NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CU 2348

LA TEFY K. GUY

VERSUS

LARRY N. GUY

Judgment Rendered: March 28, 2007

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On Appeal from The Family Court
In and For the Parish of East Baton Rouge, State of Louisiana
Trial Court No. 105,615, Division "D"

Honorable Annette Lassalle, Judge Presiding

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BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

Downing, J. dissents

HUGHES, J.

This is an appeal from a judgment denying a mother's request to relocate her residence to another state with the minor children of a former marriage. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

La Tefy K. Guy and Larry N. Guy were married in 1981 and divorced in 1994. Two children were born of the marriage: Landon Lee Guy, born October 4, 1989, and Larry Preston Guy, born November 11, 1991. The parties entered into a stipulated judgment of joint custody regarding the minor children, with the mother named as the domiciliary parent.

In 1995, La Tefy married again, to Thomas Schoen, and is now known as La Tefy Schoen. The Schoens subsequently had two children together: Taylor Schoen, born July 10, 1998, and Nathan Schoen, born March 20, 2000.

In 2005, La Tefy Schoen received a Ph.D. in Educational Leadership and Research from Louisiana State University. She then began searching in Baton Rouge and the surrounding area for employment within her specialty, to no avail. In April of 2006, Dr. Schoen was offered a professorship at North Carolina State University, which she accepted. Unable to reach an amicable agreement with their father regarding relocation of the Guy children with Dr. Schoen and her family to North Carolina, Dr. Schoen sought approval of the family court for the relocation, and Mr. Guy filed an opposition to the relocation.

The matter was heard by the court on August 31, 2006, the relocation was denied, and a judgment to this effect was signed by the court on October 10, 2006.

Dr. Schoen appeals the denial of the request to relocate her minor children, asserting in five assignments of error essentially that the trial court committed error in its decision because: the minor children were not allowed to testify, the trial court erred in finding Dr. Schoen failed to establish the move was in the best interest of the children, and in failing to give adequate consideration to the testimony of the psychologist called to testify as an expert in the matter.

DISCUSSION

The trial court and the parties hereto agreed during the hearing of this matter that LSA-R.S. 9:355.2 would not apply as the burden of proof in this case because there was an injunction in the record preventing application of the statutory guidelines. Therefore, the burden of proof applied by the trial court was as set forth in **Pittman v. Pittman**, 94-952, p. 3 (La. App. 5 Cir. 3/15/95), 653 So.2d 1211, 1212, writ denied, 95-1526 (La. 9/29/95), 660 So.2d 881, which requires a parent who wants to remove a child from the court's jurisdiction to show (1) that there is good reason for the move and (2) that the move is in the child's best interest.

In the instant case, the trial court granted Mr. Guy's motion for involuntary dismissal at the close of Dr. Schoen's case, finding that Dr. Schoen failed to demonstrate that the out-of-state move was in the best interest of the children. In so holding the trial court found that the children had extensive connections to Louisiana, having lived here since birth, which included numerous and extensive extended family relationships, school and extracurricular activities, and social relationships. In contrast, the children had never been to the city in North Carolina proposed for their relocation. Although one or two acquaintances were cited by Dr. Schoen as living there, no other family members outside their immediate family circle lived there,

and the court was not persuaded that the North Carolina school system provided any advantage over the children's current school. While the financial advantage to the family was cited as necessitating the move, the court noted that the family's available income in Baton Rouge exceeded $120,000, and the court found no credible evidence was presented to establish this amount was insufficient for the needs of the family.

Further, the sum and substance of the testimony of Dr. Cary Rostow, a psychologist who interviewed the Guy children approximately ten days prior to the hearing, was that the children were bonded with their mother and felt more comfortable living in her household, and that they desired to move with her to North Carolina. Dr. Rostow was not asked to evaluate the best interest of the children with respect to relocation. The trial court emphasized that the issue before it was not a change of domiciliary status, but was confined to whether relocation of the children's domicile was in their best interest. The court concluded after hearing the testimony presented by Dr. Schoen that she failed to prove this crucial prerequisite for relocation approval.[1]

The reasons of the trial court have an ample basis in the record, and therefore, we cannot say the court committed manifest error or abused its discretion in denying relocation.

With respect to Dr. Schoen's contention that the trial court erred in failing to allow the minor children to testify at the hearing, we conclude that even if the trial court did err in this ruling, Dr. Schoen has failed to establish on appeal that the error was prejudicial to the case. See **Raney v. Wren**, 98-0869, p. 10 (La. App. 1 Cir. 11/6/98), 722 So.2d 54, 60. The minor

[1] The issue was complicated by the fact that Dr. Schoen had accepted a position with North Carolina State University and had actually purchased a house there, prior to receiving court approval for the relocation.

children's preference of moving to North Carolina with their mother was disclosed during the testimony of Dr. Rostow. The record thus reveals the preference of the children. As the preference of the children was otherwise made known, we cannot say that the trial court abused its discretion in not forcing the children to make this declaration in open court. Moreover, Dr. Schoen failed to proffer the testimony of the children. See LSA-C.E. art. 103(A)(2); LSA-C.C.P. art. 1636; **Raney v. Wren**, 98-0869 at p. 8 n.3, 722 So.2d at 59 n.3. As a result, this court has not been provided with the means of ascertaining whether the testimony of the children would have added anything to the case. Error may not be predicated upon a ruling that excludes evidence unless a substantial right of a party is affected *and* the substance of the evidence was made known to the court by counsel. **Menzie Tile Company v. Professional Centre**, 594 So.2d 410, 415 (La. App. 1 Cir. 1991), writ denied, 600 So.2d 610 (La. 1992).

In order to determine whether an involuntary dismissal is appropriate pursuant to LSA-C.C.P. art. 1672(B), the trial court must determine whether the plaintiff has presented sufficient evidence to establish his claim by a preponderance of the evidence. **Straughter v. Government Employees Insurance Company**, 2005-699, p. 11 (La. App. 5 Cir. 3/14/06), 926 So.2d 617, 623. On appellate review, the grant of such motion will not be disturbed absent manifest error in a credibility determination or an error of law. **Id.** After a thorough review of the record presented on appeal, we find no such error in the instant case.

CONCLUSION

For the reasons assigned, the judgment of the trial court is affirmed; all costs of this appeal are to be borne by La Tefy K. Schoen.

AFFIRMED.