(12) Any other factors affecting the best interest of the child.

A trial court's determination in a relocation matter is entitled to great weight and will not be overturned on appeal, absent a clear showing of abuse of discretion.

Gathen v. Gathen, 10-2312 (La. 5/10/11), 66 So.3d 1, 9. Upon review, the entire record should reflect that the trial court properly considered all of the factors mandated by La. R.S. 9:355.12 and reasonably concluded, based on a totality of the circumstances, that relocation would or would not be in the child's best interest. **Id** at 8. Although La. R.S. 9:355:12 mandates that all listed factors be considered it does not require the court to give preferential consideration to any certain factor or factors. **Id**. The trial court in oral reasons for judgment considered each of the relevant factors of La. R.S. 9:355.12 and determined which parent each factor favored.

According to the original judgment, the parties were exercising joint custody with Jenkins exercising physical custody every other weekend with extended visitation during the summer and holidays. Jenkins testified that for the last 3½ years the parties have been sharing custody equally on a 2, 3, 2 rotation. Hernandez testified that they never had a 2, 3, 2 schedule, but she did let Jenkins see M.H. when he requested it, which may have resulted in an extra day each week. Jenkins's parents both testified that they saw M.H. when he was with Jenkins and they saw him during the week. The trial court noted that it was impossible for both parties to be telling the truth regarding the schedule and the truth was probably somewhere in the middle.

Hernandez alleged that Jenkins put her in dire straits by failing to pay his support obligation. The court found Jenkins in arrears totaling \$6,869.60 from September 2008 through April 2011, but did not find him in contempt. Jenkins had argued that he began paying less support in accordance with an extra-judicial agreement between the parties. Although Jenkins failed to pay the correct amount of support per the judgment, he consistently paid support to Hernandez.

Hernandez testified that she wanted to move to Alabama because she married the love of her life and felt she could better provide for M.H. in Alabama with her husband's assistance. According to Hernandez, she has a job offer in Alabama in the field in which she had been previously employed. Hernandez's work history in Baton Rouge had been inconsistent. The trial court was concerned that the primary motivation for the move was her marriage, but found that M.H. would benefit if Hernandez had full-time employment. The trial court further found that M.H. would benefit emotionally from being in the same household as a mom, step-dad and siblings.

M.H.'s paternal grandparents live in Baton Rouge and his aunt and her family live in Zachery. Donna Jenkins, Jenkins' mom, testified that the family gets together quite often. Ken Jenkins, Jenkins' dad, testified that he has a very good relationship with M.H., likes to take him hunting and to LSU games, and works with him on his reading. M.H. does not have any extended family in Alabama. The trial court determined that a relocation would have a negative impact on M.H.'s relationship with his father and his extended family. She noted that the move would restrict weekday interactions with M.H. and his father and family.

M.H. attends Shenandoah Elementary, which, according to the record, is a blue ribbon school. Jenkins testified that he recently found a reading specialist to assist M.H. with his reading difficulties. The trial court noted that M.H.'s current school was adequately meeting his needs, and his grandparents, who both have

experience in education, were providing him with educational support. Hernandez testified about the school M.H. would attend in Enterprise, however, little information was presented into evidence regarding the school.

The trial court noted that this was a difficult decision, and thoroughly and thoughtfully gave its reasons for denying the proposed relocation. In finding that the relocation was not in the best interest of M.H., it focused on the effect it would have on M.H.'s relationship with his father and extended family, the educational needs of M.H., and the limitations that will be created by the distance between Enterprise and Baton Rouge.

After consideration of the factors set forth in La. R.S. 9:355.12, the trial court found that Hernandez proved that the proposed relocation was in good faith, but failed to carry her burden of proving that the proposed relocation was in the best interest of M.H. The trial court properly considered all the factors mandated by the statute and reasonably concluded, based on the totality of the circumstances that the proposed relocation was not in the best interest of M.H. After careful review of the record, we find no clear showing that the trial court abused its discretion.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed. All costs of this appeal are assessed to Misty Hernandez.

AFFIRMED.

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**BEFORE: CARTER, C.J., PARRO, GUIDRY, McDONALD, AND
HIGGINBOTHAM, JJ.**

PARRO, J., dissenting.

I disagree with the majority, because I believe the court abused its discretion under the circumstances of this case.

This is a child custody case concerning M.H., an eight-year-old boy whose parents were never married and never lived together after his birth. Shortly after his birth, the parents agreed to a stipulated judgment of joint custody, with his mother, Hernandez, as the domiciliary parent and his father, Jenkins, enjoying custody every other weekend and extended custody during holidays and summertime. Hernandez has been the child's primary caregiver since his birth. Although the stipulated judgment included certain child support provisions, Jenkins did not timely pay support or medical reimbursements as required by that judgment. In May 2011, the court found he was in arrears for the period September 2008 through April 2011 in the amount of \$1,425.40 for child support and \$5,445.20 for failure to pay his share of child care costs.

Jenkins' failure to live up to his support obligations exacerbated Hernandez's financial burden of raising M.H., particularly since she was unable to find full-time employment in Baton Rouge. She eventually petitioned the court for permission to relocate with her son to Enterprise, Alabama. She was engaged to—and later married

RHP
BAC
BK

to—a man who lived there, had steady employment there, had children who could be companions for M.H., and was willing to provide financially and emotionally for her and her son. Additionally, she had been offered a good job in Alabama in her field as a mortgage loan processor. This job would allow her to work from home, so she would not incur the expense of after-school care, as she did in Baton Rouge. Hernandez was willing to make travel arrangements to facilitate Jenkins' continued regular visits with his son and was also willing for him to have additional visitation time during summers and holidays.

In making its decision, the court emphasized that M.H.'s paternal grandparents, who live in Baton Rouge, have a good relationship with him and, being educators, could help him with reading. Also, M.H. was enrolled in a blue ribbon school, Shenandoah Elementary, and Jenkins had located a tutor to help him with his reading. Rather than focusing on the child's best interest, the court focused on the relationships with his father and extended family, finding that these relationships would be negatively affected by the relocation. However, there was no explanation of why there would be a negative effect, if scheduled visitation with Jenkins in Louisiana would be continued and even increased, as Hernandez had proposed. It appeared from oral reasons that the court was more concerned with the effect on Jenkins and his parents than with the effect on M.H. Moreover, the court's decision regarding M.H.'s educational needs did not take into consideration the fact that M.H. would be attending a school in Alabama with smaller classes where he could get more attention. Finally, although the court acknowledged that M.H. would be more financially secure with his mother's new family, it did not mention the financial strain that Hernandez and M.H. would continue to endure if she could not find full-time employment and had to continue to rely on Jenkins to help her support their son. Inexplicably, the court did not even find Jenkins in contempt of court for his continued failure to provide court-ordered support for M.H.

Given these facts, I believe the court abused its discretion by denying Hernandez permission to relocate with M.H., thereby forcing on her the impossible dilemma of leaving her son in order to live with her husband or living apart from her husband in order to stay with her son. As a result of this judgment, M.H. and his mother are

sentenced to remain in financial difficulties because of limited employment opportunities, and she is unable to join with her husband in providing emotional and financial support for M.H. as a member of their family. M.H. is denied the opportunity to live in a supportive family environment with two parents in the home. Because the majority has chosen not to overturn the family court's ill-considered judgment, this intolerable situation could continue for the next ten years until M.H. reaches the age of majority.

Accordingly, I respectfully dissent.