

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2015 CU 1179

DIRK CHRISTOPHER RAMIREZ

VERSUS

DARCY LEE HITE

DATE OF JUDGMENT: DEC 23 2015

ON APPEAL FROM THE FAMILY COURT,
NUMBER F172860, DIVISION C, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE CHARLENE CHARLET DAY, JUDGE

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BEFORE: GUIDRY, HOLDRIDGE, AND CHUTZ, JJ.

Disposition: AFFIRMED.

Holdridge J., concurs with reasons, LA R.S. 9:355.12 do not apply to the facts of this case.

CHUTZ, J.

Plaintiff-appellant, Dirk Christopher Ramirez, appeals the family court's judgment, which maintains the joint custody of their minor child with him and the child's mother, Darcy Hite,¹ but modifies the designation of the domiciliary parent from Ramirez to Hite and grants primary physical custody of the child during the school year to Hite, who lives out of state, with specified visitation to Ramirez. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The parties, who were never married to each other, are the parents of a child born on October 1, 2008 in East Baton Rouge Parish. In 2009, after an acrimonious relationship with Ramirez, Hite moved to Edna, Kansas. In 2010, Ramirez filed a petition to establish filiation and for custody of the minor child. On June 21, 2010, the parties agreed in a stipulated judgment to share the physical custody of the child on a monthly basis.

In October 2011, Hite filed a petition seeking, among other things, a modification of the parties' custody. Noting the expense of the monthly exchange in which the child was traveling in excess of 700 miles between the parties' residences, the imminent need for the child to attend school by age six, and the availability of pre-kindergarten opportunities to prepare the child for school, Hite requested continuation of joint custody but sought designation as the domiciliary parent and primary physical custody during the school year with a visitation plan of custody for Ramirez. After answering Hite's petition, Ramirez filed a pleading seeking continued joint custody but with the designation of himself as the domiciliary parent, the specification of Louisiana as the child's home state, and

¹ Although she has subsequently taken the surname of her husband, Kyle Wiford, we refer to the mother by the surname she used at the institution of this litigation.

award of primary physical custody during the school year subject to a liberal visitation plan in favor of Hite.

After a two-day trial at which evidence was adduced, the family court maintained the parties' joint custody, but designated Ramirez as the domiciliary parent and awarded him primary physical custody with specified visitation to Hite. The family court subsequently signed a judgment in conformity with its ruling on September 12, 2012.

On July 31, 2013, Hite filed a pleading seeking modification of the August 17, 2012 considered decree to designate her as the domiciliary parent with primary physical custody subject to specified visitation in favor of Ramirez. A hearing addressing Hite's request for a modification was subsequently held over six days commencing on February 6, 2014 and concluding on December 5, 2014. On December 17, 2014, the family court rendered a judgment maintaining the parties' joint custody, but designated Hite as the domiciliary parent with primary physical custody of the child during the school year subject to a specified visitation schedule setting forth the periods of Ramirez's physical custody. Ramirez appeals.

MODIFICATION OF CUSTODY

Ramirez urges the family court erred in modifying custody. He asserts the record is devoid of any evidence demonstrating the modification in the designation of the domiciliary parent and primary physical custody from him to Hite is warranted.

The primary consideration in a determination of child custody is the best interest of the child. This applies not only in actions setting custody initially, but also in actions to change custody. *Mulkey v. Mulkey*, 2012-2709 (La. 5/7/13), 118

So.3d 357, 364.²

Since the August 17, 2012 judgment was a “considered decree,” Hite, as the party seeking modification of the judgment, must not only show that a change of circumstances materially affecting the welfare of the child has occurred since the prior order respecting custody, but she also bore the heavy burden of proving either that the continuation of the present custody is so deleterious to the child as to justify a modification of the custody decree, or, 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 Bergeron v. Bergeron*, 492 So.2d 1193, 1200 (La. 1986). Generally, the family court’s determination of these issues is based heavily on factual findings, and as such, we may not set those findings aside in the absence of manifest error or unless those findings are clearly wrong. *Bonnecarrere v. Bonnecarrere*, 2009-1647 (La. App. 1st Cir. 4/14/10), 37 So.3d 1038, 1044, writ denied, 2010-1639 (La. 8/11/10), 42 So.3d 381. The family court’s determination is entitled to great weight, and its discretion will not be

² The factors a court may consider in determining the best interest of the child are set forth 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.

disturbed on review in the absence of a clear showing of abuse. See Mulkey, 118 So.3d at 368.³

Based on the evidence, the family court was not manifestly erroneous in finding that Hite proved a change of circumstances materially affecting the welfare of the child had occurred since the August 17, 2012 considered decree. In particular, Ramirez did not provide the stable environment he represented to the court the child would have. Not only did he move into a different house than he said he was, but he also divorced the woman he said would be present to help raise the child. Thus, the stability and adequacy of the child's environment, as well as the permanence, as a family unit, of Ramirez's home were significantly different from that which he represented in July 2012, a difference that materially affected the child's welfare. See La. C.C. art. 134(4) & (5).

Additionally, a reasonable factual basis exists for the family court's implicit findings that Hite sustained the heavy burden of proving the continuation of Ramirez as the domiciliary parent with primary physical custody of the child during the school year was so deleterious to the child as to justify a modification of the custody decree and/or that Hite proved by clear and convincing evidence any harm likely to be caused by changing the child's environment was substantially outweighed by its advantages to the child.

Ramirez failed to maintain reasonable communications with Hite about many important matters, including the child's whereabouts and with whom the child was regularly spending time and being transported.⁴ Thus, there is no

³ Although Ramirez objected to evidence relevant to events subsequent to the date Hite filed her pleading seeking a modification in custody, the family court allowed presentation of the evidence. On appeal, Ramirez has noted, without argument or formal assignment of error, that the evidence enlarged the pleadings over objection. We find no error in the family court's expansion of the pleadings to include events subsequent to the date of filing but relevant to the best interest of the child. See La. C.C.P. art. 1154.

⁴ Pursuant to a rule for contempt filed by Hite, the family court adjudicated Ramirez in contempt for failing to communicate pertinent information about the child on the court-ordered electronic medium.

manifest error in the family court's implicit finding that since 2012, Ramirez had failed to demonstrate a willingness and ability to facilitate and encourage a close and continuing relationship between the child and Hite. See La. C.C. art. 134(10).

Over the course of the eleven months that the hearings were conducted, it became more and more apparent Ramirez's life was not as stable as he had presented to the family court in 2012. Besides moving into three residences, he also changed his jobs multiple times. In addition, he regularly handed the child off to numerous different caretakers and failed to provide a regular continuity in the young child's life. Thus, there is no manifest error in the family court's implicit finding that Ramirez failed to provide the child with a stable, adequate environment or permanence, as a family unity, of his home. See La. C.C. art. 134(4) & (5).

Most disturbing was the evidence showing that he has displayed anger toward at least two different women in his life. While there was evidence presented that Ramirez never hit or otherwise displayed physical violence toward the child or his current girlfriend's children, the family court was free to conclude that it was not in the child's best interest to hear the sort of loud yelling evidenced on audio recordings played in court. Although Ramirez's current girlfriend attempted to qualify the impact of statements she texted or made to Hite about Ramirez's displays of anger by explaining her state of mind at the time, the family court was free to believe in whole or part any of her testimony. See *Scoggins v. Frederick*, 98-1814 (La. App. 1st Cir. 9/24/99), 744 So.2d 676, 687, writ denied, 99-3557 (La. 3/17/00), 756 So.2d 1141. Therefore, the implicit finding that Ramirez had violent outbursts, acrimonious arguments, and displays of physical violence is not manifestly erroneous thereby calling into question Ramirez's moral fitness insofar as it affects the welfare of the child and his mental health. See La. C.C. art. 134(4), (6) & (7).

Lastly, the family court's implicit finding that Hite proved by clear and convincing evidence any harm caused by changing the child's environment were substantially outweighed by the advantages to the child is supported by Hite's testimony. See La. C.C. art. 134(1), (2), (3), (10), & (12). Mindful that the family court had evaluated the parties relatively equal in 2012, a reasonable factual basis exists to support the family court's implicit factual findings warranting a modification of custody that designated Hite as the domiciliary parent with primary physical custody of the child during the school year subject to specified visitation in favor of Ramirez. Accordingly, the family court did not abuse its discretion in modifying the custody decree of the minor child.

RELOCATION

Ramirez also maintains it was error for the family court not to apply the relocation statutes to Hite's request for modification of custody since her designation as the domiciliary parent with the award of primary physical custody of the minor child during the school year necessarily resulted in changing the child's principal residence to a location outside the State of Louisiana. As such, he contends that the family court's modification of custody was error, and a *de novo* review of the evidence is warranted, because Hite failed to sustain her burden of proving entitlement to relocation under the relocation statutes.

Effective August 1, 2012, the Louisiana relocation statutes apply to a proposed relocation when there is intent to establish the principal residence of a child at any location outside the state. La. R.S. 9:355.2. The principal residence of a child means (a) the location designated by a court to be the primary residence of the child; (b) in the absence of a court order, the location at which the parties have expressly agreed that the child will primarily reside; or (c) in the absence of a court order or an express agreement, the location, if any, at which the child has spent the majority of time during the prior six months. La. R.S. 9:355.1.(1). Relocation

means a change in the principal residence of a child for a period of sixty days or more, but does not include a temporary absence from the principal residence. La. R.S. 9:355.1(2).

According to La. R.S. 9:355.3:

The following persons are authorized to propose relocation of the principal residence of a child by complying with the notice requirements of [the relocation statutes]:

- (1) A person designated in a current court decree as the sole custodian.
- (2) A person designated in a current court decree as a domiciliary parent in a joint custody arrangement.
- (3) A person sharing equal physical custody under a current court decree.
- (4) A person sharing equal parental authority under Chapter 5 of Title VII of Book I of the Louisiana Civil Code.
- (5) A person who is the natural tutor of a child born outside of marriage.

Under the plain language of the relocation statutes, when Hite filed the request to modify the custody set forth in the August 17, 2012 considered decree, she was not a person authorized to propose the relocation of the child under La. R.S. 9:355.3. However, because she sought primary physical custody of the child during the school year, her pleading evinced the intent to establish the child's principal residence in Kansas, a location outside the state. And while the family court did not expressly designate that Louisiana was the child's primary place of residence when it awarded primary physical custody of the child to Ramirez on August 17, 2012, it effectuated that result. See La. R.S. 9:355.1. Therefore, the family court erred in failing to consider the relocation statutes when it modified the custody set forth in the August 12, 2012 judgment, because the practical effect of a judgment in Hite's favor was the relocation of the child. See *Trahan v. Kingrey*,

2011-1900 (La. App. 1st Cir. 5/4/12), 98 So.3d 347, 350-51, writ denied, 2012-1586 (La. 8/1/12), 92 So.3d 351.

Where one or more family court legal errors interdict the fact-finding process, the appellate court should then make its own independent *de novo* review of the record. See *Evans v. Lungrin*, 97-0541 (La. 2/6/98), 708 So.2d 731, 735. A legal error occurs when a family court applies the incorrect principles of law and such errors are prejudicial. Prejudicial legal errors occur when they materially affect the outcome and deprive a party of substantial rights. When such a prejudicial error of law skews the family court's finding of a material issue of fact and causes it to pretermite other issues, the appellate court is required, if it can, to render judgment on the record by applying the correct law and determining the essential material facts *de novo*. See *Evans*, 708 So.2d at 735.

In this case, the family court failed to conduct any analysis of the mandatory factors enumerated in the relocation statute, which was clearly prejudicial. Accordingly, we review this matter *de novo*, based on the evidence in the record.⁵ See *Trahan*, 98 So.3d at 351.

La. R.S. 9:355.14 provides mandatory factors a court must consider when a domiciliary parent seeks to relocate the child's principal place of residence. We consider each factor in turn.⁶

⁵ In his challenge of the family court's modification of custody in favor of Hite, Ramirez alternatively suggested that this court conduct a *de novo* review of the issue of Hite's entitlement to the modification because of the failure to apply the relocation statutes. Since the *Bergeron* standard for modification of a considered custody decree is applicable even in the context of a relocation request, see *Gray v. Gray*, 2011-548 (La. 7/1/11), 65 So.3d 1247, 1260, we limit our *de novo* review to the issue of whether Hite, as the duly designated domiciliary parent awarded primary physical custody of the child during the school year, is entitled to relocate the child to Kansas under Louisiana's relocation statutes.

⁶ La. R.S. 9:355.14 states in pertinent part:

A. In reaching its decision regarding a proposed relocation, the court shall consider all relevant factors in determining whether relocation is in the best interest of the child, including the following:

Factor (1)

The evidence as to factor (1) shows the nature, quality, extent of involvement, and duration of the child's relationship with Hite is a strong, healthy and involved one. Hite has been an active parent in the child's life since she was born. The child now has a sister to share a relationship with while in Kansas. Hite has consistently and vigilantly maintained not only her periods of physical custody but also the court-ordered Skyping schedule. She has attempted to gather information from Ramirez as well as those caretakers of whom she has been aware. While it is evident that Ramirez is deeply involved in the child's life, the record

(1) The nature, quality, extent of involvement, and duration of the relationship of the child with the person proposing relocation and with the non-relocating person, 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.

(3) The feasibility of preserving a good relationship between the non-relocating person and the child through suitable physical custody or visitation arrangements, considering the logistics and financial circumstances of the parties.

(4) The child's views about the proposed relocation, taking into consideration the age and maturity of the child.

(5) Whether there is an established pattern of conduct by either the person seeking or the person opposing the relocation, either to promote or thwart the relationship of the child and the other party.

(6) How the relocation of the child will affect the general quality of life for the child, including but not limited to financial or emotional benefit and educational opportunity.

(7) The reasons of each person for seeking or opposing the relocation.

(8) The current employment and economic circumstances of each person and how the proposed relocation may affect the circumstances of the child.

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

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

(11) Any history of substance abuse, harassment, or violence by either the person seeking or the person opposing relocation, including a consideration of the severity of the conduct and the failure or success of any attempts at rehabilitation.

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

does not contain evidence of regular contact between the child and Ramirez's family. More importantly, in Ramirez's custody, the child has many transient relationships with women, their children, and Ramirez's short-term friends. While it may be that the child has at least one sibling through Ramirez, she apparently has not been made aware of the nature of their relationship and, therefore, has not developed a bond on that basis. Factor (1) favors relocation to Kansas as in the best interest of the child.

Factor (2)

Examination of the evidence of 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 also favors relocation. In particular, issues with hygiene and health favor that the child be with Hite. The record indicated that Ramirez was often neglectful of the child's hygiene, which at times, various women with whom he was involved would notice and try to remedy. Nevertheless, Ramirez's neglect of the child's hygiene has resulted in an inconsistent hygiene routine for the child, and on occasion, in the child smelling of urine and her private parts having been red, irritated, and even requiring medical attention. And evidence of Ramirez's lack of knowledge of the effects of female hygiene has compounded problems. Factor (2) favors relocation to Kansas as in the best interest of the child.

Factor (3)

The evidence of the feasibility of preserving a good relationship between Ramirez and the child through suitable physical custody or visitation arrangements, considering the logistics and financial circumstances of the parties, also demonstrates that relocation of the child to Kansas is warranted. The parties have an established history of regular Skyping, for which Hite has been diligent even before the court-ordered schedule was imposed. The parties are financially

capable of transporting the child to Louisiana and Ramirez is financially able to incur the expenses of traveling to Kansas to see the child. Factor (3) favors relocation to Kansas as in the best interest of the child.

Factor (4)

Factor (4) evidence was limited in light of the child's age. The only party to suggest a preference expressed by the child was Hite, who testified that the child wanted both of her parents to live in Kansas. We believe this factor does not favor either remaining in Louisiana or relocation to Kansas.

Factor (5)

The evidence showed that Hite consistently and consciously promoted the relationship of the child and Ramirez. She stated that, without him having to ask, she would provide Ramirez all the information she had historically tried to elicit from him. On the other hand, the evidence established that Ramirez intentionally created false appearances and provided Hite with incomplete and limited information about the child's whereabouts, medical condition, scholastic progress, and social interactions. Factor (5) favors relocation to Kansas as in the best interest of the child.

Factor (6)

Factor (6) appears equal insofar as the financial and educational opportunities available to the child. But given the evidence of Ramirez's issues with anger, we believe it is emotionally beneficial for the child to reside with Hite in Kansas. In addition, the stability and family structure to which Hite testified provides another layer of emotional benefit. Factor (6) favors relocation to Kansas as in the best interest of the child.

Factor (7)

Insofar as the reasons each person seeks or opposes the relocation, we find factor (7) does not affect either relocating or remaining in Louisiana as in the best

interest of the child. Hite wishes to continue the life she has built in Kansas where her family resides. She testified that the child is the only family she has that lives in the Baton Rouge area. Ramirez understandably opposes the relocation because it will limit the amount of time he physically has custody of the child. His life is in Louisiana, and he has no contact with Kansas other than that associated with Hite and the child.

Factor (8)

The evidence of factor (8) shows that Hite and her husband have maintained a longer employment history with the same employers and their economic circumstances are such that they are able to maintain a household for the child. While Ramirez has not maintained continuous employment with the same employer, he testified that he is financially secure without employment. He also stated that his area of certification is specialized, thereby permitting him ample opportunity to work and to chose when to do so. Relocation to Kansas should not present a financial hindrance to Ramirez's visitation just as the child's residence in Louisiana should not present a problem on this basis either. Factor 8 does not favor one parent over the other.

Factors (9) & (10)

Although each parent testified to a single instance of expense due to the other's failure to adhere to their respective visitation schedules, there is no evidence that Ramirez has failed to fulfill his financial obligations to Hite or vice versa. Factor (9) is not relevant to the issue of whether relocation to Kansas is in the child's best interest. Likewise, factor (10), regarding the feasibility of a relocation by Ramirez, is irrelevant insofar as this child's best interest. The record is devoid of any intent expressed by Ramirez to move to Kansas.

Factor (11)

Given Ramirez's issues with anger, we find that factor (11) favors relocation to Kansas with Hite as in the best interest of the child. Ramirez has not suggested, and we do not find in our independent review, any other factor necessary to consider in determining whether to allow the relocation of the principal place of residence of the child. See La. R.S. 9:355.14(12).⁷

Accordingly, on *de novo* review, having applied the mandatory factors set forth in La. R.S. 9:355.14, we conclude that relocation to Kansas with Hite is in the best interest of the child.

DECREE

For these reasons, we find the family court did not abuse its discretion in modifying custody to designate Hite as the domiciliary parent and award her primary physical custody of the child during the school year subject to specified visitation in favor of Ramirez, and on *de novo* review, we conclude that relocation is in the best interest of the child. Therefore, we affirm judgment of the family

⁷ Ramirez also complains that Hite failed to provide him notice of her intent to relocate the child to Kansas. The record shows that Hite has resided in Kansas since the onset of these custody proceedings, which were initiated by Ramirez to establish paternity. Early on, Ramirez entered into a consent judgment that allowed the child to spend half of her time, on a monthly basis, in Kansas. See La. R.S. 9:355.2D(1) (providing that the relocation statutes are not applicable when the parties have entered into an express written agreement for the relocation of the principal residence of the child). Hite has never asserted any intent to move from Kansas to Louisiana or to any other place. The hearings on Hite's request to modify custody were conducted over the course of almost a year, and Ramirez certainly knew no later than July 30, 2014, that Hite intended to maintain physical custody of the child in Kansas when she so testified and Ramirez's attorney raised the issue before the family court. There were two additional days of testimony, heard five months later, and Ramirez had ample opportunity to voice his objections and present evidence, including that which was relevant to the factors set forth in La. R.S. 9:355.14. Moreover, the failure to provide notice of a proposed relocation of a child permits the court only to consider that failure as: (1) a factor in making its determination regarding the relocation of a child; (2) a basis for ordering the return of the child if the relocation has taken place without notice or court authorization; and (3) sufficient cause to order the person proposing relocation to pay reasonable expenses incurred by the person objecting to the relocation. See La. R.S. 9:355.6. In this case, Hite had not removed the child from Louisiana at the time she requested modification of custody. On *de novo* review, we considered the lack of notice as a factor in our determination of whether Hite is entitled to relocate the child. Under the facts of this case, where Hite was not the domiciliary parent at the time of her request to modify custody and Ramirez had prior knowledge of Hite's out-of-state home, had previously consented to the child's out-of-state presence for half of the year, and was given ample opportunity to present evidence of his objection to the relocation, we find any failure to notify Ramirez in accordance with La. R.S. 9:355.5 does not militate against the child's relocation.

court. Appeal costs are assessed against plaintiff-appellant, Dirk Christopher Ramirez.

AFFIRMED.