

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CU 1961



TYRONE BLANC, JR.



VERSUS

NECHOHL HILL

Judgment Rendered: MAY 02 2014



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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 2010-16948

Honorable Mary Devereux, Judge

* * * * *

Sheila M. O'Connor
Covington, LA

Attorney for Appellee
Plaintiff – Tyrone Blanc, Jr.

Sharry I. Sandler
New Orleans, LA

Attorney for Appellant
Defendant – Nechohl Hill

* * * * *

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

WELCH, J.

Necohl Hill,¹ the mother of the minor child D.A.B., appeals a judgment in favor of the father, Tyrone Blanc, Jr., granting his motion for involuntary dismissal and dismissing her motion to change custody, motion to change or increase visitation, and motion to terminate or reduce visitation bond. For reasons that follow, we affirm in compliance with Uniform Rules—Courts of Appeal, Rule 2-16.1(B).

Ms. Hill and Mr. Blanc were involved in a relationship that resulted in the conception and birth of one child, D.A.B., who was born on March 25, 2010. On November 5, 2010, Mr. Blanc filed a petition to establish custody and visitation, seeking that the parties be awarded co-domiciliary custody of D.A.B., or alternatively that the parties be awarded joint custody of D.A.B., and that he be designated as the domiciliary parent, subject to reasonable visitation rights in favor of Ms. Hill. In the petition, Mr. Blanc also alleged that Ms. Hill was planning to relocate to Maryland with D.A.B. and that he opposed and objected to her relocating to Maryland with the child.

In response, Ms. Hill filed an answer and reconventional demand requesting that the parties be awarded joint custody of the minor child, and that she be designated as the child's domiciliary parent, subject to reasonable periods of physical custody in favor of Mr. Blanc. Ms. Hill further alleged that her parents were moving to New Jersey, that she wanted to move to New Jersey with her parents and the minor child, and that it was in the best interest of the child to move to New Jersey with Ms. Hill.

After a conference with the family court hearing officer on December 17, 2010, the hearing officer issued a report and recommendation finding, among other things, that the parties should be awarded joint legal and physical custody

¹ In the original petition, Ms. Hill's first name was mistakenly set forth as Nechohl Hill.

according to a schedule that maximized the time the child could spend with both of his parents, which at that time, was such that the child would live with Ms. Hill from Monday at 6:00 p.m. until Friday at 6:00 p.m. and with Mr. Blanc from Friday at 6:00 p.m. until Monday at 6:00 p.m. A proposed judgment in accordance with the hearing officer's report and recommendation was prepared. No objection to the hearing officer's recommendation was made by either party, and therefore, the hearing officer's recommendation was signed by the trial court judge and became the judgment of the trial court.²

In addition, the parties entered into a consent judgment, which was signed by the trial court on January 5, 2011, establishing Mr. Blanc's paternity of the minor child and providing "that the issue of relocation [of the minor child was] moot."

Less than one month later, on February 2, 2011, Ms. Hill filed a rule to show cause seeking to relocate her residence and the residence of the child to New Jersey. During the conference with the hearing officer, Ms. Hill stated that she could not "fathom" relocating to New Jersey without the minor child and that she "would just keep fighting and appealing until she was allowed to relocate with" the child. Following the conference, the hearing officer recommended that Ms. Hill's request to relocate the child's residence to New Jersey be denied.³ On May 2, 2011, Ms. Hill filed an objection to the hearing officer's report and recommendation; however, later that same date, she dismissed her rule to show cause for relocation without prejudice. Thereafter, in August, 2011, Ms. Hill absconded with the child.

On September 1, 2011, Mr. Blanc filed a motion seeking ex-parte custody in accordance with La. C.C.P. art. 3945 and that a civil warrant for the return of the

² See Rule 35 of the Local Rules of Court, 22nd Judicial District Court and La. R.S. 46:236.5(C).

³ The hearing officer also found that "[s]ubstance abuse and domestic violence [were] not a concern in this case."

child be issued, that Mr. Blanc be awarded sole custody of the child, that Ms. Hill be found in contempt of court and that she be ordered to post a bond to secure custody, and that Mr. Blanc be awarded attorney's fees and costs incurred in this motion. Following this motion, the trial court issued a civil warrant directing federal and state law enforcement officials to obtain the minor child,⁴ awarded Mr. Blanc interim custody and control of the child, and awarded Ms. Hill specific supervised visitation. Since Ms. Hill remained absent from the state and Mr. Blanc did not know her whereabouts, Ms. Hill was unable to be served with Mr. Blanc's motion; therefore, an attorney was appointed to represent Ms. Hill.⁵

Thereafter, a hearing officer conference was held and the hearing officer issued a report and recommendation finding that Ms. Hill had absconded with the child to the eastern part of the United States, along with her parents, that she had refused to respond to Mr. Blanc's requests for information about the child, and that the mother was in contempt of court for her willful, deliberate disregard of a court order by depriving Mr. Blanc of his custodial rights, secreting the child, and not informing Mr. Blanc of the child's whereabouts. The hearing officer also found that Mr. Blanc had demonstrated a material change in circumstances since the last judgment warranting a modification of legal and physical custody, that Mr. Blanc should be awarded sole custody of the child since Ms. Hill's actions demonstrated that joint custody was not in the best interest of the child because she has deprived the child of all contact with Mr. Blanc and has denied Mr. Blanc of all knowledge of the child's well-being or whereabouts, and should the mother be awarded visitation, that she should post a bond in accordance with La. R.S. 9:342 in order to ensure her compliance.

⁴ See La. R.S. 9:343.

⁵ See La. C.C.P. arts. 5091, *et seq.*

On January 11, 2012, the trial court held a hearing, and by judgment signed on February 2, 2012, the trial court ordered that the child was to be returned to Louisiana and the physical custody of Mr. Blanc; that Mr. Blanc was awarded sole custody of the minor child; that Ms. Hill was awarded supervised visitation with the child in Louisiana, with said visitation to be supervised by a sheriff's deputy; that prior to any supervised visitation taking place, that Ms. Hill post a \$10,000.00 cash-only bond in accordance with La. R.S. 9:342 to secure her compliance with the visitation order; that Ms. Hill was responsible for the travel and expenses associated with the return of the child to Louisiana; that Ms. Hill was in contempt of court and sentenced to five days in jail and fined \$500.00; that Ms. Hill was cast with specific court costs incurred by Mr. Blanc, plus attorney's fees in the amount of \$5,000.00; that a civil warrant for the return of the child be issued; and that permanent injunctions be issued prohibiting Ms. Hill and her family from harassing Mr. Blanc or his family and from removing the child from the jurisdiction of the court.

On April 23, 2012, Mr. Blanc filed another motion for civil warrant alleging that Ms. Hill had initiated custody proceedings in Westchester County, New York and requesting another civil warrant be issued and that Ms. Hill be arrested until she relinquished physical custody of the child. Based on this motion and on the fact that Ms. Hill had fled the jurisdiction of the court and secreted the child from Mr. Blanc, the trial court granted the civil warrant and ordered Ms. Hill be detained until she relinquished custody of the child.

Mr. Blanc then went to New York for the custody hearing initiated by Ms. Hill, and while in New York, he filed a petition to enforce the Louisiana custody and visitation order under the Uniform Child Custody Jurisdiction Enforcement Act. At a hearing on April 26, 2012, the judge in New York adopted the orders of the Louisiana trial court herein and dismissed Ms. Hill's petition for custody. Ms.

Hill was taken into police custody pending the return of the child, who at that time, was in the physical custody of Ms. Hill's parents. Ms. Hill and her parents refused to return the child and Ms. Hill was held in contempt of court. The next day, Ms. Hill was released from police custody by mistake, and upon her release and with the help of her parents, Ms. Hill again absconded with the child. On April 28, 2012, with the help of state (New York and Maryland) and federal authorities, Ms. Hill was apprehended and arrested in Baltimore, Maryland and the child was returned to the physical custody of Mr. Blanc. Due to the events that took place in New York and Maryland, criminal charges were instituted against Ms. Hill and her parents in New York, and as of the time of the hearing in this matter, those charges were still pending.

On May 7, 2012, Mr. Blanc filed a motion to modify and suspend visitation, rule for contempt, motion for attorney's fees, court costs, and expenses, motion to reset child support, motion to increase bond for security, and motion to enforce foreign judgment. At the July 30, 2012 hearing on this motion, the parties entered into an interim stipulated judgment providing that Mr. Blanc's motion to modify and suspend visitation, to increase bond for security, to set child support and rule for contempt were continued and deferred without date; that Ms. Hill would pay expenses, court costs, and attorney's fees incurred by Mr. Blanc in securing the return of the child in the amount of \$25,000.00, which was to be paid according to a specific installment plan; that Ms. Hill would execute a valid authorization for the release of medical records for the child for physicians who treated the child in New York; and that all other judgments not specifically modified were to remain in full force and effect until further orders of the court.

On February 22, 2013, Ms. Hill filed a motion seeking to change custody, to change or increase visitation, and to terminate or reduce visitation bond. In this motion, she sought custody of the minor child, or alternatively a modification of

(increase) visitation, and that her bond to secure visitation be terminated or reduced. A hearing on her motion was held on May 29, 2013. At the conclusion of Ms. Hill's evidence, which consisted of her testimony and that of her parents, Mr. Blanc moved for an involuntary dismissal⁶ on the grounds that Ms. Hill failed to meet the burden to overcome a change in custody, visitation or to reduce the bond to secure visitation. The trial court granted the motion for involuntary dismissal, and a judgment in accordance with the trial court's ruling was signed on June 19, 2013. It is from this judgment that Ms. Hill now appeals.

Louisiana Code of Civil Procedure article 1672(B) provides for a motion for involuntary dismissal of an action in the course of a bench trial:

In an action tried by the court without a jury, after the plaintiff has completed the presentation of his evidence, any party, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal of the action as to him on the ground that upon the facts and law, the plaintiff has shown no right to relief. The court may then determine the facts and render judgment against the plaintiff and in favor of the moving party or may decline to render any judgment until the close of all the evidence.

Unlike a motion for directed verdict in a jury trial, La. C.C.P. art. 1672(B) requires the trial court to evaluate all of the evidence and render a decision based upon a preponderance of the evidence without any special inferences in favor of the opponent to the motion. **Carollo v. Carollo**, 2013-0010 (La. App. 1st Cir. 5/31/13), 118 So.3d 53, 61. Proof by a preponderance of the evidence simply means that taking the evidence as a whole, such proof shows that the fact or cause sought to be proved is more probable than not. *Id.*

⁶ Although the transcript from the hearing reflects that Mr. Blanc's counsel moved for a "directed verdict," which may be granted in a jury trial pursuant to La. C.C.P. art. 1810, rather than an involuntary dismissal pursuant to La. C.C.P. art. 1672(B), which may be granted in a bench trial, the error was one of form rather than substance, as the ultimate object of both motions is the same. See **Gillmer v. Parish Sterling Stuckey**, 2009-0901 (La. App. 1st Cir. 12/23/09), 30 So.3d 782, 785 n.2. Furthermore, the record transcript from the hearing and the judgment on appeal reflect that the trial court granted an involuntary dismissal.

An involuntary dismissal should not be reversed by an appellate court in the absence of manifest error. *Id.* Accordingly, in order to reverse the trial court's grant of an involuntary dismissal, we must find, after reviewing the record, that there is no factual basis for its finding or that the finding is clearly wrong or manifestly erroneous. *Id.* at 61-62. The issue is not whether the trial court was right or wrong, but whether its conclusion was reasonable. *Id.* at 62.

In a custody proceeding, there is a distinction between the burden of proof needed to change a considered custody decree and of that needed to change a non-considered custody decree. **Elliott v. Elliott**, 2005-0181 (La. App. 1st Cir. 5/11/05), 916 So.2d 221, 227, writ denied, 2005-1547 (La. 7/12/05), 905 So.2d 293. 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. *Id.* By contrast, a non-considered decree or uncontested decree is one in which no evidence is presented as to the fitness of the parents, such as one that is entered by default, by stipulation or consent of the parties, or is otherwise not contested. *Id.*

In cases where the underlying custody decree is a non-considered decree, the party seeking a modification of that decree must prove that there has been a material change of circumstances since the original or previous custody decree was entered and that the proposed modification is in the best interest of the child. *Id.*

In this case, the underlying custody decree was the February 2, 2012 judgment, which was a non-considered decree because Ms. Hill was an absent defendant (who had been served through an appointed attorney) and the record reflects that there was no evidence of parental fitness offered at that hearing. Therefore, in order to modify that custody judgment, Ms. Hill had to prove that (1) a change in circumstances materially affecting the welfare of the child had occurred since the rendition of the February 2, 2012 judgment and (2) the

modification proposed by her—that she be granted custody, or alternatively increased visitation, and that the bond to secure visitation be terminated or reduced—was in the best interest of the child. **Carollo**, 118 So.3d at 62. See also Elliott, 916 So.2d at 227.

After a thorough review of the record, we find no manifest error in the trial court's decision to grant Mr. Blanc's motion for involuntary dismissal of Ms. Hill's motion. The record reflects that Ms. Hill absconded twice with the child and that she secreted the child from his father for over eight months. The testimony offered by Ms. Hill and her parents established that Ms. Hill has been devastated since the child was removed from her custody, that Ms. Hill has not seen the child since he was removed from her custody because she has not posted the requisite bond to secure her visitation, and that Ms. Hill wants to visit with her child. This evidence simply does not establish that there has been a change in circumstances materially affecting the welfare of the child since the rendition of the February 2, 2012 judgment or that the modification proposed by Ms. Hill was in the best interest of the child. Accordingly, the June 19, 2013 judgment of the trial court is affirmed.⁷

All costs of this appeal are assessed to the appellant, Nechohl Hill.

AFFIRMED.

⁷ On appeal, Ms. Hill also asserts that the trial court erred in refusing to allow her to make a record of events that caused her to leave the jurisdiction of the court. Notably, the trial court told Ms. Hill she could make a proffer of such evidence, but the record does not reflect that she ever made such proffer. It is incumbent upon a party, who contends that evidence was improperly excluded, to make a proffer, and if that party fails to do so, that party cannot contend such exclusion was error. **Kennedy v. Johnny F. Smith Trucking**, 94-0618 (La. App. 1st Cir. 3/3/95) 652 So.2d 526, 530. Accordingly, Ms. Hill cannot now complain that the exclusion of such evidence was error.

In addition, Ms. Hill claims that the trial court erred in upholding the hearing officer's findings that she should be denied visitation because she had not paid court costs and attorney's fees, which were being used as "ransom" for her access to the child. The record before us contains no such finding by either the hearing officer or the trial court. Instead, the record reflects that the trial court found Ms. Hill failed to meet her burden of proof on her motion to change custody and visitation. Accordingly, we will not address Ms. Hill's claims in this regard.