

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CU 1339

KIMBERLY COSTANZA

VERSUS

KERRY AUDIBERT, JR.

Judgment Rendered: **JAN 30 2012**

**Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Case No. 2004-15289**

The Honorable Dawn Amacker, Judge Presiding

**H. Craig Cabral
Metairie, Louisiana**

**Counsel for Plaintiff/Appellant
Kimberly Costanza**

**Shandy Arguelles
Slidell, Louisiana**

**Counsel for Defendant/Appellee
Kerry Audibert, Jr.**

BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

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GAIDRY, J.

In this case, a mother appeals a judgment modifying a non-considered decree on the grounds that the judgment is an absolute nullity because the court ruled on matters that were not before the court. We affirm.

FACTS AND PROCEDURAL HISTORY

Kerry Audibert, Jr. and Kimberly Costanza were never married, but have one child together, who was born June 12, 2002. On December 7, 2004, Mr. Audibert filed a rule to establish custody and support in which he asked to be named the domiciliary parent of the child. On July 19, 2005, an interim order was entered providing that, pending further orders of the Court or the hearing on custody, the parties would have joint custody of the child according to a physical custody schedule set forth therein. Subsequently, in a May 10, 2007 stipulated judgment, the parties agreed to joint custody, a physical custody schedule, and for Ms. Costanza to be the domiciliary parent.

On March 15, 2010, Mr. Audibert filed a motion to modify custody in which he requested that the parties have shared custody of the child and that he be named the domiciliary parent. Alternatively, Mr. Audibert requested increased physical custody of the child. After a February 18, 2011 hearing at which the court heard testimony from the parties and other witnesses, the court found that a material change in circumstances had occurred since the parties entered into the consent judgment and, considering the factors set forth in La. C.C. art. 134, that it would be in the best interest of the child for the parties to have joint custody, for Mr. Audibert to be the domiciliary parent, and for him to have increased periods of physical custody. The court signed a judgment granting Mr. Audibert's motion to modify custody, naming Mr. Audibert the domiciliary parent, establishing a physical custody

schedule which gives Mr. Audibert increased time with the child, and dealing with other matters. Ms. Costanza appealed.

DISCUSSION

Since the parties' prior custody arrangement was pursuant to a non-considered decree, in order to modify custody, Mr. Audibert must prove that there has been a material change of circumstances affecting the welfare of the child since the consent decree was entered and that the proposed modification is in the best interest of the child. *Perry v. Monistere*, 08-1629, p. 5 (La. App. 1 Cir. 12/23/08), 4 So.3d 850, 853.

The best-interest-of-the-child test 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. *Martello v. Martello*, 06-0594, p. 5 (La. App. 1 Cir.3/23/07), 960 So.2d 186, 191. 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 which is in the best interest of the child. *Id.*

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. A trial court's determination regarding child custody will not be disturbed absent a clear abuse of discretion. *Id.*, 06-0594 at p. 5, 960 So.2d at 191-92.

Ms. Costanza argues on appeal that the sole issues before the trial court were whether the evidence warranted a change from joint custody to shared custody, or alternatively, whether Mr. Audibert was entitled to increased visitation. She alleges that the court's modification of the physical custody schedule and changing of the domiciliary parent was an

impermissible enlargement of the pleadings. She argues that Mr. Audibert sought only a shared custody regime with a 50-50 sharing of physical custody or, in the alternative, increased physical custody of the minor child, but never requested that he be given physical custody of the child the majority of the time. As such, she alleges that the judgment is an absolute nullity.

Initially, we note that contrary to Ms. Costanza's assertions, Mr. Audibert did, in fact, request in his motion to modify custody to be named the domiciliary parent. Furthermore, Mr. Audibert requested a modification of custody or an increase in his periods of physical custody of the child. The modification of custody was properly before the court. The court found there to be a change in circumstances and modified the physical custody of the child in the way it found to be in the best interest of the child. We do not believe that this was an enlargement of the pleadings, and do not find that the court abused its broad discretion.

DECREE

For the reasons set forth herein, the judgment of the trial court is affirmed. Costs of this appeal are assessed to appellant, Kimberly Costanza.

AFFIRMED.