

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2006 CU 2434**

**MICHAEL S. BALLIO**

**VERSUS**

**TABITHA MERRITT BALLIO**

**Judgment Rendered: March 23, 2007**

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On Appeal from the Twenty-Second Judicial District Court  
In and For the Parish of St. Tammany  
State of Louisiana  
Docket No. 2000-14969

Honorable Patricia T. Hedges, Judge Presiding

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Ernest E. Barrow, III  
Covington, LA

Counsel for Plaintiff/Appellant  
Michael S. Ballio

John B. Wells  
Slidell, LA

Counsel for Defendant/Appellee  
Tabitha Merritt Ballio

\* \* \* \* \*

**BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.**

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**McCLENDON, J.**

The plaintiff appeals the judgment of the trial court permitting the relocation of his minor child to Alabama. We affirm.

**FACTS AND PROCEDURAL HISTORY**

Michael S. Ballio and Tabitha Merritt Ballio were married in December of 1996, and one child, Michael Ballio, Jr., was born of the marriage, on September 25, 1997.<sup>1</sup> They last resided in Slidell, Louisiana, before their divorce in April 2002. Prior to their divorce, the parties entered into a stipulated judgment, signed by the trial court on December 20, 2000, regarding custody and visitation. A subsequent consent judgment was signed by the court with respect to custody and visitation on April 7, 2005. The consent judgment continued the joint custody of Michael with Mrs. Greenlee as the primary domiciliary parent, continued Mr. Ballio's custody on alternating weekends, and further provided for counseling for Michael.

Because of Hurricane Katrina on August 29, 2005, Mrs. Greenlee and Michael evacuated from their home in Slidell to a shelter. They settled in Citronelle, Alabama, with Mrs. Greenlee's husband and father in-law.<sup>2</sup> Thereafter, the parties entered into another consent judgment, signed by the trial court on September 29, 2005. In the consent judgment, the parties agreed that the prior consent judgment would remain in effect; that Mrs. Greenlee would make every effort to move back to Slidell before the end of the school year in Alabama; that the parties would coordinate transportation to be as equal in cost as possible; and that Mrs. Greenlee would not

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<sup>1</sup> The defendant, Tabitha Merritt Ballio, subsequently remarried and will be referred to as Mrs. Greenlee herein.

<sup>2</sup> Prior to Hurricane Katrina, the parties lived approximately five miles apart. Following Mrs. Greenlee's move to Alabama, the distance was about 150 miles, or two and one-half hours driving time.

permanently move away from the Slidell area without conforming to the requirements of LSA-R.S. 9:355.1.

On March 2, 2006, Mr. Ballio filed a rule for contempt, change of domiciliary status, and sanctions. Mr. Ballio asserted that he received a certified letter from Mrs. Greenlee, which was dated February 8, 2006, stating that she did not intend to move back to Louisiana, and stating that despite a good faith effort to repair their house in Louisiana, the unavailability of a contractor and limited insurance proceeds prevented her from moving back anytime in the foreseeable future. Mrs. Greenlee additionally stated that Michael was adjusting well to his new school, that his grades were improving, and that his therapist agreed that Michael should remain in Alabama. In the rule for contempt and sanctions filed by Mr. Ballio, he asserted that Mrs. Greenlee willfully violated the September 29, 2005 consent judgment, in that she never intended to return to Louisiana with the minor child and that she deceived the court regarding her intentions and efforts to return to Louisiana by the end of the 2005-2006 school year. Mr. Ballio further asserted that Mrs. Greenlee has continued to prevent Mr. Ballio from having a meaningful relationship with his son by her willful and deceitful efforts. Mr. Ballio requested that he be designated as the domiciliary parent and that Mrs. Greenlee be ordered to return Michael to Louisiana.

Following a hearing on August 8, 2006, the trial court rendered judgment on September 7, 2006, approving Mrs. Greenlee's request to relocate with Michael. Mr. Ballio appealed.

## DISCUSSION

Louisiana Revised Statute 9:355.12 sets forth the factors to consider when determining if relocation is appropriate.<sup>3</sup> 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. LSA-R.S. 9:355.13. A trial court's determination in a relocation matter under LSA-R.S. 9:355.13 is entitled to

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<sup>3</sup> Louisiana Revised Statute 9:355.12(A) provides:

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.

great weight and will not be overturned on appeal absent a clear showing of abuse of discretion. **Curole v. Curole**, 02-1891, p. 4 (La. 10/15/02), 828 So.2d 1094, 1096; **Rao v. Rao**, 05-1523, p. 2 (La.App. 1 Cir. 11/4/05), 927 So.2d 391, 392.

In this appeal, Mr. Ballio contends that the trial court did not apply the relocation factors of LSA-R.S. 9:355.12, but rather focused on the factors set forth in LSA-C.C. art. 134, regarding awards of child custody.<sup>4</sup> He also contends that the trial court erred in holding him to the standard of a considered decree in a change of custody case, rather than the standard applicable in the case of a stipulated judgment. We disagree.

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<sup>4</sup> Louisiana Civil Code article 134 provides that the court shall consider all relevant factors in determining the best interest of the child. Such factors may include:

- (1) The love, affection, and other emotional ties between each party and the child.
- (2) The capacity and disposition of each party to give the child love, affection, and spiritual guidance and to continue the education and rearing of the child.
- (3) The capacity and disposition of each party to provide the child with food, clothing, medical care, and other material needs.
- (4) The length of time the child has lived in a stable, adequate environment, and the desirability of maintaining continuity of that environment.
- (5) The permanence, as a family unit, of the existing or proposed custodial home or homes.
- (6) The moral fitness of each party, insofar as it affects the welfare of the child.
- (7) The mental and physical health of each party.
- (8) The home, school, and community history of the child.
- (9) The reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference.
- (10) The willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party.
- (11) The distance between the respective residences of the parties.
- (12) The responsibility for the care and rearing of the child previously exercised by each party.

When a trial court has made a considered decree of permanent custody, the party seeking a change bears a heavy burden of proving that the continuation of the present custody is “so deleterious to the child as to justify a modification of the custody decree,” or of proving by “clear and convincing evidence that the harm likely to be caused by a change of environment is substantially outweighed by its advantages to the child.” **Bergeron v. Bergeron**, 492 So.2d 1193, 1200 (La. 1986). However, in cases where the original custody decree is a stipulated judgment, such as when the parties consent to a custodial arrangement, and no evidence of parental fitness is taken, the heavy burden of proof enunciated in **Bergeron** is inapplicable. Instead, where the original custody decree is a stipulated judgment, the party seeking modification must prove (1) that there has been a material change of circumstances since the original custody decree was entered, and (2) that the proposed modification is in the best interest of the child. **Evans v. Lungrin**, 97-0541, p. 13 (La. 2/6/98), 708 So.2d 731, 738.

Arguably, the standards for change in custody as set forth in the **Bergeron** and **Evans** decisions do not apply in the special, limited circumstances of parent relocation, which was specifically addressed by the legislature in LSA-R.S. 9:355.1, *et seq.* **Rao**, 05-1523 at p. 3, 927 So. 2d at 392. However, to the extent that the **Bergeron** and **Evans** decisions might somehow be applicable to the determination of a relocation request and corresponding change in custody, the standards are inherent within the statutory relocation factors and requirements of good faith and best interest of the children as set forth in LSA-R.S. 9:355.12 and 9:355.13 respectively.<sup>5</sup> **Rao**, 05-1523 at p. 3, 927 So.2d at 392. Accordingly, we find that Mr. Ballio’s argument is without merit.

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<sup>5</sup> The trial court herein never articulated that it was using **Bergeron**, nor does it apply, as this matter involves only stipulated judgments.

Further, we find that the trial court's oral reasons for judgment thoroughly discuss the facts of this case and the relocation factors relevant to this matter. The trial court noted that Michael has emotional and educational problems, but was doing well in his special education program in Alabama. Michael had been a failing student, but has since made the honor roll in that program at his new school. His therapist testified as to Michael's noted improvement academically and behaviorally. The therapist further stated that Mrs. Greenlee was good at following through with the rules set out for therapy and at home. The trial court also noted the therapist's testimony that there was medical evidence that Mr. Ballio failed to give Michael his prescribed medication when Michael was in his father's custody. The court further recognized the havoc caused by Hurricane Katrina, and that the home in Alabama appeared to be preferable to what was available in the Slidell area. Additionally, the court was concerned with Mr. Ballio's living arrangement with another woman. In conclusion, the trial court determined that Michael had found a stable environment in Alabama, and it allowed the relocation.

A careful and thorough review of the record shows that the trial court did not abuse its discretion in finding that the relocation was in the best interests of the minor child. Louisiana Revised Statute 9:355.12 does not mandate that any one factor be given more weight than others in comparing them and in determining the issue. **Curole**, 02-1891 at p. 6, 828 So.2d at 1097; **Rao**, 05-1523 at p. 4, 927 So.2d at 392. We cannot say the trial court's decision was a clear abuse of discretion.

With regard to Mr. Ballio's argument that the matter should be remanded because Mrs. Greenlee's maternal grandparents were not allowed to testify, the record shows that both grandparents did testify. Additionally,

Mr. Ballio's failure to provide a proffer of any excluded testimony, even when invited by the trial court to do so, constitutes a waiver of his right to raise the issue on appeal. **Our Lady of the Lake Regional Medical Center v. Helms**, 98-1931, p. 11 (La.App. 1 Cir. 9/24/99), 754 So.2d 1049, 1056, writ denied, 99-3057 (La. 1/7/00), 752 So.2d 863.

We find no abuse of discretion in the trial court's decision to permit the relocation of Michael with his mother to Alabama.

### **CONCLUSION**

For the above reasons, the judgment of the trial court is affirmed at Mr. Ballio's costs.

**AFFIRMED.**