

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 CU 0918

B.T.B.

VERSUS

V.L.B.

Judgment Rendered: OCT 31 2016



APPEALED FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF ST. TAMMANY
STATE OF LOUISIANA
DOCKET NUMBER 2009-13515
DIVISION "L"

HONORABLE DAWN AMACKER, JUDGE


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BEFORE: PETTIGREW, McDONALD, AND DRAKE, JJ.

 Pettigrew, J. Concurs

McDONALD, J.

This is an appeal from a child custody judgment that found a material change in circumstances had occurred since the stipulated custody decree and changed custody from 50/50 shared weekly-rotating custody with co-domiciliary parents to naming the father as the primary domiciliary parent with primary custody, and awarded three of four or four of five weekends custody to the mother, among other provisions. After a thorough review, we reverse the judgment in part, vacate the judgment in part, amend the judgment in part, and affirm the judgment as amended.

FACTS AND PROCEDURAL HISTORY

The parties in this case are B.T.B. (the father) and V.L.B. (the mother), of one child together, Z.B., who was born on January 11, 2008, when the parties were both eighteen. The parties were never married. The parties began living together with Z.B. in New Orleans after his birth, however, their relationship deteriorated and they separated.

On September 17, 2009, the parties entered into a consent judgment that provided for 50/50 shared custody of Z.B. and co-domiciliary status. Mutual permanent injunctions were issued, preventing each party from harassing the other party, and each party was prohibited from having overnight guests of the opposite sex when exercising physical custody of Z.B. Each party had a right of first refusal to exercise physical custody when the other party needed a caregiver for Z.B. for an extended period of time.

On October 13, 2009, the parties entered into a stipulation and interim order that continued the 50/50 shared custody and co-domiciliary status, continued the mutual restraining orders, continued the prohibition on overnight guests of the opposite sex when exercising physical custody of Z.B., and continued to give the parties the right of first refusal when needing a caregiver for Z.B. for an extended

period of time. At that time, V.L.B. had continued to live in New Orleans and B.T.B. had moved to New Orleans from his parents' home in St. Tammany Parish.

On June 21, 2010, the court entered an interim order, finding that 50/50 shared custody would continue; that no nude pictures of V.L.B. would be displayed in her home and that Z.B. would not be involved in modeling work or any other work that might be considered part of V.L.B.'s lifestyle; that B.T.B. would complete an anger management course; that a parenting coordinator would be appointed to assist the parties in dealing with issues that might arise before the court date; that mutual injunctions would continue to prohibit both parties from harassing each other; and that all previous orders from May 4, 2010, that were not replaced would remain in effect.

On June 22, 2010, B.T.B. filed a rule for contempt, asserting that V.L.B. had violated court orders and had pictures of Z.B. on her "lifestyle" website in violation of the court order. B.T.B. asked the court to order V.L.B. to remove Z.B.'s pictures from her website and to find her in contempt for disobedience of the court's order.

V.L.B. filed a rule for contempt on September 24, 2010, asserting that B.T.B. had violated the court's restraining order by leaving contemptuous messages on her answering machine and by failing to allow V.L.B. to have physical care of Z.B. when he needed child care. V.L.B. asked that B.T.B. be found in contempt of court.

On October 18, 2010, the parties entered into a consent judgment providing that they would continue 50/50 shared weekly custody, that each party had the right of first refusal when the other needed childcare for an extended period of time, and that they would alternate custody on holidays. Further, among other things, the judgment provided that Z.B. would remain at his daycare center until the parties agreed upon a change of day care or until Z.B. started school. It was ordered that

each party would pay one-half of day care and medical costs not covered by insurance; that the parties would not have inappropriate or nude photographs displayed in their homes that would not be suitable for Z.B. to view; that V.L.B. would not be involved in any business or lifestyle related to an exhibit in the record; that V.L.B. would have no nude or sexually suggestive photographs displayed in her home or on the internet, no internet blogs with sexual content, no internet blogs or websites with pictures of her child (other than Facebook or other non-sexual blog sites), and that conventional, non-nude modeling was excepted. V.L.B. was ordered to continue psychological therapy. The parties' rules for contempt were dismissed at their own costs.

In the years that followed, B.T.B. married N.B. and they had a child together. V.L.B. graduated from Tulane and married K.S. The parties continued their 50/50 shared custody and continued as co-domiciliaries throughout this time period.

Thereafter, by letter dated December 4, 2014, V.L.B. notified B.T.B. of her intention to relocate to Cary, North Carolina with Z.B. By letter dated December 29, 2014, B.T.B. notified V.L.B. of his objection to her proposed relocation with Z.B.

On March 23, 2015, V.L.B. filed a motion to relocate to North Carolina, asked for a mental health expert to be appointed, and asked for Z.B. to attend her wedding ceremony in New Orleans. V.L.B. averred that she had a job opportunity in Cary, North Carolina, that Z.B. had been attending a French immersion school in New Orleans, and that a French immersion Montessori school was available for him in Cary, North Carolina.

On March 24, 2015, B.T.B. filed a rule to change custody, for contempt, and an objection to the relocation of Z.B. B.T.B. asserted that V.L.B. had notified him by letter of December 4, 2014, of her intent to relocate to Cary, North Carolina

with Z.B., and that she had enrolled Z.B. in school in Cary, North Carolina. B.T.B. asserted that relying on V.L.B.'s assertions, he had made plans to move to the Northshore, and that he had begun enrolling Z.B. in school on the Northshore. B.T.B. asserted that since V.L.B. intended to relocate to Cary, North Carolina, it was in the best interest of Z.B. that custody be modified, and he asked the court to grant him sole custody of Z.B., with liberal visitation to V.L.B. He also asked that V.L.B. be held in contempt for violating the court order by scheduling extracurricular activities for Z.B. without his prior consent, unilaterally selecting a child psychologist for Z.B., and having nude photographs of herself displayed in her home. In the alternative, he asked that the parties continue shared custody, but that he be designated the domiciliary parent.

Thereafter, B.T.B. informed V.L.B. that he could no longer afford the private French immersion school that Z.B. was attending in New Orleans. B.T.B. relocated to Abita Springs in June 2015, and he enrolled Z.B. in a Montessori school in Abita Springs near his new home. V.L.B. was unhappy with the change in school, as she had wanted Z.B. to continue at the French immersion school in New Orleans that he had been attending, but during her weeks with Z.B. she brought Z.B. to and from school in Abita Springs.

On August 5, 2015, a hearing was held on B.T.B.'s rule for contempt, V.L.B.'s request for a mental health evaluation, and the issue of where Z.B. would attend school. By judgment rendered orally on August 5, 2015, the trial court found that it was in the best interest of Z.B. to attend the Montessori school in Abita Springs, denied V.L.B.'s request for a mental health evaluation, and deferred V.L.B.'s rule for contempt to the trial on the merits. On the school determination issue, V.L.B. applied for writs to this court, which were denied. **B.T.B. v. V.L.B.**, 2015-CW-1232 (La. App. 1 Cir. 8/12/15) (unpublished writ action). V.L.B. filed an application for writs to the Louisiana Supreme Court, which were denied. **B.T.B.**

v. **V.L.B.**, 2015-CJ-1542 (La. 8/13/15), 174 So.3d 1153.

On September 16, 2015, V.L.B. filed a motion to dismiss her petition for relocation, averring that she had decided to stay in New Orleans. V.L.B.'s petition for relocation was dismissed by the trial court on September 24, 2015.

At trial on November 9, 2015, B.T.B. dismissed his request for sole custody, and the parties stipulated that they would remain joint custodial parents. The hearing went forward on B.T.B.'s request to be named the domiciliary parent, and the court stated that "because they have both changed their positions on where they are planning to live, obviously, the plan itself, the custodial plan of equal shared joint custody, would be before the [c]ourt."

After the hearing, the trial court found that there was a material change in circumstances that affected Z.B.'s welfare and that required a domiciliary parent be named and a new joint custody plan be implemented. In its reasons for judgment, the trial court stated that the physical custody plan had become unworkable due to the distance to travel between the parents' domiciles, the intense acrimony between the parties, and the vastly different family values and lifestyles of parents.

The trial court rendered judgment on February 11, 2016, naming B.T.B. the primary domiciliary parent, with B.T.B. having physical custody of Z.B. at all times not specifically allotted to V.L.B., with V.L.B. having physical custody for the first three weekends of every month that has four weekends, and for the first four weekends in every month that has five weekends, providing for shared holidays and for rotating two-week custody during the summer. Further, the judgment ordered that, among other provisions, V.L.B. was prohibited from taking Z.B. to Cary, North Carolina; that V.L.B. and K.S. were prohibited from talking to Z.B. about their desire to relocate to another state or country without prior written permission from B.T.B. or order of the court; that V.L.B. could not be involved in any business or lifestyle depicted in her photographs or her blog; that V.L.B. not

have Z.B. in the presence of or in contact with any photographer/individual who engaged in nude photography (including a photographer who had previously photographed V.L.B.); and that V.L.B. was prohibited from having overnight guests of the opposite sex while she had physical custody of Z.B., excepting family members and persons related to Z.B. by blood or marriage. Further, B.T.B.'s rule for contempt was granted, finding that V.L.B. had scheduled extracurricular activities for Z.B. without B.T.B.'s prior knowledge or consent; that V.L.B. had scheduled a baptism for Z.B. without B.T.B.'s prior knowledge or consent; and that V.L.B. had scheduled and selected a psychologist for Z.B. without B.T.B.'s prior knowledge or consent. V.L.B. was ordered to perform 10 hours of community service in a court-approved program and to pay \$2,500.00 in attorney fees to B.T.B. Further, V.L.B.'s request for a parenting coordinator was denied.

V.L.B. appealed that judgment, and makes the following assignments of error.

1. The trial court erred in changing the custody schedule and naming the father as the domiciliary parent because the father did not meet his burden of showing a change in circumstances and that the schedule he proposed was in the child's best interest.
2. The trial court erred in restricting the mother's constitutional right to travel with the minor child to Cary, North Carolina.
3. The trial court erred in ordering that the mother is not to have the minor child in [contact] with certain photographers/individuals, as there was no proof of any harm to the child from being around any photographers.
4. The trial court erred in placing a restriction on the mother and step-father in having overnight guests of the opposite sex, but not placing that same restriction on the father.

STANDARD OF REVIEW

Each child custody case must be viewed in light of its own particular set of facts and circumstances. A trial 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. **Elliott v. Elliott**, 2005-0181 (La. App. 1 Cir. 5/11/05), 916 So.2d 221, 226, writ denied, 2005-1547 (La. 7/12/05), 905 So.2d 293. When a custody decree is a stipulated judgment, a party seeking modification of custody must prove that there has been a material change in circumstances (also referred to as a change of circumstances materially affecting the welfare of the child) since the original decree, as well as prove that the proposed modification is in the best interest of the child. **Cedotal v. Cedotal**, 2005-1524 (La. App. 1 Cir. 11/04/05), 927 So.2d 433, 437.

ASSIGNMENT OF ERROR NO. 1

In this assignment of error, V.L.B. asserts that the trial court erred in changing the custody schedule and naming B.T.B. as the domiciliary parent because B.T.B. did not meet his burden of showing a change in circumstances and showing that the schedule he proposed was in the child's best interest.

We find that the trial court was correct in finding that there was a change of circumstances in Z.B.'s life. V.L.B. had graduated from college and gotten married. B.T.B. had gotten married, and B.T.B. and N.B. had moved to Abita Springs and had a child. Z.B. was attending Montessori school in Abita Springs. These factors all contributed to a change in circumstances in Z.B.'s life. However, the trial court also had to find that a change from shared custody with alternating weeks was in Z.B.'s best interest. Louisiana Civil Code article 134 provides that the court shall consider all relevant factors in determining the best interest of the child.

The trial court stated in its reasons for judgment that due to the child attending school in Abita Springs, the physical custody plan had become "unworkable due to the distance required to travel between the parents' respective domiciles and the intense acrimony and vastly different family values and lifestyles of the parents." The trial court stated that it had examined all of the factors under

Article 134; that Z.B. was doing well and was flourishing in the Abita Springs Montessori School; that Z.B.'s anxiety had abated since the change in schools; and that V.L.B. had exhibited immature behavior intended to convey her discontent and unhappiness with the school, which was not in Z.B.'s best interest. Although V.L.B. had testified that she and her husband intended to stay in New Orleans, the trial court expressed concern as to whether the mother had truly decided to stay in New Orleans or wanted to move to North Carolina, "with or without the child." The trial court also stated that the mother came across as an "elitist" and "standoffish and cold".

The evidence in the record shows that Z.B. was doing well at the time of trial with alternating weeks of custody with each parent. Mandy Dennis, one of Z.B.'s teachers and the co-owner/co-director of his school in Abita Springs testified that Z.B. arrived at school each morning with a "great attitude" and ready to work. Ms. Dennis further testified that Z.B. had positive interactions with his teachers and his peer group, and that he was "a delight" to have in class.

Z.B. had lived with alternating weeks of custody with B.T.B. and V.L.B. since at least their first consent judgment in September 2009. While the trial court noted that V.L.B. and B.T.B. had an acrimonious relationship, the record shows that both parties fueled the acrimony and acted immaturely at times. V.L.B. was clearly not happy that B.T.B. had enrolled Z.B. in Montessori school in Abita Springs. However, the school choice issue was not before the court at the custody hearing.

Furthermore, the courts of this state have recognized that an award of custody is not a tool to regulate human behavior. **Kingston v. Kingston**, 2011-1629 (La App. 1 Cir. 12/21/11), 80 So.3d 774, 779. A change from shared custody with alternating weeks and co-domiciliary parents to B.T.B. as primary custodial parent and V.L.B. having most weekends would be a major change in Z.B.'s young

life. Z.B.'s relationship with V.L.B. is a close and loving relationship.

There was simply no showing that it was in Z.B.'s best interest to go from rotating weekly shared custody with his parents to spending every week with B.T.B. and three or four weekends a month with V.L.B. See La. C.C. art. 134. While it is true that V.L.B. had a long drive to take and pick up Z.B. from school in Abita Springs each day every other week, she is willing to make the drive, and the record indicates that they use the time to talk, listen to foreign language tapes, or for Z.B. to look at flash cards to study. Thus, we find that the trial court abused its discretion in giving B.T.B. primary custody with three out of four or four out of five weekends of custody in favor of V.L.B. See Cedotal, 927 So.2d at 437. We find no abuse of discretion in the trial court's designation of B.T.B. as the domiciliary parent, and we affirm that designation.

ASSIGNMENT OF ERROR NO. 2

In this assignment of error, V.L.B. asserts that the trial court erred in restricting her right to travel to Cary, North Carolina with Z.B. V.L.B. asserts that the right to travel freely from state to state is protected under the U.S. Constitution, and that without any evidence of how traveling to Cary, North Carolina would be detrimental to Z.B, the trial court ordered that V.L.B. was prohibited from taking Z.B. to Cary, North Carolina.

A review of the record shows that the trial court was concerned that a friend/photographer who took nude photographs of V.L.B. lived in Cary, North Carolina, and that V.L.B. had stayed with this individual during the summer. However, we note that V.L.B. would not have to go to Cary, North Carolina to see this individual, as they could meet anywhere. Thus, we find the restriction on traveling to Cary, North Carolina is unnecessary. We amend this portion of the judgment to provide that V.L.B. is not to have Z.B. in the presence of anyone taking nude photographs.

ASSIGNMENT OF ERROR NO. 3

In this assignment of error, V.L.B. asserts that the trial court erred in ordering her not to have Z.B. in contact with certain photographers/individuals, as there was no proof of any harm to the child being around any photographers.

A review of the record shows that the trial court expressed concern that Z.B. should not be spending time in the company of any individual taking nude photographs of V.L.B. The court's concern was that Z.B. not be exposed to nude photographs and photo studios; however, as asserted by V.B. in her argument on appeal, this puts V.L.B. in the position of questioning everyone around her when she is with Z.B. as to whether they take nude photographs. Thus, we amend this restriction to state, again, that V.L.B. shall not allow Z.B. to be in the presence of anyone taking nude photographs.

ASSIGNMENT OF ERROR NO. 4

In this assignment of error, V.L.B. asserts that the trial court erred in placing a restriction on her having overnight guests of the opposite sex, but not placing the same restriction on B.T.B. Ordinarily, the restriction on having overnight guests of the opposite sex is imposed upon unmarried parties. V.L.B., however, is married. Thus, this court finds it is an abuse of discretion to restrict V.L.B. from having overnight guests of the opposite sex when she has physical custody of Z.B., and this restriction is vacated.

Although V.L.B. did not assign as error the trial court's judgment finding her in contempt of court, she argues in her brief that the trial court abused its discretion in this determination. After review of the record, we find no abuse of discretion in the trial court judgment's finding that V.L.B. was in contempt of court, and that finding is affirmed.

CONCLUSION

For the foregoing reasons, the trial court judgment changing custody from 50/50 shared custody to primary custody to B.T.B. with three out of four weekends or four out of five weekends custody to V.L.B. is reversed, and 50/50 shared custody with rotating weeks of custody is restored; B.T.B.'s domiciliary parent status is affirmed. The trial court judgment's restriction on V.L.B. traveling to Cary, North Carolina with Z.B. and restriction on V.L.B. from having Z.B. in the presence of photographers/individuals who engage in nude photographs is amended such that V.L.B. is restricted from having Z.B. in the presence of anyone taking nude photographs. The trial court judgment's restriction on V.L.B. having overnight guests of the opposite sex when she has physical custody of Z.B. is vacated; and the trial court judgment's finding that V.L.B. was in contempt of court is affirmed.

**REVERSED IN PART, VACATED IN PART; AMENDED IN PART;
AND AFFIRMED AS AMENDED.**