NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 CU 0699

NICHOLAS MILLER

VERSUS

TEAL DICHERRY

Judgment Rendered: SEP 27 2017

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On Appeal from the Twenty-Third Judicial District Court
In and for the Parish of Ascension
State of Louisiana
No. 110,689

Honorable Jason Verdigets, Judge Presiding

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BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.

Welch J. concurs in result

McCLENDON, J.

A mother challenges a trial court's judgment awarding joint custody to her and the father on the basis that the trial court failed to apply the **Bergeron** standard for reviewing a custody award. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

Teal Dicharry[1] and Nicholas Miller are the parents of the minor child, H.M. After the parents' relationship ended, Mr. Miller, on August 1, 2014, filed a petition that sought, among other things, to set custody and support. At the hearing on Mr. Miller's petition, the parties stipulated to a custody arrangement, designating Ms. Dicharry as the domiciliary parent and granting Mr. Miller physical custody on alternating weekends and an additional four-hour visit once per month.

After several orders were issued by the trial court addressing custody following various hearings, Mr. Miller filed a motion on April 19, 2016, requesting "even joint custody of [J.M.]" On July 6, 2016, a hearing was held on Mr. Miller's motion. At the hearing, Ms. Dicharry contended that Mr. Miller was required to meet the burden of proof set forth in **Bergeron v. Bergeron**, 492 So.2d 1193 (La. 1986).[2] The trial court found that the **Bergeron** standard did not apply, reasoning that the prior orders were "interim" in nature and that there had never been a signed judgment or considered decree. Following the hearing, wherein both parties testified, the trial court held that it would maintain Ms. Dicharry as domiciliary parent, but also indicated:

> [Mr. Miller] has every right to spend as much time with the child as you do so ... no major grounds have been shown to me to deny any parent that right of equal time. So the Court is going to order seven days on, seven day off system. We're going to do it on Sundays, going to exchange on Sunday at 6:00 in the evening. I'll see if y'all can work out some kind of holiday schedule if you can. I'll make the holiday schedule as well.

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[1] In the petition's caption, the appellant's last named is spelled "Dicherry," but in her brief to this court, appellant spells her last name as "Dicharry."

[2] In **Bergeron**, the Louisiana Supreme Court stated that in a case involving modification of a considered decree of permanent custody, the burden of proof for the petitioning party is to show that the continuation of the present custody is so deleterious to the child so as to justify the modification, or that the harm likely to be caused by a change of environment is substantially outweighed by its advantages to the child. The purpose of this heavy burden is to avoid extensive and repetitive litigation that could be harmful to the child and to avoid unnecessary changes in the child's life. 492 So.2d at 1200.

Subsequently, on August 9, 2016, the trial court signed a judgment in accord with its oral reasons, naming Ms. Dicharry domiciliary parent and ordering the parties to share "50/50 joint physical custody."[3] Ms. Dicharry has appealed, asserting that the "district court erred by concluding that it need not find a change in circumstances before entering an order modifying the custody decree."

DISCUSSION

Each child custody case must be viewed in light of its own particular set of facts and circumstances. **Perry v. Monistere**, 08-1629 (La.App. 1 Cir. 12/23/08), 4 So.3d 850, 852. There is a distinction between the burden of proof required to change a custody plan ordered pursuant to a considered decree and the burden of proof required to change a custody plan ordered pursuant to a non-considered decree (or stipulated judgment).

Once a considered decree of permanent custody has been rendered by a court, the proponent of a change of custody bears the heavy burden of proving that a change of circumstances has occurred, such that the continuation of the present custody arrangement is so deleterious to the child 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 child. **Perry v. Monistere**, 4 So.3d at 853 (citing **Bergeron**, 492 So.2d at 1200).

Ms. Dicharry contends that the trial court entered a considered decree after a May 4, 2015, hearing. Ms. Dicharry avers that the court awarded custody after receiving evidence of parental fitness, including testimony from the parents and a custody assessment. Ms. Dicharry acknowledges, however, that no written judgment evincing the trial court's ruling was ever rendered. Ms. Dicharry notes that the May 4, 2015 minute entry reflects that a judgment was "to be signed when formal judgment is presented to the Court," and the parties discussed circulating a "judgment" during the hearing. Ms. Dicharry also notes that she presented a judgment to the court, but the court never signed it nor provided an explanation for refusing to do so. Ms. Dicharry

[3] In another judgment also rendered on August 9, 2016, the trial court recognized Ms. Dicharry's proposed holiday schedule.

concludes that the May 4, 2015 ruling should be a considered decree such that the **Bergeron** standard should apply.

However, a review of the transcript from the May 4, 2015 hearing, indicates that the trial court anticipated revisiting the custody issue and did not contemplate that its ruling in open court was a considered decree. Specifically, in rendering the interim custody order following the May 2015 hearing, the trial court opined that the custody schedule could change "if [Mr. Miller's] work type changes and [his] work hours change. It doesn't mean [that the custody schedule entered is] going to stay like that until she's six, okay. It's just going to be like that for now." Further, at the July 6, 2016, hearing, the trial court noted that its recollection of the May 4, 2015 ruling "regarding custody issues was interim type stuff." The trial court opined that it had never entered a "considered decree."

Further, whether or not the parties intended the May 4, 2015 ruling in open court to be a considered decree, no written judgment was ever rendered following the hearing. We recognize that a final judgment can be inconsistent with reasons for judgment. **Thurman v. Thurman**, 521 So.2d 579, 581 (La.App. 1 Cir. 1988). What is said in open court will not take the place of a signed judgment. See **René v. René**, 95-0460 (La.App. 4 Cir. 6/29/95), 657 So.2d 788. Reasons for judgment are considered to be interlocutory rulings and do not carry the finality of a judgment. Prior to final judgment, a trial judge may, at his discretion, change the substance or the result of interlocutory rulings. See **Meyer & Associates, Inc. v. Coushatta Tribe of Louisiana**, 14-1109 (La.App. 3 Cir. 1/27/16), 185 So.3d 222, 239, writ denied, 16-0369 (La. 4/22/16), 191 So.3d 1048 ("Additionally, it has long been recognized that 'where there are only written reasons and no separate signed judgment, there is no final judgment[,]' and that '[p]rior to final judgment, a trial judge may, at his discretion, change the substance or the result of interlocutory rulings. A trial judge may also sign a judgment based on written reasons which differ substantially from previously stated oral reasons.'")

Based on the unique circumstances presented, we cannot conclude that the trial court erred in failing to apply the **Bergeron** standard. As such, Ms. Dicharry's assignment of error is without merit.

CONCLUSION

For the foregoing reasons, we affirm the trial court's August 9, 2016 judgment. Costs of this appeal are assessed to appellant, Teal Dicharry.

AFFIRMED.