

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2017 CU 1128

TRENT THOMAS LEACH

VERSUS

CINDY WARNER DYKES

Judgment rendered **DEC 21 2017**

Appealed from the
Family Court

in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. F187410
Honorable Pamela Baker, Judge

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ATTORNEY FOR
PLAINTIFF-APPELLEE
TRENT THOMAS LEACH

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AND
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ATTORNEYS FOR
DEFENDANT-APPELLANT
CINDY WARNER DYKES

BEFORE: GUIDRY, PETTIGREW, AND CRAIN, JJ.

Crain, J. concurs with assigned reasons

PETTIGREW, J.

In this child custody case, the mother appeals a family court judgment awarding joint custody to the parties with equal sharing of physical custody and designating the father as the domiciliary parent. We affirm.

FACTS AND PROCEDURAL HISTORY

Trent Leach and Cindy Dykes are the parents of one child, Brayden Leach, who was born on April 24, 2012. Mr. Leach and Ms. Dykes were never married, but lived together for a short period of time prior to and after Brayden's birth. On October 23, 2012, Mr. Leach filed a Petition to Establish Paternity and Custody. At a November 27, 2012 hearing, a written stipulation labeled "Interim Order" was read into the record. The written stipulation stated that the parties agreed that Mr. Leach is Brayden's father, that the parties will have joint custody of Brayden according to a physical custody schedule set forth in the stipulation, and dealt with other incidental matters. Throughout the written stipulation there were several references to the parties' intent that this stipulation would be interim and without prejudice: "This is without prejudice and interim only. Set for review February ___;" "All Interim Only;" and "Interim only." The family court rendered judgment on December 17, 2012, incorporating the parties' stipulations, naming Ms. Dykes the "interim domiciliary parent," and setting the matter for review on February 5, 2013. The judgment states, "**IT IS FURTHER ORDERED** that all issues pertaining to custody and support are set without prejudice to either party, and are interim in nature." A Case Management Schedule was signed by the family court on February 4, 2013, setting the case for trial on June 12, 2013 on "custody, support, all issues related to custody;" however, it does not appear from the record that a trial was held on June 12th.

On August 8, 2013, Mr. Leach filed a Rule to Modify Support and Custody. On September 10, 2013, the parties entered into another written stipulation, which stated that the parties would share equal physical custody of Brayden "pending further order of the court;" that child support would be set effective September 1, 2013, pursuant to Worksheet B in accordance with the parties' income; and addressing other incidental matters. This written stipulation again explicitly stated, "This order is without prejudice," and the

judgment rendered by the family court in accordance therewith stated, "**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that this matter is set without prejudice to either party."

On May 6, 2015, Mr. Leach filed a Rule to Modify Custody, asking the court to designate him as the domiciliary parent, "subject to reasonable visitation," and to hold Ms. Dykes in contempt for violating the interim custody order. Mr. Leach alleged that Ms. Dykes was dating and living part-time with a man named Philip Ziegler, who had been arrested recently for Sexual Battery of a twelve-year-old child. Mr. Leach alleged that Brayden had disclosed inappropriate sexual behavior by Mr. Ziegler, which he communicated to Ms. Dykes, but Ms. Dykes continued to allow Mr. Ziegler to be around Brayden. Mr. Leach also alleged that when he refused to switch physical custody periods with Ms. Dykes one week so that she could take Brayden on an impromptu trip to Disney World, Ms. Dykes filed a Petition for Protection from Abuse, alleging that Mr. Leach had been physically abusive to her and to Brayden, obtained a temporary restraining order, and brought the child on the trip to Disney World without informing Mr. Leach. Mr. Leach alleged that he was not aware of the temporary restraining order or that his child was out of state until he tried to pick the child up from school and he was not there. The Petition for Protection from Abuse was ultimately dismissed after a hearing. On July 7, 2015, the family court issued an order, again in accordance with a stipulation of the parties, ordering Ms. Dykes to ensure that Mr. Ziegler is not around Brayden at any time pending further order of the court, ordering that there will be no change in daycare for the child pending trial or further order of the court, ordering that Mr. Leach shall make all major medical decisions for the child, and further ordering "that this order is interim in nature pending trial herein, and that all prior orders rendered herein shall remain in full force and effect."

On September 12, 2016, Ms. Dykes filed a Rule to Modify Custodial Restrictions, asking the court to lift the restriction prohibiting Mr. Ziegler from being around Brayden for a number of reasons: Mr. Ziegler had not yet been formally charged with any crime a year and a half after he was arrested for sexual battery; Mr. Ziegler's Psychosexual Evaluation allegedly resulted in a recommendation that he "be considered for the least restrictive

disposition consistent with public safety;" Mr. Ziegler provides health insurance through his employer for Brayden; Ms. Dykes and Mr. Ziegler had a child together and would like to get married; and the custodial restriction had become "unnecessary and prohibitive in exercising normal family functions" and created a "disruptive burden upon the petitioner and the minor child."

A trial was held on Mr. Leach's Rule to Modify Custody and Ms. Dykes' Rule to Modify Custodial Restrictions on January 25, 2017 and February 9, 2017. After trial, the court gave oral reasons and rendered judgment, noting that "all of the [prior] judgments have been interim, and this is an initial setting of custody hearing. So, no change in circumstance is necessary, there is no consent or considered decree." The court then awarded joint custody of Brayden to the parties with equal sharing of physical custody on an alternating weekly basis, designated Mr. Leach as the domiciliary parent, lifted the restrictions against Mr. Ziegler being in the child's presence as long as there is another adult present at all times who can see and hear Brayden, and dealt with other incidental matters.

Ms. Dykes appealed, alleging that the family court erred in concluding that Mr. Leach did not need to prove a material change in circumstances in order to change their custody plan, which had been ordered pursuant to a non-considered decree. Ms. Dykes also argues that the court erred in changing the custody plan because Mr. Leach did not prove a material change in circumstances or that the change was in the best interest of the child.

DISCUSSION

There is a distinction between the burden of proof needed to change a custody plan ordered pursuant to a considered decree and that needed to change a custody plan ordered pursuant to a non-considered decree. **Elliott v. Elliott**, 10-0755, p. 8 (La. App. 1 Cir. 9/10/10), 49 So.3d 407, 412, writ denied, 10-2260 (La. 10/27/10), 48 So.3d 1088; see also **Evans v. Lungrin**, 97-0541, 97-0577, pp. 12-13 (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. **Elliott**, 10-0755 at p. 8, 49 So.3d at 412. 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 which is otherwise not contested. **Id.**

Once a considered decree of permanent custody has been rendered by a court, the proponent of the change 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 of proving by clear and convincing evidence that the harm likely caused by a change of environment is substantially outweighed by its advantages to the child. **Id.** citing **Bergeron v. Bergeron**, 492 So.2d 1193, 1200 (La. 1986).

However, in cases where the underlying custody decree is a stipulated judgment, and the parties have consented to a custodial arrangement with no evidence as to parental fitness, the heavy burden of proof rule enunciated in **Bergeron** is inapplicable. **Elliott**, 10-0755 at p. 8, 49 So.3d at 412-413; see also **Evans**, 97-0541, 97-0577 at p. 13, 708 So.2d at 738. Rather, a party seeking a modification of a consent decree must prove: (1) that there has been a change in circumstances materially affecting the welfare of the child since the original (or previous) custody decree was entered; and (2) that the proposed modification is in the best interest of the child. **Tinsley v. Tinsley**, 16-0891, p. 9 (La. App. 1 Cir. 1/18/17), 211 So.3d 405, 411-12, reh'g denied (Feb. 7, 2017), citing **Elliott**, 10-0755 at p. 8, 49 So.3d at 413; **Richard v. Richard**, 09-0299, p. 7 (La. App. 1 Cir. 6/12/09), 20 So.3d 1061, 1066; and **Evans**, 97-0541, 97-0577 at p. 13, 708 So.2d at 738.

In this case, all prior judgments regarding custody were issued pursuant to stipulations of the parties, and both the parties and the family court took great pains to make it clear that the judgments were intended by the parties to be interim, without prejudice, and temporary pending further review by the court. As such, we do not believe that either party was required to prove a change in circumstances materially affecting the welfare of the child. See **Sanders v. Sanders**, 05-0803, p. 5 (La. App. 1 Cir. 9/23/05), 923 So.2d 721, 724; see generally **Jordan v. Jordan**, 294 So.2d 261, 264-65 (La. App. 1 Cir. 4/22/74), writ denied, 296 So.2d 835 (La. 1974). The court did not commit legal error, and Ms. Dykes's first assignment of error is without merit.

Although we conclude that Mr. Leach did not need to prove a change in circumstances in order for the court to rule on custody, a review of the evidence before the family court in this case reveals that Mr. Leach did prove a change in circumstances materially affecting Brayden's welfare since the prior interim orders. Specifically, Mr. Leach submitted evidence that Ms. Dykes's boyfriend, with whom she sometimes lived, had been arrested for sexual battery of a twelve-year-old girl, that Ms. Dykes did not inform Mr. Leach of her boyfriend's arrest, that Brayden disclosed inappropriate sexual behavior by the boyfriend to Mr. Leach, and that after being informed of Brayden's disclosures, Ms. Dykes continued to allow Mr. Ziegler to be around Brayden.

Ms. Dykes also argues that the family court erred in finding that a change in custody and domiciliary status was in the best interest of the child. The paramount consideration in a child custody determination is always the best interest of the child. La. C.C. art. 131. In determining the best interest of the child, the court shall consider all relevant factors, including those enumerated in La. C.C. art. 134.¹ The best-interest-of-the-child test under La. C.C. arts. 131 and 134 is a fact-intensive inquiry, requiring the weighing and balancing of factors favoring or opposing custody in the competing parties on the basis of the evidence presented in each case. **Randazzo v. Prosperie**, 13-0704, pp. 3-4 (La. App. 1 Cir. 9/13/13), 135 So.3d 22, 24-25. Every child custody case is to be viewed on its own peculiar set of facts and the relationships involved, with the paramount goal of reaching a decision

¹ La. C.C. art. 134 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.

that is in the best interest of the child. **Randazzo**, 13-0704 at p. 4, 135 So.3d at 25. The trial court is vested with broad discretion in deciding child custody cases; because of the trial court's better opportunity to evaluate witnesses, and taking into account the proper allocation of trial and appellate court functions, great deference is accorded to the decision of the trial court. **Id.** A trial court's determination regarding child custody will not be disturbed absent a clear abuse of discretion. **Id.**

In ruling, the family court specifically noted that since this was an initial setting of custody, it considered all of the factors in La. C.C. art. 134 in determining the best interest of the child. The court specifically noted the evidence which led it to conclude that a change in custody from the interim arrangement was in the best interest of the child, including: Ms. Dykes elected not to tell Mr. Lynch that her boyfriend had been accused of sexual battery of a young girl, and refused to acknowledge the possibility that he could be guilty of the crime, even when Brayden made disclosures of inappropriate behavior; Ms. Dykes showed up at Mr. Leach's mother's house drunk one night, snatched the child from bed, and engaged in a physical struggle over the child with Mr. Leach's family; Ms. Dykes removed the child from daycare in violation of the interim order; Ms. Dykes obtained a temporary restraining order against Mr. Leach when the parties could not agree on a modification of custody so that she could take the child to Disney World; after obtaining the temporary restraining order, Ms. Dykes immediately drove to the airport and flew to Disney World with the child without informing Mr. Leach that they were leaving town, in violation of the interim custody order; and Ms. Dykes takes multiple prescription medications for anxiety, depression, and ADHD.

Based on the evidence before the family court, we cannot say that the court abused its discretion in concluding that the award of joint custody and designation of Mr. Leach as the domiciliary parent was in the best interest of the child.

CONCLUSION

The March 14, 2017 judgment of the family court is affirmed. Costs of this appeal are assessed to appellant, Cindy Dykes.

AFFIRMED.

TRENT THOMAS LEACH

STATE OF LOUISIANA

VERSUS


COURT OF APPEAL

CINDY WARNER DYKES

FIRST CIRCUIT

NO. 2017 CU 1128

CRAIN, J., concurring.



While the judgments preceding the March 14, 2017 judgment that is the subject of this appeal were all consent judgments, each being rendered by agreement of the parties and without the introduction of evidence, the parties expressly agreed they were also “interim” and entered “without prejudice.” Consequently, I agree that proof of a “change in circumstances materially affecting the welfare of the child” was not necessary to fix custody in the March 14, 2017 judgment. The effects of an “interim” award of custody on the best interests of the child can be adequately considered when applying the factors in Louisiana Civil Code article 134, without the additional burden of proving a change in circumstances. This analytical framework is set forth in the concurring opinion in *Chandler v. Chandler*, 48,891 (La. App. 2 Cir. 12/13/13), 132 So. 3d 413, 421 (Caraway, J., concurring), with which I agree.