STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 CU 0358

ALISHA HOWZE

VERSUS

JACOB HOWZE

TMH
GH
ahp

Judgment Rendered: SEP 28 2017

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On Appeal from the
Twenty-First Judicial District Court
In and for the Parish of Livingston
State of Louisiana
Trial Court No. 131644

The Honorable Jeffrey Oglesbee, Judge Presiding

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BEFORE: HIGGINBOTHAM, HOLDRIDGE, AND PENZATO, JJ.

PENZATO, J.

This is an appeal by Appellant, Jacob Howze, of a judgment modifying custody of the two minor children in favor of Appellee, Alisha Howze. For the reasons set forth below, we reverse the trial court.

FACTS AND PROCEDURAL HISTORY

Jacob and Alisha were married on September 5, 2003, and were divorced on February 5, 2013, and by stipulated judgment signed February 4, 2013 (2013 judgment), the parties agreed to joint custody and to be named co-domiciliary parents of the two minor children born of the marriage. In the 2013 judgment, Alisha maintained physical custody of the children during the week and Jacob had physical custody every weekend. Subsequently, Jacob filed a rule to modify custody. In his motion to modify custody, Jacob noted that despite the stipulated 2013 judgment, he consistently had physical custody of the children over 50% of the time and primarily assisted them with school and extracurricular activities. He also requested that Alisha's boyfriend at the time have no contact with the children. After a trial on May 20, 2014, the trial court granted Jacob's motion, continued the joint custody of the children, but designated Jacob as the primary domiciliary parent and changed the custody schedule so that the children would primarily reside with Jacob. Alisha was granted supervised custodial periods with the children every other weekend from Friday to Sunday and on Tuesday evenings from 4:00 p.m. to 7:00 p.m., and the trial court signed a judgment in conformance with this ruling on June 12, 2014 (2014 judgment). The transcript from the May 20, 2014 trial is not in the record, but according to the minutes the trial court heard testimony and admitted evidence. Additionally, the judgment states "[t]he court, after considering the evidence presented, did render judgment ...." Therefore, although from the record it cannot be determined the reasoning as to why the trial

court modified custody, decreasing the time of physical custody of Alisha, it did so after hearing testimony and admitting evidence.

On September 18, 2014, Alisha sought to modify custody, or in the alternative, modify visitation rights. A trial of the matter took place on March 30, 2015, and the trial court ordered that the parties maintain joint custody of the minor children, with Jacob designated as the domiciliary parent. The trial court signed a judgment in accordance therewith on October 8, 2015 (2015 judgment). The 2015 judgment granted Alisha custodial periods on alternating weekends from Friday after school until she returned them to school on Monday morning, as well as every Tuesday from after school until she returned them to school on Wednesday morning, together with such other holiday periods as had been set forth in the 2013 judgment.[1] Therefore, the 2015 judgment increased the time Alisha had physical custody of the children, and the custodial periods were no longer required to be supervised.

On December 23, 2015, Appellee filed a second motion to modify custody alleging that she sought to modify the 2015 judgment because a change of circumstances had occurred such that "the continuation of the present custody is so deleterious to the children to justify a modification of the present custody decree, and/or that the harm likely to be caused by a change in environment is substantially outweighed by its advantages to the children." Appellee claimed that she should be the domiciliary parent of the children because (1) the children expressed a preference to primarily reside with her; (2) Appellant had refused to facilitate and foster a relationship with Appellee; (3) Appellant had performed acts that disturbed the visitation privileges of Appellee; (4) Appellee had taken steps and

[1] The 2015 judgment referred to the judgment "rendered on February 13, 2012." Although the trial court rendered the judgment in open court on February 13, 2012, it was not signed until February 4, 2013.

accomplished goals to be able to provide a more stable environment for the children; and (5) other reasons to be proven at trial.

A trial was held on April 8, 2016 regarding Appellee's second motion to modify custody. After taking the matter under advisement, the trial court signed a judgment on September 30, 2016 (2016 judgment), modifying the 2015 judgment, awarding the parties joint custody, maintaining Appellant as the designated domiciliary parent, but changing the physical custody of the children to each party having alternating weeks from Friday to Friday. It is from the 2016 judgment that Appellant appeals.

ERRORS

Appellant asserts that the trial court erred in (1) modifying a considered custody decree without requiring a showing that the continuation of the existing custody arrangement was so deleterious to the minor children as to justify a modification of the custody decree; and (2) modifying a considered custody decree without requiring a showing that the harm likely caused by a change of environment was substantially outweighed by its advantages to the minor children.

LAW AND DISCUSSION

It is well settled jurisprudentially that "upon appellate review, the determination of the trial judge in child custody matters is entitled to great weight, and his discretion will not be disturbed on review in the absence of a clear showing of abuse." *Bergeron v. Bergeron*, 492 So. 2d 1193, 1196 (La. 1986). The paramount consideration in any determination of child custody is the best interest of the child. La. C.C. art. 131. However, in actions to change custody decisions rendered in *considered decrees,* an additional jurisprudential requirement is imposed. *Evans v. Lungrin*, 97-0541 (La. 2/6/98), 708 So. 2d 731, 738. 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. *Evans*, 708 So. 2d at 738; *Major v. Major*, 2002-2131 (La. App. 1 Cir. 2/14/03), 849 So. 2d 547, 551. An uncontested decree in which no evidence is presented as to the fitness of the parents is not a considered decree. *Major,* 849 So. 2d at 552. When a trial court has made a *considered decree* of permanent custody, the party seeking a change bears the heavy burden of proving that the continuation of the present custody is "so deleterious to the child as to justify a modification of the custody decree," or of proving by "clear and convincing evidence that the harm likely to be caused by the change of environment is substantially outweighed by its advantages to the child." *Bergeron,* 492 So. 2d at 1200. "Although the trial court retains a continuing power to modify a child custody order, there must be a showing of a change in circumstances materially affecting the welfare of the child before the court may consider making a significant change in the custody order." *Bergeron,* 492 So. 2d at 1194.

The transcript of the March 20, 2015 trial on the motion to modify custody is not contained in the record before us. However, from the minutes and the language of the judgment stating "after conclusion of the trial," it is evident that both parties put on testimony and evidence at the trial. Therefore, the 2015 judgment was a *considered decree* and the heavy burden enunciated in *Bergeron* applies in this matter.

Alisha, as the party seeking a modification of custody, bore the heavy burden to prove the continuation of the present custody is so deleterious to the child as to justify a modification of the custody decree, or by proving 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. *Smith v. Smith,* 615 So. 2d 926, 930-31 (La. App. 1 Cir.), *writ denied,* 617 So. 2d 916 (La. 1993). Alisha alleged that the children expressed a preference to live with her, but the only evidence was the general assertion that the children performed acts that led Alisha

to believe that they wanted to live with her. There was no specific testimony as to what those acts were. A child's preference, in and of itself, with no explanatory evidence, is not a material change of circumstance affecting the child's welfare. *Bergeron,* 492 So. 2d at 1203. Alisha also asserted that Jacob had refused to facilitate and foster a relationship between the children and her and had disturbed her visitation privileges. The evidence at the trial was that Alisha requested to change the visitation schedule quite frequently. However, both Alisha and Jacob testified that Jacob accommodated Alisha with those requests. Alisha testified that her visitation time was interrupted when the children had ball practices or had to go to a baseball camp, but she admitted those occasions were for extracurricular activities of the children. Alisha also testified that she works cleaning houses and a bank Monday through Thursdays both in the morning and from 5:00 p.m. to 8:00 p.m. Both parties agreed that her requests to alter the schedule were due to her work schedule.

Alisha further alleged that she could provide a more stable environment for the children. At trial, Jacob testified that Alisha's environment was not stable because she constantly requested to change the visitation schedule for various reasons. He also testified that the children went with their mother on occasions to her cleaning job.

Alisha testified that since the rendition of the 2015 judgment she had been found not guilty for the felony theft charges for which she had previously been arrested. She testified that she wanted to co-parent the children at least 50% of the time and was willing to work with Jacob. There is evidence in the record that the children were checked into school late on three occasions by Alisha, who testified that two of those occasions were for dermatologist appointments. Nothing in the record indicates whether any of the occasions were excused or unexcused. The report cards of both children showed that they were doing very well. Alisha

testified that her older child exhibited an attitude, and she and Jacob communicated regarding discipline. This child also shot himself with a BB gun while at Alisha's house, even though the gun had been in a locked box in a closet. Alisha agreed that she was $5000.00 behind in the child support payments she owes to Jacob. Alisha claimed that if she had the children for a week at a time, rather than just on the weekends and every Tuesday night, the scheduling problems would not be an issue. Alisha also testified that if she had the children for an entire week at a time, she would not have to work the 5:00 p.m. to 8:00 p.m. shifts on the weeks she had the children because she worked those shifts to pay for the child support she owed. Jacob testified that the children usually had to stay with their grandmother or someone else on Tuesday nights.

The trial court stated on the record that the *Bergeron* standard had not been met with regard to a modification of custody. However, the trial court opined that there was room to modify the visitation schedule as the Tuesday night visitation did not appear to be working for either party. Therefore, although the trial court issued no written reasons, it appears that the judgment was based on the "tweaking" of visitation schedules. Other circuits have noted that as a practical matter, courts may "tweak" visitation schedules even when the evidence will not support modifying a prior *considered decree. Mason v. Mason,* 2016-287 (La. App. 3 Cir. 10/5/16), 203 So. 3d 519, 529; *Brantley v. Kaler,* 43,418 (La. App. 2 Cir. 6/4/08), 986 So. 2d 188, 191. Visitation is always open to change when the conditions warrant it. However, courts are not permitted to apply the more flexible standard of visitation to circumvent the principles and protection announced in *Bergeron. Mason,* 203 So. 3d at 529; *Brantley,* 986 So. 2d at 192.

This circuit has recognized that the standard to modify visitation and to modify custody are separate and distinct. In *Harang v. Ponder,* 2009-2182 (La. App. 1 Cir. 3/26/10), 36 So. 3d 954, 961, *writ denied,* 2010-0926 (La. 5/19/10), 36

So. 3d 219, both parties expressly requested a modification in the "visitation" time that the defendant was exercising under the joint custody plan implemented in the consent judgment. This circuit noted that the parties' use of the term "visitation" in their requests to modify the defendant's physical custody time and in the language of both judgments was misleading. The parties in *Harang* continuously shared joint legal custody of the minor child since the rendering and signing of the consent judgment. The time that parents with joint legal custody share with their child is more properly described as a "physical" or "actual" custody allocation of a joint custody plan, rather than visitation. *Harang,* 36 So. 3d at 961, *citing* La. R.S. 9:335(A); *Cedotal v. Cedotal,* 2005-1524 (La. App. 1 Cir. 11/4/05), 927 So. 2d 433, 436 (wherein Mr. Cedotal's use of the term "visitation privileges" was found to be misleading when he sought to obtain equal physical custody of the child by way of alternating weeks). The typical joint custody plan will allocate time periods for physical custody between parents so as to promote a sharing of the care and custody of the child in such a way as to ensure the child of frequent and continuing contact with both parents. *Harang,* 36 So. 3d at 961, *citing Evans,* 708 So.2d at 737.

In the present case, Alisha shared joint custody with Jacob. When she sought to obtain equal physical custody of the children by way of alternating weeks, she was seeking to modify custody, not visitation. The more flexible standard of visitation could not be used to circumvent the principles and protection announced in *Bergeron. Mason,* 203 So. 3d at 529; *Brantley,* 986 So. 2d at 192. The trial court recognized that Alisha did not meet the *Bergeron* standard to modify custody. We agree with that assessment that Alisha failed to carry her burden of proof, as there was no evidence that the continuation of the present custody is so deleterious to the child as to justify a modification of the custody decree, or proof 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. The record does not contain any evidence to support a finding that a modification of child custody would be in the best interest of the minor children and that the current custody decree adversely affects the welfare of the children. Therefore, we are unable to infer that the present custody is so deleterious to the children 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 children. Instead of applying the standard of *Bergeron,* it appears that the trial court erroneously applied the more flexible standard of visitation to the facts of this case.

CONCLUSION

For the above and foregoing reasons, the trial court's September 30, 2016 judgment is reversed and set aside and the custody decree dated October 8, 2015, is reinstated. All costs of this appeal are assessed against Appellee, Alisha Howze.

REVERSED.