Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **10th day of May, 2011**, are as follows:

BY VICTORY, J.:

2010-CJ-2312 ROBERT MALCOLM GATHEN v. VANESSA K. GATHEN (Parish of Lafourche)

For the reasons state herein, the judgment of the court of appeal is reversed and the judgment of the trial court is reinstated. REVERSED; TRIAL COURT JUDGMENT REINSTATED.

JOHNSON, J., dissents and assigns reasons.
KNOLL, J., dissents with reasons.

5/10/11

SUPREME COURT OF LOUISIANA

No. 2010-CJ-2312

ROBERT MALCOLM GATHEN

versus

VANESSA K. GATHEN

**ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
FIRST CIRCUIT, PARISH OF LAFOURCHE**

VICTORY, J.

We granted this writ application to determine the appropriate standard of review of a trial court's decision in a child relocation case, where the trial court does not expressly analyze each factor under La. R.S. 9:355.12 in determining whether relocation is in the best interest of the child. After review of the record and the applicable law, we find that while La. R.S. 9:355.12 mandates that the trial court consider all twelve factors listed in La. R.S. 9:355.12, its failure to expressly analyze each factor in its written or oral reasons does not constitute an error of law such that *de novo* review is appropriate. Where the trial court has considered the factors listed under La. R.S. 9:355.12 in determining whether relocation is in the best interest of the child or children, this determination is reviewed for abuse of discretion. In this case, the court of appeal erred in reviewing the case *de novo*. Utilizing the correct standard, we see no abuse of discretion in the trial court's decision to deny the mother's relocation request. Therefore, we reverse the judgment of the court of appeal and reinstate the trial court's judgment denying relocation.

FACTS AND PROCEDURAL HISTORY

Robert Gathen ("Robert") and Vanessa K. Gathen ("Vanessa") met in the state of Washington while Robert was serving in the U.S. Navy. On January 6, 1996, they were married in California where their first child, Andru, was born on August 3, 1997. Shortly thereafter, they moved to Thibodaux, Louisiana, where Robert's family resided. Their second child, Evan, was born there on March 3, 2002. On August 5, 2005, Robert filed a petition for divorce and on October 11, 2005, a consent judgment awarded joint custody of the children with Vanessa designated as the domiciliary parent subject to Robert's reasonable visitation. A joint implementation plan detailing the custodial arrangements was never filed. Vanessa was awarded monthly child support of $1,320.00 and was granted possession and use of the family home with Robert paying the house note.

On January 18, 2006, Vanessa notified Robert of her desire to relocate with the children to Puyallup, Washington. Robert objected and the trial court denied her relocation request in March of 2006.[1] Vanessa did not appeal that

[1] In oral reasons dated March 13, 2006, the trial court reasoned:

> Louisiana Revised Statutes Title 9, Section 355.13 provides the burden of proof which Ms. Gathen must meet in order to relocate the children from the state of Louisiana to the state of Washington. That article provides as follows: The relocating parent has the burden of proof that the proposed relocation is made in good faith and is in the best interest of the child.
>
> Ms. Gathen, the law provides that you have to prove those two factors. I believe that you've proven the first one, that your desire to relocate is made in good faith. You've testified that one of the reasons you want to move to the state of Washington is that you can enhance or improve your relationship with your only sister. Observing your testimony, I believe that your testimony was truthful that you do have a desire to have a closer relationship with your sister and you want your children to have a closer relationship with your sister.
>
> Also, you testified that another reason you wish to move to Washington is that you wish to obtain an associate's degree as a dental hygienist. Although there are programs here in Louisiana which would allow you to become a dental hygienist, the program which is closest which was earlier in New Orleans and they currently relocated to Baton Rouge is a four year program, a bachelor's program. The only associate degree program is in Shreveport, a considerable distance from where you currently live. Obtaining an associates degree as a dental hygienist would benefit yourself. It would also benefit your children. You'd have a greater ability to earn money to support yourself and the children. So, clearly your intention to relocate is made in good faith.
>
> I then have to evaluate whether or not the relocation is in the best

interest of the children and the statute further provides that in determining the child's best interest the court shall consider the benefits which the child derived either directly or indirectly from the enhancement from the relocating parent's general quality of life. Based upon the evidence that's been presented today, it appears that the quality of life both for yourself and for the children would be essentially the same either here in Thibodaux or in the state of Washington. Both communities provide an excellent opportunity for the education of the children. Both communities provide the necessary infrastructure for your children to enjoy their recreational activities.

But there are other factors that the Court has to consider. The evidence clearly proves that the children have a very close and loving relationship with their father. The testimony proves that when he works a seven and seven work schedule and the very day that he returned from work he immediately goes to see his youngest child and would see the older child but for the fact that the child was in school. If the children were to relocate to the state of Washington this would significantly diminish the contact with their father and the contact with their father is very important to their development as young children.

Also, the evidence proves that both the children, Mr. Gathen and also yourself have benefitted for approximately eight years from the extended family that exists here in Louisiana. There's a larger extended family here in Louisiana than there is in the state of Washington. Here they have the paternal grandmother and two paternal aunts who are very much involved in the lives of these children and have been very beneficial to you and your husband over these past eight years. It's clear from this testimony that's been presented that these children are very close to their extended family here in Louisiana. Every Friday and every Sunday there's a family gathering. In fact, much to your credit, even after you and your husband separated you continued to allow the children to enjoy that contact on Fridays and Sundays with their father's family. And I say that much to your credit. Most mothers would have stopped that to the detriment of their child. It is obvious to me that if the children were to relocate to the state of Washington this would significantly diminish their contact with the paternal extended family.

Also, Andrew has been attending St. Joseph for a minimum of three years, possibly longer. It was not clear from the evidence how many years he had been attending that school. In your testimony you acknowledged that this is a good school, that he has done well there. And although there wasn't any direct evidence about the amount of friendships that have developed with other students while he is at this school, it would be obvious to me that he has developed a circle of friends at the school that he attends and that would end if he were to relocate to the state of Washington.

Your attorney has argued that the father could maintain his relationship with the children through visitation. In fact, he has argued that you appear to be prepared to offer extensive summertime visitation. But interaction with children is better when it's on a continuing basis than just on a periodic basis. And clearly the distance between the state of Louisiana and the state of Washington will not make it very likely that Mr. Gathen will be able to visit on a regular basis during most of the year. So, the use of visitation to maintain this very, very close and very strong relationship between the father and children is not very feasible.

And although the attorneys have not brought this issue before the Court, it is one of the factors that I'm required to look at is whether or not it's practical for Mr. Gathen to possibly relocate to the state of Washington. And from the evidence that's been presented, I don't believe that that is practical. He has a job here in the state of Louisiana. It's a very beneficial job to the family. It

judgment. The parties were divorced on April 17, 2006. On November 20, 2006, the parties executed a community property partition agreement in which they stipulated they were equally responsible for the monthly payments of the first and second mortgage notes that were secured by the family home. The parties agreed that Robert would deduct Vanessa's share of these payments from the child support payments and pay the remainder to Vanessa. The parties agreed not to partition the family home until Vanessa could secure another suitable residence.

In March 2009, Vanessa told Robert that she intended to relocate with the children to Puyallup, Washington, and Robert initially acquiesced. However, after Vanessa filed the required written notice on March 25, 2009, Robert filed an objection to the relocation on April 24, 2009. Subsequently, on May 22, 2009, Vanessa filed a rule seeking past-due child support in the amount of $14,900.00, an income assignment, a contempt of court ruling against Robert, attorney fees, and costs.

The trial court considered the relocation request on June 30, August 6, and August 21, 2009. The evidence presented showed that Vanessa had been the primary caregiver, and that Robert worked offshore every other seven days and had physical custody of the boys twice a month for a weekend. Vanessa testified that she lived in the state of Washington with her parents from first grade until fifth grade, returned for her sophomore year of high school to live with her sister, and returned there after high school graduation, from 1993-1995, at which time she

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> provides the necessary income for the family to maintain the lifestyle that the family has enjoyed over the last eight years. And if he were to relocate, it would result in him, Mr. Gathen, also having diminished contact with his family. And it is clear from the evidence that has been presented today that Mr. Gathen also has a very close and loving relationship with his mother, his aunts and the other members of his extended family.
>
> Ms. Gathen, it is for these reasons that the Court will deny your request to relocate the children to the state of Washington. Court costs of today's motion will be assessed to the defendant, Ms. Gathen.

moved with Robert to San Diego. She testified that one reason she wanted to return to Washington was to be with her family, which includes her sister and two children, and her aunt. Her mother lives in Hawaii to care for her aging grandmother, but visits Washington often and plans to relocate there. Vanessa planned to live with the boys in the bottom floor of her sister's house rent-free, which includes a living area, two bedrooms, and a full bath. In addition, the oldest child was becoming too old for after-school care, and in Washington, her aunt and sister could pick the children up after school and help her with day care until she finished work. Vanessa presented evidence that she made $10.17 per hour working as an administrative assistant for Nicholls State University, but because of budget cuts she would not receive a merit pay increase, and, Nicholls was instituting a 6 and ½ day furlough, which would decrease her annual income. She testified that a friend in Washington had offered her a job with an orthodontic lab for $15.00 per hour, which would require her to perform the same general duties she performs at Nicholls, and work with study models for various orthodontic offices in the area. Because she would be living rent-free and have an increased salary, she would be much better able to provide for her children. Vanessa testified she has no support system in Louisiana and wants to return to Washington to be with her family and to have her sons be with her family.

Robert argued that the requested relocation is for essentially the same reasons as the 2006 relocation request which was denied, except that now she has been offered a job that pays more money. He testified that his sons have lived their entire lives in Thibodaux, that they have a strong connection to his family, their friends and their school. He testified that the great distance between Louisiana and Washington would greatly diminish the children's relationship with him and his family.

After hearing the testimony, the judge denied the relocation request with the following oral reasons:

> The evidence establishes that the mother, Ms. Gathen, desires to relocate to the State of Washington for numerous reasons which include she has been offered employment at an orthodontic lab with an increase in income. Her current employer Nicholls State University is scheduled to impose a six and one-half day furlough without pay due to budget cuts, which would result in a reduction in her income. Her employer, Nicholls State University is also scheduled to impose a freeze regarding merit pay increases.
>
> Also, Ms. Gathen has testified that her relocation to the State of Washington would economically benefit her. She would be relieved of the necessity to pay day care expenses because her sister residing in Washington is a homeowner.
>
> Ms. Gathen has also testified that the child Andrew [sic] can no longer attend day care. And there is the potential that there would be a period of time after school when there would be difficulty in providing adequate supervision.
>
> Also, Ms. Gathen has testified that initially should she relocate to the State of Washington, she would live with her sister. She testified that she was raised in the State of Washington and that she has lived with her sister in Washington at time periods in the past.
>
> She has also stated that a consideration for her desire to relocate to the State of Washington is that she would live closer to her mother, who is a resident of Hawaii.
>
> Mr. Gathen opposes the relocation to the State of Washington. He has provided proof that the children have resided predominantly within the State of Louisiana and within the Parish of Lafourche. The child Evan has lived his entire life within the State of Louisiana and the child Andrew [sic] has lived more than ten years of his life within the State of Louisiana.
>
> The evidence proves that the children have attended all of their time in school in Lafourche Parish. Andrew [sic] has attended school for six years now and Evan has now attended pre-K and kindergarten.
>
> Mr. Gathen has testified that he has a close - - that the children have a close relationship with his mother and his aunts and that testimony has been supported by the testimony of his mother and aunt.
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> Mr. Gathen also submits that the relocation would significantly limit the children's contact with their father and the father's family.
>
> Mr. Gathen also argues or has presented evidence that the children have had a limited relationship with the aunt who lives in the

State of Washington. The evidence presented is that this aunt has visited the State of Louisiana approximately two times and that the children and Ms. Gathen visit with the aunt in Washington approximately one time each year during the Christmas break.

This evidence which has been presented to the Court causes the Court to determine that the relocation of the children to the State of Louisiana would have a significant adverse effect on the children. A relocation to the State of Washington would result in a change of the schools that the children have attended. Andrew [sic] has attended school for a period of six years and Evan has attended pre-K and kindergarten.

Also, a relocation to the State of Washington would remove Andrew [sic] from the friends that he has enjoyed while living here in the State of Louisiana.

A relocation to the State of Washington would limit the children's contact and, therefore, limit their relationship with their father due to the great distance between the State of Louisiana and the State of Washington. The relocation to the State of Washington would also limit the contact and, therefore, significantly limit the relationship the children have with their paternal grandmother and paternal aunts, again, due to the significant distance between the State of Louisiana and the State of Washington. And the evidence proves that the children have a limited relationship with the maternal aunt who they would reside with in the State of Washington.

Although the child has indicated a preference to live in the State of Washington, the Court will not give any significant weight to the determination of an eleven year old child as to what is in his best interest.

There is no competent evidence before the Court that the educational opportunities in the State of Washington are any greater than the educational opportunities available to the children in the State of Louisiana.

It is for these reasons that the Court will deny the intended relocation of the minor children to the State of Washington.

With two judges dissenting, a five-judge panel of the First Circuit Court of Appeal reversed, finding that a *de novo* review of the record was necessary because the trial judge "did not articulate its best-interest determination utilizing each of the statutorily-required factors set forth in La. R.S. 9:355.12, factor by factor." ***Gathen v. Gathen***, 10-0439, p. 7 (La. App. 1 Cir. 9/15/10) (unpublished). Utilizing a *de novo* standard of review, the court of appeal allowed relocation

finding that "factors 2, 3, 5, 6, 8 and 11 weigh in favor of Vanessa and the remaining factors favor neither party." ***Id.*** at p. 16. Further, even under the manifest error standard of review, the court of appeal found the trial court abused its discretion in denying relocation because "mindful of the express statements about the evidence relative to the statutory factors, we cannot say that the evidence as a whole preponderated in favor of the reasonableness of the trial court's decision." ***Id.*** at p. 17. We granted Robert's writ application to determine whether La. R.S. 9:355.12 requires that a trial court expressly analyze each of the listed factors in oral or written reasons in making a relocation determination; and, if it does not, to determine the appropriate standard of review. ***Gathen v. Gathen***, 10-2312 (La. 11/12/10).

DISCUSSION

A divorced parent seeking to relocate with his or her children to another state bears the following burden of proof:

> The relocating parent has the burden of proof that the proposed relocation is made in good faith and is in the best interest of the child. In determining the child's best interest, the court shall consider the benefits which the child will derive either directly or indirectly from an enhancement in the relocating parent's general quality of life.

La. R.S. 9:355.13. In determining the best interest of the children, La. R.S. 9:355.12 lists the following factors to be considered:

> A. In reaching its decision regarding a proposed relocation, the court shall consider the following factors:
>
> (1) The nature, quality, extent of involvement, and duration of the child's relationship with the parent proposing to relocate and with the nonrelocating parent, 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, taking into consideration any special needs of the child.

(3) The feasibility of preserving a good relationship between the nonrelocating parent and the child through suitable visitation arrangements, considering the logistics and financial circumstances of the parties.

(4) The child's preference, taking into consideration the age and maturity of the child.

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

(6) Whether the relocation of the child will enhance the general quality of life for both the custodial parent seeking the relocation and the child, including but not limited to financial or emotional benefit or educational opportunity.

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

(8) The current employment and economic circumstances of each parent and whether or not the proposed relocation is necessary to improve the circumstances of the parent seeking relocation of the child.

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

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

(11) Any history of substance abuse or violence by either parent, including a consideration of the severity of such conduct and the failure or success of any attempts at rehabilitation.

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

B. The court may not consider whether or not the person seeking relocation of the child will relocate without the child if relocation is denied or whether or not the person opposing relocation will also relocate if relocation is allowed.

In ***Curole v. Curole***, 02-1891 (La. 10/15/02), 828 So. 2d 1094, we first discussed the burden of proof in a relocation case.[2] We stated that as in divorce, adoption, and termination of parental rights cases, "Louisiana's relocation statutes retain the 'best interest of the child' standard as the fundamental principle

[2] At the time of ***Curole***, La. R.S. 9:355.12 contained only eight factors. While now La. R.S. 9:355.12 contains twelve factors, the holding of ***Curole*** is unaffected.

governing decisions made pursuant to its provisions." 828 So. 2d at 1096. As explained, the relocation statutes govern the relocation of a child's principal residence to a location outside the state, or, if there is no court order awarding custody, more than 150 miles within the state from the other parent, or, if there is a court order awarding custody, more than 150 miles from the domicile of the primary custodian at the time the custody decree was rendered. ***Id.*** Pursuant to La. R.S. 9:355.13, the relocating parent has the burden of proving that the proposed relocation is: (1) made in good faith; and (2) in the best interest of the child. In determining the child's best interest, the court must consider the benefits which the child will derive either directly or indirectly from an enhancement in the relocating parent's general quality of life. La. R.S. 9:355.13. In ***Curole***, we explained that by placing this two-part burden on the relocating parent and placing no burden on the nonrelocating parent, the legislature chose to assign a very heavy burden to the relocating parent to prove that relocation is in the best interest of the child.[3] ***Curole****, supra* at 1097.

After listing the factors provided in La. R.S. 9:355.12, we stated "[t]his statute mandates that all of the factors set forth be considered by the court." ***Id.*** at 1097. "It does not, however, direct the court to give preferential consideration to certain factors." ***Id.*** Finally, ***Curole*** set forth the appropriate standard of review as follows: "[a] trial court's determination in a relocation matter is entitled to great

[3] In ***Curole***, the Court explained that in adopting the language of La. R.S. 9:355.13, the legislature was presented with three alternatives by the drafters of the Model Act regarding the burden of proof. The first placed the burden of proving good faith and best interest on the relocating parent, the second placed the burden of proving good faith and best interest on the nonrelocating parent, and the third placed the burden of proving good faith on the relocating parent and best interest on the nonrelocating parent. The legislature chose the first option. 828 So. 2d at 1096-97.

weight and will not be overturned on appeal absent a clear showing of abuse of discretion." ***Id.*** at 1096.[4]

Courts of appeal have differed somewhat on ***Curole***'s meaning. In ***H.S.C. v. C.E.C.***, 05-1490 (La. App. 4 Cir. 11/8/06), 944 So. 2d 738, the Fourth Circuit held that where the record does not support a finding that the trial court actually considered each separate factor of La. R.S. 9:355.12, *de novo* review, rather than reversal, was the appropriate remedy. However, proof that the trial court actually considered each factor "might be adduced from other than a rigid formulaic factor

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[4] This Court has previously discussed the reasons for the abuse of discretion standard in child custody cases, stating:

> Upon appellate review, the determination of the trial judge in child custody matters is entitled to great weight. He is in a better position to evaluate the best interests of the children from his total overview of the conduct and character of the parties and the children and of community standards. His discretion on the issue will not be disturbed on review in the absence of a clear showing of abuse of discretion.

Fulco v. Fulco, 259 La. 1122, 1129, 254 So. 2d 603, 605 (1971) (citing ***Messner v. Messner***, 240 La. 252, 122 So. 2d 90 (1960); ***Salley v. Salley***, 238 La. 691, 116 So. 2d 296 (1959); ***Decker v. Landry***, 227 La. 603, 80 So. 2d 91 (1955); ***Guillory v. Guillory***, 221 La. 374, 59 So. 2d 424 (1952)).

While ***Curole*** stated that abuse of discretion was the correct standard of review in a relocation case, it interchangeably referred to the manifest error standard in parts of the opinion. This was not technically correct. In ***Cleeton v. Cleeton***, 383 So. 2d 1231, 1235 (La. 1979) (on reh'g), we granted a rehearing in part to address an "important particular" overlooked by the Court on original hearing, which was that it erred in applying the manifest error standard. The Court explained that while the manifest error standard reverses "for error," "[t]he better standard of review in custody matters gives the trial court decisions great weight, to be overturned only when there is a clear abuse of discretion." 383 So. 2d at 1235. *See also* ***Thompson v. Thompson***, 532 So. 2d 101 (La. 1988) and ***Stephenson v. Stephenson,*** 404 So. 2d 963 (La. 1981) (both applying the abuse of discretion standard in child custody cases). Similarly, in ***Bergeron v. Bergeron***, 492 So. 2d 1193, 1197 (La. 1986), we criticized an earlier Court's characterization of manifest error and abuse of discretion as being "substantially similar," *see* ***Bordelon v. Bordelon***, 390 So. 2d 1325, 1329 (La. 1980), calling this treatment of the appropriate standard "equivocal." In ***Bergeron***, the Court conducted a very thorough analysis of whether the heavy burden of proof and abuse of discretion standard of review in child custody cases had been legislatively abrogated by the rejection of the maternal preference rule and found that they had been retained. The Court explained that the abuse of discretion standard "preserves the trial court's determination of the child's best interest, except in case of an abuse of discretion." 492 So. 2d at 1196. Commentators have likewise distinguished the abuse of discretion standard as being a "a higher standard of deference" than the manifest error standard, applicable to cases where "the substantive law vests a high degree of discretion in the trial judge." Frank L. Maraist, Louisiana Civil Law Treatise: Civil Procedure, Volume I, § 14:14, p. 558 (2nd ed. 2008). Relocation cases, like other cases involving determinations of the best interest of the child, are such cases where the trial court is vested with a high degree of discretion and, as stated in ***Curole***, where the abuse of discretion standard is appropriate. Thus, while the manifest error and abuse of discretion standards may be similar, it is the abuse of discretion standard that applies here and the phrase should not be used interchangeably with manifest error.

by factor analysis by the trial court . . . ." *Cf.* ***McLain v. McLain***, 07-0752 (La. App. 4 Cir. 12/12/07), 974 So. 2d 726, 736 (statute does not require that judge must expressly analyze each factor). The Fifth Circuit has also held that where the record does not support a finding that the trial court actually considered each factor, prejudicial legal error has occurred and the court of appeal may remedy the deficiency by *de novo* review of the record. ***Johnson v. Spurlock***, 07-949 (La. App. 5 Cir. 5/27/08), 986 So. 2d 724, 728, *writ denied*, 08-1400 (La. 7/25/08), 986 So. 2d 670. The Third Circuit has held that even where the written reasons only mention certain of the factors, "the trial court's decision to emphasize only certain factors does not, in and of itself, constitute error." ***Jarnagin v. Jarnagin***, 09-903 (La. App. 3 Cir. 12/9/09), 25 So. 3d 1028, 1033; *see also* ***Miller v. Miller***, 01-0356 (La. App. 3 Cir. 10/31/01), 799 So. 2d 753. Lastly, in a case where the trial court only expressly considered certain factors, the Second Circuit applied the manifest error standard and held that the trial judge properly focused on the best interest of the children and conducted an "overall analysis" of the factors. ***Bingham v. Bingham***, 44,292 (La. App. 2 Cir. 5/13/09), 12 So. 3d 448, 452. One finding common to all these cases is that where it can be determined that the trial court considered the factors, *de novo* review is inappropriate.

Based on our review of the law, we find that the trial court is not required to expressly analyze each factor in its oral or written reasons for judgment in a relocation case. Not only does La. R.S. 9:355.12 not expressly require it, but a trial court is never required to give oral reasons and is not required to give written reasons for its "findings of fact and reasons for judgment" unless requested by a party in most types of non-jury cases. La. C.C.P. art. 1917. Had either party desired the trial court's findings of fact and reasons to be in writing, they could have asked. Further, if the legislature had intended the trial court to expressly

analyze each and every factor in either oral or written reasons, it could have provided so. Consequently, we find the trial court's failure to expressly analyze each factor does not constitute an error of law that would allow *de novo* review. *See* ***Evans v. Lungrin***, 97-541 (La. 2/6/98), 708 So. 2d 731, 735 (where one or more legal errors interdict the fact-finding process, if the record is complete the court of appeal must conduct a *de novo* review of the record). The appropriate standard of review, as stated in ***Curole***, is that the trial court's relocation determination is entitled to great weight and will not be overturned absent a clear showing of abuse of discretion.

That being said, it is readily apparent that a trial court's failure to expressly analyze each factor makes appellate review for abuse of discretion somewhat difficult. Most certainly an articulation of the trial court's consideration of each of the factors would better facilitate appellate review. However, based on the reasons given, we can assume that the trial court discussed the factors it felt were decisive to the case, and did not discuss the factors that it believed were not as important and should not be given much weight. As La. R.S. 9:355:12 "does not . . . direct the court to give preferential consideration to certain factors," ***Curole***, *supra* at 1097, the trial court is free to give whatever weight it deems appropriate to each of the factors. Thus, upon review, it is appropriate for a reviewing court to look to the reasons and factors the trial court did expressly take into account in reaching its ultimate determination, and, for the factors the trial court did not expressly discuss, it is appropriate for the reviewing court to determine whether the trial court's failure to give weight to these factors led the court to abuse its discretion in reaching its ultimate determination on relocation. Our review follows.

As stated earlier, a relocating parent must prove that the move is in good faith and in the best interest of the child or children. La. R.S. 9:355.13. There is

no dispute that Vanessa proved her proposed relocation was in good faith. She testified that she wished to move to Washington to be closer to her family and to pursue an employment opportunity and housing situation that would be beneficial to her. Although Robert claimed the move was not made in good faith in opposing the relocation, he presented no evidence that the relocation request was not made in good faith.

Secondly, the court must determine whether relocation would be in the best interest of the children considering the twelve factors enumerated in La. R.S. 9:355.12. In this case, it is significant that this same trial judge considered and denied a relocation request from Vanessa just three years earlier and most of the facts supporting the relocation were the same. Inevitably, the trial judge was cognizant of the considerations he made in 2006. Thus, regarding the facts that remain the same in 2006 and 2009, we will take into account the considerations he made in 2006 in reviewing his decision to deny relocation.

The first factor the court must consider is the nature, quality, extent of involvement, and duration of the child's relationship with the parent proposing to relocate and with the nonrelocating parent, siblings, and other significant persons in the children's lives. The trial judge was well aware of the custody arrangement between the parents and knew the mother was the primary caretaker. He found that the children's involvement with their father's relatives in Thibodaux was substantial, while their involvement with their mother's relatives in Washington was "limited."

The second factor is the age, developmental stage, needs, and likely impact the relocation would have on the child's physical, educational, and emotional development, taking into account any special needs of the child. In his 2006 reasons, the trial judge considered that Andru had been attending school for three

years, was doing well there and had developed a circle of friends at the school that would end if her were to relocate. In its 2009 reasons, he recognized that there would be a problem with daycare for Andru if they were to remain in Louisiana which would be solved by a move to Washington. However, he also considered that Andru had attended school in Thibodaux for six years and Evan for two years and a move would result in a change in schools that the children have attended, which apparently he found would be detrimental, and Andru would be removed from his friends in Thibodaux. Finally, he found no evidence that the educational opportunities are better in Washington than they are in Thibodaux.

Third, the court must consider the feasibility of preserving a good relationship between the nonrelocating parent and the child through suitable visitation arrangements, considering the logistics and financial circumstances. The trial judge found the move would "limit their relationship with their father due to the great distance between the State of Louisiana and the State of Washington." In 2006, he also considered the fact that Vanessa was offering extensive summertime visitation for Robert, just as she is now, but found that the use of visitation to maintain Robert's relationship with the children was not very feasible.

The fourth factor is the child's preference, taking into consideration the age and maturity of the child. Although there was testimony that Andru wanted to move to Washington, the trial judge decided not to give "any significant weight to the determination of an eleven year old child as to what is in his best interest." This was within his discretion.

Fifth, the court must consider whether there is an established pattern of conduct of the parent seeking the relocation, either to promote or thwart the relationship of the child and the nonrelocating party. The testimony was consistent that the mother was very accommodating to Robert regarding visitation and Robert

never disputed this. In the 2006 oral reasons, the trial judge commended Vanessa for continuing to allow the children to attend gatherings with Robert's family every Friday and Sunday even after they had separated.

Sixth, the court must consider whether the relocation will enhance the general quality of life for both the custodial parent seeking the relocation and the children, including but not limited to financial or emotional benefit or educational opportunity. While the trial judge did not find any emotional or educational benefit to the relocation, he recognized that she had been offered a job at a dental lab with an increase in income and that her current employer was scheduled to impose a work furlough and a pay increase freeze. He also recognized that she would be relieved of paying day care expenses. This is one significant situation that changed since 2006, when she did not have a firm job offer in Washington and the trial judge found their quality of life would be the same in both Washington and Louisiana. While the trial judge could have discussed the other ways in which Vanessa and the children would financially benefit from the move, i.e., she would no longer be paying a mortgage and thus would have the entire $1,320.00 for child support, the trial judge did recognize and consider that Vanessa and the children would financially benefit from the move.

Seventh, the court must consider the reasons of each parent for seeking or opposing the relocation. As stated earlier, the trial judge recognized Vanessa's reasons early in the oral reasons, apparently in an effort to consider whether the relocation request was in good faith. The trial judge also considered that Robert opposed the relocation because it would limit his contact and his family's contact with the children, and remove them from the community they have known all their lives.

Eighth, the court must consider the current employment and economic circumstances of the each parent and whether or not the proposed relocation is necessary to improve the circumstances of the parent seeking relocation. The trial judge recognized the economic circumstances regarding Vanessa's current employment, the increase in pay her new job would afford her, and the fact that she would no longer have to pay day care expenses. In fact, because Vanessa would not have to pay rent and would be making $5.00 more an hour, the proposed relocation was necessary to improve Vanessa's economic circumstances. However, ***Curole*** directs that the trial court is not to give preferential consideration to any one factor; therefore, even though we may have placed more emphasis on Vanessa's economic situation, the trial court did not abuse its discretion by not giving it more weight.

Ninth, the court must consider the extent to which the objecting parent has fulfilled his or her financial obligations to the parent seeking relocation, including child support, spousal support, and community property obligations. While the trial judge did not mention this factor in its oral reasons, Vanessa filed a rule seeking past-due child support payments, an income assignment, and a finding that Robert was in contempt of court for failure to pay child support. The trial judge issued judgments on both matters the same day, denying Vanessa's relocation request, but finding Robert in contempt of court for failure to pay child support and ordering him to pay $14,900 in arrearages along with interest, court costs, and attorney's fees. Thus, while the trial judge did not mention Robert's failure to fulfill his financial obligations in his oral reasons at the relocation hearing, these matters were essentially heard together and the trial court had to have considered this factor in his relocation decision. Undoubtedly, this factor weighs against Robert, but does not mandate that relocation be approved.

The tenth factor is the feasibility of a relocation by the objecting parent. As stated earlier, the trial judge determined in 2006 that it was not practical for Robert to relocate to Washington, given his job in Louisiana that provides the necessary income for the family to maintain their lifestyle. Robert maintains the same job as he did in 2006, thus this factor has not changed and the trial court has considered it.

The eleventh factor is any history of substance abuse or violence by either parent, including a consideration of the severity of such conduct and the failure or success of any attempts at rehabilitation. The trial judge did not make any determinations regarding this factor. The only evidence presented on this subject was Vanessa's testimony that Robert told her he became intoxicated at a friend's house after a family dinner and could not remember how he arrived home with the boys. While serious, this isolated incident does not constitute a "history or substance abuse or violence."

The twelfth factor directs the court to consider any other factors affecting the best interest of the child. This catch-all provision basically supports the "best interest of the child" focus in relocation cases and allows the trial court to consider any other factor that affects the best interest of the child, even if not listed. Here, the trial judge did not expressly consider any other factors.

Based on a thorough review of the record, we cannot say that the trial judge abused his discretion in denying the relocation request. The trial judge expressly analyzed the factors he felt were most decisive, and ultimately determined, as he did in 2006, that relocation was not in the best interest of the children. Nothing in the record or the trial judge's reasons leads us to the conclusion that the trial judge abused its discretion in determining relocation would not be in the best interest of the children.

CONCLUSION

While La. R.S. 9:355.12 requires the trial court to consider twelve factors in determining whether a relocation is in the best interest of the child, the trial court is not required to expressly analyze each factor in its oral or written reasons and its failure to do so does not constitute an error of law allowing *de novo* review. Here, it can be gleaned from the record as a whole that the trial judge followed the law in reaching his ultimate determination, and his decision cannot be overturned because there was no abuse of discretion.

DECREE

For the reasons stated herein, the judgment of the court of appeal is reversed and the judgment of the trial court is reinstated.

REVERSED; TRIAL COURT JUDGMENT REINSTATED.

5/10/11

SUPREME COURT OF LOUISIANA

NO. 2010-CQ-1823

IN RE: KATRINA CANAL BREACHES LITIGATION

ON CERTIFIED QUESTION FROM THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

JOHNSON, Justice

We accepted the certified question presented to this Court by the United States Fifth Circuit Court of Appeals in *In Re: Katrina Canal Breaches Litigation*, 613 F. 3d 504 (5th Cir. 2010).[1] The question presented is "Does an anti-assignment clause in a homeowner's insurance policy, which by its plain terms purports to bar any assignment of the policy or an interest therein without the insurer's consent, bar an insured's post-loss assignment of the insured's claims under the policy when such an assignment transfers contractual obligations, not just the right to money due?"

For the reasons set forth below, we answer the question as follows:[2] There is no public policy in Louisiana which precludes an anti-assignment clause from applying to post-loss assignments. However, the language of the anti-assignment clause must clearly and unambiguously express that it applies to post-loss assignments, and thus it must be evaluated on a policy by policy basis.

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[1] *In Re: Katrina Canal Breaches Litigation*, 2010-1823 (La. 10/29/10), 51 So. 3d 1.

[2] The Fifth Circuit provided: "We disclaim any intent that the Louisiana Supreme Court confine its reply to the precise form or scope of the legal questions certified." 613 F. 3d at 512.

FACTS AND PROCEDURAL HISTORY[3]

To provide relief in the aftermath of Hurricanes Katrina and Rita, Congress appropriated federal funds, administered by the Department of Housing and Urban Development ("HUD"), to affected states. Louisiana distributed some of those funds via the "Road Home" program, which provided grants of up to $150,000 to Louisiana homeowners to repair uninsured or under-insured property damage. Purporting to fulfill an obligation under federal law to "prevent recipients from receiving any duplication of benefits," the State required more than 150,000 Road Home grant recipients to execute a "Limited Subrogation/Assignment Agreement."[4] It stated, in pertinent part:

> I/we hereby assign to the State of Louisiana ... to the extent of the grant proceeds awarded or to be awarded to me under the [Road Home] Program, all of my/our claims and future rights to reimbursement and all payments hereafter received or to be received by me/us: (a) under any policy of casualty or property damage insurance or flood insurance on the residence, excluding contents ("Residence") described in my/application for Homeowner's Assistance under the Program ("Policies"): (b) from FEMA, Small Business Administration, and any other federal agency, arising out of physical damage to the Residence caused by Hurricane Katrina and/or Hurricane Rita.

According to the State, the Road Home program created perverse incentives for insurance companies and insured homeowners: some insurers inadequately adjusted and paid grant-eligible homeowners' claims, and some grant-eligible homeowners had little motivation to file claims or challenge low insurance

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[3] We set out the facts primarily as delineated by the United States Fifth Circuit. 613 F. 3d at 507-09.

[4] According to the State, the guidelines for administering Road Home funds were set forth by the Louisiana Recovery Authority ("LRA") in its 2006 *Road Home Housing Programs Action Plan Amendment for Disaster Recovery Funds* ("action plan"). That plan contains the requirement that fund recipients agree to subrogate claims for unpaid and outstanding insurance claims back to the Program. The LRA was granted authority to develop the action plan by the legislature in the 2006 Legislative session. Act No. 5, 2006 1st Extraordinary Sess. (La. 2006); S.C.R. 63, 2006 Reg. Sess. (La. 2006). Such plan was required to, and did, obtain approval by the governor, the legislature, and the HUD.

settlements. Consequently, Road Home applications and grant amounts drastically increased, creating a one billion dollar projected shortfall in the program.

To remedy this situation, and pursuant to the assignment agreements, the State filed suit against more than two hundred insurance companies - allegedly all of the insurers who wrote property insurance in Louisiana at the time of the Hurricanes - in state court in Orleans Parish. The State sought to recover the funds expended and anticipated to be expended under the Road Home program and a declaration of the insurers' duties under the "all risk" policies they had issued to Road Home applicants.

The Defendants successfully removed the case to federal district court under the Class Action Fairness Act. According to the Defendants, the insurance industry has paid more than forty billion dollars to homeowners as a result of losses from Hurricanes Katrina and Rita. The insurers argue that the State's suit is an attempt to obtain yet more money from the insurers, even in situations where the homeowner was satisfied with the amount paid, had already filed a lawsuit against the insurer, or had reached a settlement agreement. Moreover, the insurers contend the State brought suit without investigating whether the Defendants had actually failed to make sufficient payment on individual homeowners' claims.

The Defendants subsequently filed a Federal Rule 12(b)(6) motion to dismiss in the federal district court, arguing in part that the State's claims failed as a matter of law because anti-assignment clauses in the homeowners' policies invalidated the purported assignments to the State.

Making an *Erie*[5] guess, the federal district court denied the motion to dismiss, holding that the contractual anti-assignment provisions did not bar post-loss assignments under Louisiana law. The federal district court also denied the

[5] *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

Defendants' motion for reconsideration, but certified that order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). An appeal to the United States Fifth Circuit Court of Appeals followed. Because "interpretation of the policy provisions at issue is a matter of Louisiana law that will determine the outcome of this case and because there are no clear controlling precedents in the decisions of the Louisiana Supreme Court," the Fifth Circuit invoked the certification privilege.

DISCUSSION

Parties' Contentions

The insurers contend the post-loss assignments to the State are invalid as a matter of law. They argue the anti-assignment clauses in the policies are enforceable based on Louisiana Civil Code article 2653[6], which provides that a right cannot be assigned when the contract from which that right arises prohibits assignment of the right. The insurers note the anti-assignment clauses in the insurance contracts are broadly worded and contain no exception for post-loss assignments.

Additionally, the insurers argue this Court should not create a judicial exception to Article 2653 as a matter of public policy. The legislature, not the courts, creates public policy and thus only the legislature can create an exception to La. C.C. art. 2653. Moreover, the insurance industry is highly regulated, and the Commissioner has never imposed any restrictions on anti-assignment clauses or required that they contain exceptions for post-loss assignments.

Furthermore, even if this Court were to consider public policy, it favors enforcement of the anti-assignment clauses under the circumstances of this case. The

[6] La. C.C. art. 2653 provides: "A right cannot be assigned when the contract from which it arises prohibits the assignment of that right. Such a prohibition has no effect against an assignee who has no knowledge of its existence."

Road Home assignments are not merely assignments of perfected or liquidated claims for money due. There is a difference between a liquidated claim for policy proceeds, where an insurer simply has to pay an undisputed amount of money, and an unliquidated claim for additional damage to the property, which has not yet been proven. This distinction is critical because the insured must comply with various obligations under a property insurance policy in order to assert a claim, and the insured's duties cannot be transferred to the State. To allow the assignments in this case results in increased risk to the insurers because they would be compelled to litigate thousands of previously closed homeowners' insurance claims where the State has very limited, if any, access to the relevant loss information to which the insurers are contractually entitled. The insurers contend they would be further prejudiced because, in many instances, they would be required to defend two separate lawsuits seeking to recover the same insurance claim - one filed by the policy holder and the current suit filed by the State - thus imposing additional costs and possibly leading to inconsistent results. The insurers would be compelled to litigate against the State, with which they did not contract and with which they never anticipated having to litigate. And, in many cases, the property damage was repaired, or the home torn down, long ago which prejudices the insurers' ability to adequately investigate the State's new claims and substantially increases the insurers' administrative costs and legal fees.

By contrast, the State argues Article 2653 is not determinative. That article merely bars assignment of a right if the contract prohibits assignment of *that* right. These insurance contracts do not bar assignments post-loss. These contracts generally state that "assignment of the policy" is not valid unless the insurer consents, or that "no interest in the policy" can be transferred without consent. Post-loss assignments

of payment rights do not qualify as "assignment of a policy" or as a transferred "interest in a policy," and therefore fall outside of an anti-assignment clause. Virtually every jurisdiction strictly interprets such anti-assignment clauses as not including an assignment of payment rights after a loss occurs. Such post-loss assignments merely transfer an accrued right to payments and do nothing to alter the risk originally assumed by the insurance company. The prevailing national jurisprudence makes no distinction between liquidated and unliquidated claims. This interpretation comports with the Civil Code regarding contract interpretation because Article 2047[7] provides that contractual terms must be given their generally prevailing meaning. The State also argues this Court does not have to create a public policy exception to La. C.C. art. 2653. If this Court follows the prevailing national rule, the Road Home assignments simply fall outside the anti-assignment clauses in the homeowners' property insurance policies.

Further, the State argues this Court's answer to the certified question should not prematurely address any purported defenses to the State's claims. The assignments give the State the right to seek payments, but the insurers are still entitled to raise valid defenses to the payment of claims. The Road Home assignments simply place the State in the insureds' shoes with a limited right to seek payments duplicative of Road Home disbursements. The assignments do not facially confer additional contractual duties to the State.

Law and Analysis

Generally, rights arising from a contract are assignable unless the law, the terms of the contract, or the nature of the contract preclude such assignment. La. C.C.

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[7] La. C.C. art. 2047 provides: The words of a contract must be given their generally prevailing meaning. Words of art and technical terms must be given their technical meaning when the contract involves a technical matter.

art. 1984. Louisiana Civil Code article 2642 further provides that all rights may be assigned, except those pertaining to strictly personal obligations. Central to the issue involved in this case is Civil Code article 2653, which provides, in pertinent part: "***A right cannot be assigned when the contract from which it arises prohibits the assignment of that right***."[8] (Emphasis added) The language of Article 2653 is broad. It does not exclude insurance contracts, nor does the Article expressly exclude post-loss assignments. Thus, on its face, Article 2653 appears to apply to all assignments.

As noted by the Fifth Circuit, the insurers contend Article 2653 is "the beginning and the end of the matter." 613 F. 3d at 509. However, pointing out that insurance contract provisions cannot conflict with statutory law or public policy, the Fifth Circuit agreed with the State that "Article 2653 begs the question presented in this case: whether Louisiana courts would interpret the anti-assignment clauses in these homeowner's insurance policies as prohibiting post-loss assignments." *Id*. at 510. In certifying the question to this Court, the Fifth Circuit stated the specific issue before it as "whether the Louisiana Supreme Court would hold that a contractual prohibition on post-loss assignments violates public policy." *Id.* We conclude there is no public policy in Louisiana to prevent parties from contractually prohibiting post-loss assignments.

This Court has never addressed public policy considerations relative to post-loss assignments. The most relevant appellate case on the issue is *Geddes & Moss Undertaking & Embalming Co. v. Metro. Life Ins. Co.*, 167 So. 209 (La. App. Orl. 1936). In that case, Metropolitan Life Insurance Co. ("Metropolitan") issued policies of insurance on the life of Silas Therell. Pauline Rhinehart, the daughter of the insured, was designated as beneficiary. After Mr. Therell died, Ms. Rhinehart

[8] This article was enacted by Acts 1993, No. 841, § 1, eff. Jan. 1, 1995.

assigned her rights to Geddes & Moss Undertaking & Embalming Co. ("Geddes"). Subsequently, Geddes filed suit against Metropolitan, seeking to recover on the policy. Metropolitan filed an exception of no cause of action, arguing the assignment to Geddes was invalid because of a policy prohibition against assignment of "any benefits" due under the policy. The trial court maintained the exception of no cause of action, and Metropolitan appealed. The court of appeal reversed. After reviewing jurisprudence from other states, the court concluded the weight of authority indicated an assignment **after** a loss was not prohibited. The court explained:

> **It appears to us, however, that a distinction is to be made between the assignment of a policy before and after loss has accrued thereon, and that the majority opinion sustains the view that such stipulations in policies do not prevent assignment after the loss has occurred.**
>
> "General stipulations in policies, prohibiting assignment thereof, except with the insurer's consent, or upon giving some notice, on like conditions, have universally been held to apply only to assignments before loss, and, accordingly, non-compliance or non-conformity therewith does not prevent an assignment, after loss, of the claim or interest of the insured in the insurance money then due in respect to the loss." *Couch on Insurance*, vol. 6, p. 5276, § 1459.
>
> "An assignment of the policy after loss is in effect no more than an assignment of a claim against the company, and is valid though the policy expressly provides against an assignment either before or after loss. **Such a stipulation, as applied to an assignment after loss, is void as against public policy**." *Cooley's Briefs on Insurance*, vol. 7, p. 6310.
>
> "**A provision in a policy against assignment does not apply to assignment after loss**, and a specific provision against such an assignment is null and void, as inconsistent with the covenant of indemnity and **contrary to public policy**." *Ruling Case Law*, verbo "Insurance," vol. 14, p. 182.
>
> "It is further contended that the policy is void because of a provision therein that it shall be void 'If it be assigned' without the indorsement of the secretary of the insurer. Such provision is not applicable in the instant case, because the assignment here was not of the policy before

> the death of the insured, but of the cause of action accruing thereon after loss. 14 R.C.L. 1004. **An assignment of a policy, and the right to recover upon it, after maturity, is valid, regardless of the conditions of the policy.** *Kerr on Insurance*, 688." *Metropolitan Life Ins. Co. v. Lanigan*, 74 Colo. 386, 222 P. 402, 403.

Geddes, 167 So. at 210 (Emphasis added).

While *Geddes* was decided prior to the enactment of Article 2653, *Geddes* correctly expresses the prevailing American rule distinguishing between pre-loss and post-loss assignments.[9] In differentiating between the two, courts reason that allowing an insured to assign the right to coverage (pre-loss) would force the insurer to protect an insured with whom it had not contracted - an insured who might present a greater level of risk than the policyholder. However, allowing an insured to assign its right to the proceeds of an insurance policy (post-loss) does not modify the insurer's risk. The insurer's obligations are fixed at the time the loss occurs, and the insurer is obligated to cover the loss agreed to under the terms of the policy. This obligation is not altered when the claimant is not the party who was originally insured. After the loss, the anti-assignment clause serves only to limit the free assignability of claims, which is not favored by the law, and such restrictions on an insured's right to assign its proceeds are generally rendered void. See Lee R. Russ & Thomas F. Segalla, *3 Couch on Insurance 3d*, § 35:7 (2005); Richard A. Lord, *29 Williston on Contracts* § 74:22 (4th ed.); 44 Am Jur. 2d Insurance § 787.

Since Article 2653 was enacted, the only Louisiana appellate decision relative to this issue is *R.L. Lucien Tile Co. v. Am. Sec. Ins. Co.*, 08-1190 (La. App. 4 Cir.

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[9] See, e.g., *Conrad Brothers v. John Deere Ins. Co.*, 640 N.W.2d 231, 237 (Iowa 2001) (noting the weight of authority supporting the same rule and citing to cases from Wisconsin, Pennsylvania, Michigan, Texas, North Carolina, Delaware, Missouri, Arizona, Florida, Illinois, New Jersey, Washington, and West Virginia); *Antal's Restaurant, Inc. v. Lumbermen's Mutual Casualty Co.*, 680 A.2d 1386, 1388 (D.C.1996) (citing cases from Alabama, Maine, Wisconsin, California, Georgia, Illinois and New York).

3/11/09), 8 So. 2d 753. In that case, R.L. Lucien Tile Company, Inc. ("Lucien Tile") purchased property from Joshua and Sandy Cage, by quitclaim deed, for the sum of $100. Lucien Tile did not refinance or assume the Cages' mortgage. Instead, Lucien Tile paid the Cages' monthly note on the existing mortgage with EMC Mortgage Corporation ("EMC"). At all relevant times, EMC held a mortgage on the insured property, and American Security Insurance Company ("ASIC") maintained the insurance policy for damages caused by wind and rain. The named insured under this policy was EMC, with the Cages as additional insureds.

After Hurricane Katrina, ASIC received notice that the property sustained damage. The notice identified the claimant as Sandy Cage, the named insured as EMC, and the additional insureds as Joshua and Sandy Cage. ASIC paid policy benefits to EMC and the Cages. Subsequently, Lucien Tile filed a petition for damages against ASIC, claiming rights to policy benefits. Thereafter, ASIC moved for summary judgment, arguing Lucien Tile was neither an insured nor additional insured under the policy. ASIC further argued the policy contained an anti-assignment clause, and Lucien Tile had no valid assignment of the Cages' rights against ASIC. Consequently, Lucien Tile had no standing to bring the action.

The trial court granted ASIC's motion for summary judgment. Lucien Tile appealed, and the court of appeal affirmed. The court noted two documents relied on by Lucien Tile: the November 2, 2005, document entitled, "ASSIGNMENT AND TRANSFER OF ALL RIGHTS AND CLAIMS," which was signed by the Cages; and the March 31, 2008, document styled "Supplement to our November 2, 2005 Assignment and Transfer of All Rights and Claims," which stated "in addition to and included under" the previous assignment, are "all claims … against anyone … arising out of the ownership of or related to our previous ownership of … 8833 Green

Street." However, the court of appeal found the insurance policy "**clearly and unambiguously prohibits the insured from assigning the policy without ASIC's written consent. Therefore, absent a valid assignment of rights to which the insurer, ASIC, consented, Lucien Tile has no standing to sue**." *Lucien Tile*, 8 So. 3d at 756-57 (Emphasis added).

Although *Lucien Tile* involved a post-loss assignment of claims under an insurance policy, it provides us with no guidance because it does not address the distinction between pre-loss and post-loss assignments, nor does it address the application of Article 2653.

The Louisiana Civil Code does not place limits on parties' contractual right to prohibit the assignment of insurance proceeds. In fact, Article 2653 contemplates that the parties to a contract may contract to limit assignability. Thus, while the Louisiana legislature has clearly indicated an intent to allow parties freedom to assign contractual rights, by enacting La. C.C. art. 2653 it has also clearly indicated an intent to allow parties freedom to contractually prohibit assignment of rights. We recognize the vast amount of national jurisprudence distinguishing between pre-loss and post-loss assignments and rejecting restrictions on post-loss assignments, however we find no public policy in Louisiana favoring free assignability of claims over freedom of contract. This court has long recognized that the freedom to contract is an important public policy. See *Barrera v. Ciolino*, 92-2844 (La. 5/5/94), 636 So.2d 218, 223. We have explained:

> [P]arties are free to contract for any object that is lawful, possible, and determined or determinable. La. C.C. art. 1971. "Freedom of contract" signifies that parties to an agreement have the right and power to construct their own bargains. In a free enterprise system, parties are free to contract except for those instances where the government places restrictions for reasons of public policy. The state may legitimately restrict the parties' right to contract if the proposed bargain is found to have some deleterious effect on the public or to contravene some other

matter of public policy.

Louisiana Smoked Products, Inc. v. Savoie's Sausage and Food Products, Inc., 96-1716 (La. 7/1/97), 696 So.2d 1373,1380-81.

Nothing in the facts of this case support a finding that the non-assignment clauses contained in the policies have a deleterious effect on the public or that they violate public policy. Further, public policy determinations are better suited to the legislative, rather than the judicial forum. See *Marcus v. Hanover Ins. Co., Inc.*, 1998-2040 (La. 6/4/99), 740 So.2d 603; *State v. Edwards*, 2000-1246 (La. 6/1/01), 787 So.2d 981. Thus, if any exception to Article 2653 should be created relative to post-loss assignments, it is up to the legislature to create such an exception.

Although we hold that parties may contract to prohibit post-loss assignments, we also hold the contract language must clearly and unambiguously express that the non-assignment clause applies to post-loss assignments. An insurance policy is a contract between the parties and should be construed by using the general rules of interpretation of contracts in the Civil Code. *Louisiana Ins. Guaranty Assn. v. Interstate Fire & Casualty Co.*, 630 So. 2d 759, 763 (La. 1994); *Lewis v. Hamilton*, 94-2204 (La. 4/10/95), 652 So. 2d 1327, 1329. Insurers are entitled to limit their liability and to impose reasonable conditions upon the policy obligations absent a conflict with statutory provisions or public policy. *Louisiana Ins. Guaranty Assn.*, 630 So. 2d at 763. However, because insurance policies are adhesionary in nature, any contradiction or ambiguity in the contract must be strictly construed against the insurer, the party who drafted the policy. La. C.C. art. 2056[10]; *Louisiana Insurance Guaranty Assn.*, 630 So. 2d at 764; *Lewis*, 652 So. 2d at 1330.

[10] La. C.C. art. 2056 provides: In case of doubt that cannot be otherwise resolved, a provision in a contract must be interpreted against the party who furnished its text. A contract executed in a standard form of one party must be interpreted, in case of doubt, in favor of the other party.

Insurance is a highly regulated industry, and insurers are well aware of the distinction between pre-loss and post-loss assignments. Post-loss assignment of claims arising under the policy is not equivalent to the assignment of the policy itself, or an interest in the policy. Given the categorical difference, we find it incumbent on insurers to include clear and unambiguous language in their policies. We do not find it necessary to formulate a test consisting of specific terms or words, however the insurer must include language making it clear and explicit that post-loss assignments are prohibited under the policy.

We note the varying language in the insurance policies regarding assignment of rights, and further note that the hundreds of relevant polices are included in the record. However, we decline to review the language of each on a policy-by-policy basis, and instead leave that task to the federal district court on the merits.

CONCLUSION

There is no public policy in Louisiana which precludes an anti-assignment clause from applying to post-loss assignments. However, the language of the anti-assignment clause must clearly and unambiguously express that it applies to post-loss assignments. Thus, it is necessary for the federal district court to evaluate the relevant anti-assignment clauses on a policy-by-policy basis to determine whether the language is sufficient to prohibit post-loss assignments.

DECREE

We answer the certified question as set forth in this opinion. Pursuant to Rule XII, Supreme Court of Louisiana, the judgment rendered by this Court upon the question certified shall be sent by the Clerk of this Court under its seal to the United States Court of Appeals for the Fifth Circuit and to the parties.

CERTIFIED QUESTION ANSWERED.

5/10/11

SUPREME COURT OF LOUISIANA

No. 2010-CJ-2312

ROBERT MALCOLM GATHEN

VERSUS

VANESSA K. GATHEN

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,

FIRST CIRCUIT, PARISH OF LAFOURCHE

Knoll, J., dissents.

There are several important aspects of this parental relocation case that I feel the majority opinion either inappropriately glossed over as unimportant or failed to consider, which prompts me to dissent with all due respect.

As an initial matter, I disagree with the majority's characterization of the burden of proof which the relocating parent must meet. La. Rev. Stat. § 9:355.13 states that the "relocating parent has the burden of proof that the proposed relocation is made in good faith and is in the best interest of the child." Although we examined this statute in *Curole v. Curole*, 02-1891 (La. 10/15/02), 828 So. 2d 1094, we did not address whether the moving parent's burden was simple preponderance of the evidence or a heightened standard such as clear and convincing evidence. The majority opinion, however, claims that the relocating parent bears a "very heavy burden" to prove that relocation is in the best interest of the child. I disagree. Preponderance of the evidence is the usual standard in non-criminal cases, and neither La. Rev. Stat. § 9:355.13 nor this Court's prior jurisprudence support imposing a stricter standard for a motion to relocate.

I also disagree with the majority's treatment of the primary question before this Court, that is, whether a trial court judgment must explicitly address each one of the twelve factors set forth in La. Rev. Stat. § 9:355.12. I find the majority

opinion creates ambiguous precedent -- although it states a trial court is not required to examine each individual statutory factor set forth in RS 9:355.12, the opinion goes on to discuss each factor one by one. This suggests that, even if the trial court has not explicitly ruled on each factor, a reviewing court must.

Although I do not believe that a trial judge must go down the list of every factor, at the very least the trial court must make sufficient factual findings to allow for appellate review of those factors. Put otherwise, the factors must be applied in each case, even if they are not specifically enumerated. The legislature drafted twelve highly specific factors for a reason, and it must have intended courts to give due consideration to each factor. Here, the trial court failed to make adequate factual findings to support a finding as to each factor. Indeed, the record reflects the court all but ignored some highly relevant factors while giving undue weight to others.

In its oral reasons for judgment, the trial court gave undue weight to the factors favoring Robert and his extended family. The evidence is uncontroverted that the children's relationship with Vanessa is significantly closer than their relationship with Robert. The children lived with Vanessa the vast majority of the time and stayed with Robert every other weekend, or approximately four days a month. Vanessa was primarily responsible for raising the children during the marriage and remained the principal caretaker after the separation and divorce. Yet, as appropriately noted by the court of appeal, the "trial court did not make any reference to the nature, quality, extent of involvement, and duration of the children's relationships with Vanessa."

Moreover, Robert did not take full advantage of the opportunities he did have to spend time with his children. Of the fourteen days a month Robert spends at home, he only takes his children for four days. Vanessa would have been willing to let Robert spend additional time with his children, but he never asked. After

moving, Vanessa offered to let the children spend their summers in Thibodaux and to rotate major holidays in Louisiana. This arrangement would have given Robert roughly the same amount of time with his children as he currently spends. Given Robert's unwillingness to devote equal amounts of time to his children while he lives in Louisiana, I do not believe he should have a veto on them moving to Washington.

The trial court also gave disproportionate consideration to the children's relationship with their paternal grandmother and aunts. Although relationships with extended family are no doubt important, the primary focus must always be on the children's relationship with their parents and the children's best interest. The trial court seemed more concerned with the interests of the extended family than the interests of Vanessa and the children themselves.

Moreover, there are no grounds for favoring Robert's extended family over Vanessa's family. The record reflects Vanessa had a good relationship with her sister in Washington, and there is reason to believe the children will form equally beneficial relationships with their mother's family after the move.[1] The court apparently did not even consider these possible benefits to the children, and instead focused only on the detrimental effect a move would have on Robert's family in Louisiana.

The trial court also put great emphasis on the fact the children had lived in Louisiana for most of their lives and leaving Lafourche Parish would require changing schools and finding new friends. But this alone cannot be determinative. If it were, no motion for relocation would ever be granted. Neither party suggests the children would be unable to cope with starting at a new school or finding new

[1] Although the record on this issue is limited, Andru, the older son, had ongoing communication with his cousins in Washington. Andru, who was eleven at the time of the hearing, is certainly old enough to express a meaningful opinion as to whether he would like to move to Washington.

friends. It appears both children were progressing well socially and in school and were looking forward to moving to Washington.

By far the most important factor in this case is the improvement in the children's standard of living that would result from moving to Washington. Vanessa is struggling to make ends meet. She makes just over $10 an hour as a secretary at Nicholls State University and is understandably concerned that budget cuts to higher education will lead to a long-term freeze in pay and that, eventually, cuts may have to be made. The university has already imposed one unpaid involuntary furlough. Given her meager income and the expenses of raising two boys, she pays her monthly living expenses by relying on student loans. This is obviously not a sustainable financial situation.

By moving to Washington, she would start a new job with an increased salary of $15 an hour, a house to live in rent-free, and free childcare assistance from her sister. In the long term, her mother had tentatively agreed to help her pay a down payment on a new house of her own. This is not an ancillary or minor benefit; it represents a marked increase in the standard of living for both Vanessa and the children. The statute clearly states a court must consider the "current employment and economic circumstances of each parent and whether or not the proposed relocation is necessary to improve the circumstances of the parent seeking relocation of the child." La. Rev. Stat. § 9:355.12(8). It is beyond dispute that moving to Washington would materially improve Vanessa's current employment and economic circumstances.

Perhaps most egregiously, the trial court did not consider the root cause of Vanessa's financial stress – Robert's ongoing nonpayment of child support. A consent judgment signed by both parties required Robert to pay $1,320 in child

support per month.[2] However, within a month of the divorce Robert was already in arrears. In May 2006 he paid $660; half what he owed. From June through October 2006 he did not pay anything at all; as he tells it, Vanessa agreed to "relax" the child support. Robert claims that sometime in the fall of 2006 he convinced Vanessa to accept about $900 a month – the $637.84 which was Vanessa's share of the mortgage, and $300 in cash. For her part, Vanessa testified she never agreed to accept less money and repeatedly asked him for the full amount.[3] This went on through June 2008, during which time Vanessa applied for government aid to make up for the shortfall. From June 2008 to March 2009 Robert paid the full $1,300. However, in April 2009 Robert again decided he had been paying too much, allegedly because the house note changed, and unilaterally reduced the monthly payments by $130. In May 2009, Vanessa filed a rule to show cause to recover past due payments of $14,900.

Vanessa's rule on child support was originally set for hearing on June 30, 2009. The hearing, along with the hearing on the motion to relocate, was reset for August 9, 2009. When Robert's attorney withdrew from the case and new counsel substituted, the hearings were again reset for August 21, 2009. On August 21 the hearing on the motion for relocation ran long and the rule for child support was continued to September 1, 2009.[4] After hearing testimony from the parties, the court awarded Vanessa the full $14,900, plus attorney's fees and court costs, and

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[2] At the time of the judgment Robert's income was $6,708 per month and Vanessa's was $0 per month. The $1,320 figure is roughly in line with the child support schedule set forth in La. Rev. Stat. § 9:315.19.

[3] Robert told Vanessa she should be more like his buddy's ex-wife, who (according to Robert) didn't make her ex-husband pay.

[4] The majority opinion states that the trial court "issued each judgment on the same day." Not so. While it is true that the trial court signed both written judgments on November 3, 2009, the court gave its oral judgment and reasons on the dates of the hearings. There is no question that the court had given its final ruling on the motion for relocation before the rule for child support had been heard.

ordered that Robert's wages be garnished effective immediately. In my view, the trial court committed reversible error in not considering this important child support rule first.

La. Rev. Stat. § 9:355.12(A)(9) states a trial court must consider the "extent to which the objecting parent has fulfilled his or her financial obligations to the parent seeking relocation, including child support, spousal support, and community property obligations." Because the court ruled on the motion to relocate first, it did not have the benefit of the evidence showing Robert's repeated failure to pay his child support obligations. Although the majority opinion claims the court "had to have considered this factor" in ruling on the motion to relocate, there is no evidence to support that speculation. Indeed, the trial court could not have considered this factor when ruling on the motion to relocate. At that point, all it had before it was Vanessa's allegations.

Robert's failure to pay his child support is directly relevant to his fitness as a parent and is highly relevant in any motion to relocate. Financially supporting your children is the first, fundamental obligation of parenthood. Civ. Code art. 227. In my opinion, by failing to meet his bare minimum obligation, Robert effectively lost his right to object when Vanessa sought to move to Washington to improve her financial position – a financial position which was caused in large part by Robert's failure to pay. Robert did not pay his child support, thereby sending his ex-wife and children into severe financial distress. He should not have veto power over her right to try to escape that predicament. The legislature obviously believes what it calls "deadbeat" parents are a serious problem – serious enough that Robert's failure to pay is a crime punishable by a fine in the amount of $500 and six

months' imprisonment. La. Rev. Stat. § 14:75.[5] This Court should treat this serious problem with the same gravity.

I therefore respectfully dissent and would affirm the judgment of the court of appeals.

[5] Robert's arrearages were only $100 shy of the $15,000 minimum which would have made him eligible for even harsher criminal punishments.