NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CU 1397

MICHELLE MALBROUGH

VERSUS

SRINIVAS VISHNUBHOTLA

DATE OF JUDGMENT: DEC 22 2010

ON APPEAL FROM THE TWENTY-FIRST JUDICIAL DISTRICT COURT
NUMBER 98-04086, DIVISION A, PARISH OF TANGIPAHOA
STATE OF LOUISIANA

Kleine concurs with reasons

HONORABLE W. RAY CHUTZ, JUDGE

* * * * * *

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* * * * * *

BEFORE: KUHN, PETTIGREW, AND KLINE, JJ.,[1]

Disposition: TRIAL COURT JUDGMENT AFFIRMED; ANSWER TO APPEAL DENIED.

[1] The Honorable William F. Kline, Jr. is serving *pro tempore* by special appointment of the Louisiana Supreme Court.

JJP Pettigrew, J. Concurs and assigns reasons.

KUHN, J.

This appeal involves a father's challenge to the trial court's suspension of his right to visit his minor child, Sebastien Antoine Malbrough. We affirm the trial court's judgment. We further deny the mother's answer to the appeal that seeks damages on the basis that the father's appeal is frivolous.

I. PROCEDURAL AND FACTUAL BACKGROUND

Michelle Malbrough and Sriniva Vishnubhotla were never married but had a relationship of which one child, Sebastien, was born in October 1998. The parties do not dispute that they never resided together after Sebastien's birth. In December 1998, Malbrough filed a petition seeking sole custody.[2] However, pursuant to an August 11, 1999 consent judgment, the court granted joint custody of Sebastien to the parties, with Malbrough as domiciliary parent, subject to reasonable visitation in favor of Vishnubhotla.

During the next several years, Vishnubhotla visited Sebastien very infrequently and was largely absent from Sebastien's life. A period of approximately six years passed during which Vishnubhotla did not visit Sebastien.[3] During at least part of that time, Visnubhotla resided in Texas and was working on a doctoral degree. Malbrough has resided in Covington, Louisiana.

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[2] Malbrough's petition also sought to establish paternity and to recover child support. The August 11, 1999 consent judgment declared Vishnubhotla to be Sebastien's father and ordered him to pay monthly child support.

[3] During this period of time, Vishnubhotla requested the opportunity to visit Sebastien on a couple of occasions, but Malbrough did not agree to the visitations. On one occasion she advised Vishnubhotla that there had been a "great loss in our life" that had "left [Sebastien] really distraught." At trial, Malbrough explained that her grandmother had died with whom Sebastien had a close relationship. On another occasion, Malbrough advised that Sebastien's previously-scheduled activities conflicted with the requested visitation.

In September 2009, Vishnubhotla, while still residing in Texas, filed a rule to show cause to establish specific visitation rights that was opposed by Malbrough. Pursuant to a December 7, 2009 consent judgment, the trial court implemented the provisions of the parties' joint stipulation, whereby they agreed that supervised visitations would occur between Sebastien and Vishnubhotla on December 18, and 19, 2009, and on January 30, and 31, 2010.

On January 22, 2010, Vishnubhotla filed a rule to show cause why Malbrough should not be held in contempt based on her refusal to honor the visitation agreement outlined in the December 2009 consent judgment. Vishnubhotla also sought primary custody of Sebastien or unsupervised visitation, with more visitation than previously allowed "in either the original consent decree ... or the [subsequent December 2009 consent judgment]." Vishnubhotla asserted that Malbrough had informed him after the December visitations had transpired that she would no longer permit him to have contact with Sebastien. Malbrough responded by filing a rule to modify visitation, wherein she prayed for the suspension of Vishnubhotla's visitation based on the significant adverse impact that the December 18 and 19, 2009 visits had on Sebastien.

At the hearing on the parties' opposing rules, Malbrough described Sebastien as initially being "a special ed kid," who was "nonverbal until he was three and a half" years old due to a hearing loss in his left ear. She also related that Sebastien had been diagnosed with a learning disability and attention deficit disorder, and she described him as an "extremely anxious" child. She testified that her boyfriend of many years, Karl Keiger, had assumed the role of Sebastien's father by teaching him, taking him on outings, supporting him financially, and

otherwise taking an active role in his life. Malbrough explained that due to the close relationship between Keiger and Sebastien, he identified Keiger as his father and called him, "Dad." She further alleged that until Sebastien entered second grade, he was unaware that Keiger was not his biological father. Malbrough informed him otherwise while he was under the care of Dr. Colomb, a psychiatrist, for anxiety and attention deficit hyperactivity disorder.

At trial, Malbrough testified that Sebastien became very upset when he learned of the proposed visitations. She stated that immediately after the first December 2009 visit with Vishnubhotla, Sebastien began to worry that his "family" was going to be taken away from him, and he became violent and abusive. Malbrough also explained that Sebastien did not want to return to see Vishnubhotla, and she had to force him to comply with the scheduled visitation on the following day. After that next visit, Sebastien began to describe in detail how he would kill himself.

Malbrough also offered the testimony of Dr. Colomb, who was accepted by the court as an expert in the field of psychiatry. When Malbrough offered Dr. Colomb's expert testimony, Vishnubhotla stipulated that Colomb was qualified to testify as an expert in the field of psychiatry. Dr. Colomb testified that although he had never met Vishnubhotla, he had treated Sebastien for four to five years and that Sebastien's anxiety regarding the visitations with Vishnubhotla was "very tangible" and "totally different from his baseline anxiety." Dr. Colomb recommended that the "forced" visitations between Sebastien and his father should not continue at this time. Dr. Colomb explained that after the December 2009 visits, Sebastien was "grossly overwhelmed, sad, [and] depressed," and he pleaded

for the visits not to occur again. Dr. Colomb opined that if the court were to order continued visitations with Vishnubhotla, Sebastien's personality would change "grossly," and "it [would] cause catastrophic harm to him." Dr. Colomb further elaborated that Sebastien would be at a risk of "self harm" and that the potential for the forced visits "absolutely contributes to [Sebastien] wanting to hurt himself." Dr. Colomb further testified that Sebastien's bond is with his mother and Keiger rather than with Vishnubhotla. Dr. Colomb opined that it was not in Sebastien's best interest to be subjected to visitations with Visnubhotla at this time; he testified there may be a time in the future at which Sebastien's emotional state would be more stable.

Vishnubhotla testified that prior to the December 2009 visits, he had last seen Sebastien in 2003. Vishnubhotla described that during the first of the December 2009 visits, Sebastien was "very affectionate" and "very friendly," but on the second day, Vishnubhotla described that Sebastien was "angry" and "very quiet." Vishnubhotla also stated that during this visit, Sebastien asked him to forfeit his rights so that "my ["Dad"] can adopt me." Although Vishnubhotla admitted to being nervous prior to the December 2009 visits and acknowledging that Sebastien was probably nervous too, he further admitted that he was late for both of these visits. Vishnubhotla, being of Indian descent, denied any intention of returning to India or removing Sebastien from his mother.

At the conclusion of the hearing, the trial court denied Vishnubhotla's rule and granted Malbrough's rule, ordering the suspension of Vishnubhotla's visitation rights, reasoning in pertinent part, "I have [heard] evidence from a competent treating physician ... who has testified ... this child's condition is such

that if this [visitation] continues, ... it will [have] severe detrimental effects [on the child]. There is no evidence ... to the contrary...."[4] In accordance with the judgment rendered, the trial court signed a written judgment, dated March 15, 2010.

Visnubhotla appealed, urging that the trial court erred in: 1) suspending his visitation, relying largely on the testimony of Dr. Colomb to the exclusion of the "best interest of the child" factors set forth in La. C.C. art. 134; 2) refusing to allow a psychological evaluation of all of the parties; 3) allowing Malbrough to benefit from preventing his contact with Sebastien and in failing to recognize that she did not foster a harmonious relationship between Sebastien and him; and 4) failing to recognize the cultural issues inherent in this case. Pursuant to this appeal, Visnubhotla prays that the trial court's suspension of his visitation rights be reversed. Malbrough has answered the appeal, seeking an award for damages and costs pursuant to La. C.C.P. art. 2164, on the basis that Visnubhotla's appeal is frivolous.

II. ANALYSIS

Louisiana Civil Code article 131 prescribes that the court shall award custody of a child in accordance with the best interest of the child. Louisiana Civil Code article 134 mandates that the court "shall consider all relevant factors in determining the best interest of the child." It then enumerates twelve factors

[4] During the hearing, Visnubhotla offered no expert testimony to counter the testimony of Dr. Colomb or to support his position that he should have primary custody or increased, unsupervised visitation.

that *may* be relevant to the best interest determination.[5] But the court is not bound to make a mechanical evaluation of all of the statutory factors listed in Article 134. It should decide each case on its own peculiar set of facts and the relationships involved. ***In re Custody of Ricard***, 04-2573, p. 3 (La. App. 1st Cir. 2/11/05), 906 So.2d 544, 546.

A party seeking a modification of a custody decree where the underlying decree is a stipulated judgment, as opposed to a considered decree of permanent custody, must prove that there has been a change in circumstances materially affecting the welfare of the child since the original (or previous) custody decree

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[5] The enumerated factors set forth in Louisiana Civil Code article 134 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.

was entered and that the proposed modification is in the best interest of the child. ***Elliott v. Elliott***, 10-0755, p. 4 (La. App. 1st Cir. 9/10/10), ___ So.3d ___. On appeal, a trial court's assessment of the probative value of the evidence is accorded great weight and will not be disturbed absent a clear abuse of discretion. ***In re Custody of Ricard***, 04-2573 at p. 3, 906 So.2d at 546.

Based on Dr. Colomb's testimony, we conclude that the trial court did not abuse its discretion in implicitly finding that the visits with Visnubhotla, and their adverse effect on Sebastien, constituted a change in circumstances that materially affect Sebastien. Further, we find no error or abuse of discretion in the trial court's reliance on Dr. Colomb's testimony to support its determination that the suspension of visitation was in Sebastien's best interest. Dr. Colomb's conclusions were uncontradicted and placed paramount consideration on Sebastien's mental and physical health and his stated preferences. La. C.C. art. 134(7) and (9). Counsel for Visnubhotla made no formal request for further evaluations by other mental health professionals, and even if such a request had been made, the trial court was not mandated to grant such a request. See La. R.S. 9:331[6]; ***Elliott***, 10-0755 at p. 3, ___ So.3d at ___. Accordingly, we find no abuse of discretion in the trial court's decision not to order additional psychological evaluation. ***Id.***

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[6] Louisiana Revised Statutes 9:331 provides in pertinent part, as follows:

> A. The court may order an evaluation of a party or the child in a custody or visitation proceeding for good cause shown. The evaluation shall be made by a mental health professional selected by the parties or by the court....
>
> B. The court may order a party or the child to submit to and cooperate in the evaluation, testing, or interview by the mental health professional. The mental health professional shall provide the court and the parties with a written report. The mental health professional shall serve as the witness of the court, subject to cross-examination by a party.

We recognize that the willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party is one of the factors that a trial court may consider in determining the best interest of a child. La. C.C. art. 134(10). Although the record demonstrates that there were at least two instances when Visnubhotla asked to see Sebastien and Malbrough did not grant these requests, we cannot say that the trial court did not consider or give appropriate weight to this factor in making his determination to suspend visitation. Whether Malbrough has failed to foster a relationship between Sebastien and Visnubhotla is not a compelling factor at this juncture in light of Dr. Colomb's testimony that the visitations have increased Sebastien's anxiety, have caused him to want to hurt himself, and are not in Sebastien's best interest at this time. Additionally, we find no evidence to support Visnubhotla's claim that the trial court did not appropriately consider Sebastien's Indian descent or his need for a continued awareness of his cultural heritage. We conclude that the trial court's uppermost concern was to ensure the health and safety of Sebastien by suspending the visitations with Visnubhotla, and we find no abuse of discretion in the trial court's decision to grant Malbrough's rule.

Lastly, in an answer to Visnubhotla's appeal, Malbrough claims the appeal is frivolous and seeks to recover "appropriate damages, cost and other sanction[s]." Although the recovery of damages for frivolous appeal is authorized by La. C.C.P. art. 2164, our courts have been very reluctant to grant such damages under this article, as it is penal in nature and must be strictly construed. ***Taylor v. Hanson North America***, 08-2282, p. 10 (La. App. 1st Cir. 8/4/09), 21 So.3d 963, 970. Additionally, because appeals are favored in our law, penalties for the filing

of a frivolous appeal will not be imposed unless they are clearly due. ***Lane Memorial Hosp. v. Gay***, 03-0701, p. 8 (La. App. 1st Cir. 2/23/04), 873 So.2d 682, 687. Damages for frivolous appeal will not be awarded unless it appears that the appeal was taken solely for the purpose of delay or that the appellant's counsel does not seriously believe in the position he advocates. ***Taylor***, 08-2282 at p. 10, 21 So.3d at 970. Based on our review of this matter, we conclude that Visnubhotla's counsel seriously believed the position they advocated and that Visnubhotla's appeal was apparently motivated by a desire to have contact with his son. Accordingly, the criteria for awarding damages for frivolous appeal are not met, and we therefore deny Malbrough's answer.

III. CONCLUSION

For these reasons, we affirm the trial court's judgment, which granted Malbrough's rule to modify visitation and ordered the suspension of Sebastien's visitations with his biological father, Visnubhotla. Malbrough's answer to the appeal is denied. Appeal costs are assessed against Visnubhotla.

TRIAL COURT JUDGMENT AFFIRMED; ANSWER TO APPEAL DENIED.

MICHELLE MALBROUGH

VERSUS

SRINIVAS VISHNUBHOTLA

NUMBER 2010 CU 1397

COURT OF APPEAL

FIRST CIRCUIT

STATE OF LOUISIANA

BEFORE: KUHN, PETTIGREW, JJ., and KLINE, J. *pro tempore*[1]

PETTIGREW, J., CONCURS, AND ASSIGNS REASONS.

If I had been the trial judge, I would have maintained the restricted visitation rights in favor of Srinivas Vishnubhotla pursuant to the stipulated consent judgment of December 7, 2009. However, considering the limited record before us, I cannot say the trial court committed a clear abuse of discretion. **Martello v. Martello**, 2006-0594, p. 5 (La. App. 1 Cir. 3/23/07), 960 So.2d 186, 191-192. For these reasons, I will concur with the majority.

[1] Judge William F. Kline, Jr., retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

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Kline, J., concurs and assigns reasons

Under the evidence presented in this case, I agree that the trial court's judgment should be affirmed. It is important to note, however, that the trial court's judgment does not terminate Mr. Vishnubhotla's exercise of physical custody. Rather, it suspends it. Thus, the trial court has not rendered any final ruling on Mr. Vishnubhotla's right to exercise periods of physical custody with his son. In fact, the judgment is made "pending further order of this court." Accordingly, the heavy double burden imposed under **Bergeron v. Bergeron**, 492 So.2d 1193 (La. 1986) for changes to a considered custody decree will not apply to a hearing to modify the suspension of exercise of physical custody.

The court and the parents should encourage and foster a close and continuing relationship between Mr. Vishnubhotla and his child. *See* La. C.C. art. 134(10).[1] Further, La. R.S. 9:335 requires that the non-domiciliary parent should have frequent and continuing contact with his children **to the extent it is in the best interest of the child**,[2] which is the paramount determination.

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[1] This factor requires the trial court to consider in its custody determination "[t]he willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party.

[2] Louisiana Revised Statutes 9:335A provides as follows:

> A. (1) In a proceeding in which joint custody is decreed, the court shall render a joint custody implementation order except for good cause shown.
>
> (2)(a) The implementation order shall allocate the time periods during which each parent shall have physical custody of the child so that the child is assured of frequent and continuing contact with both parents.

Here, on another note, the parties and the trial court utilized the customary, vernacular meaning of the term, "visitation." Throughout the transcript, the parties refer to the exercise of physical custody as "visitation." As this court discussed in **Cedotal v. Cedotal**, 05-1524, p. 5 (La.App. 1 Cir. 11/4/05), 927 So.2d 433, 436, however, "[t]he time that parents with joint legal custody share with their child is more properly described as a physical custody allocation of a joint custody plan, rather than as visitation." Physical custody is actual custody. **Id.** Even so, the trial court's judgment does not affect the joint legal custody previously ordered by the court in a consent decree.

By contrast, Louisiana Civil Code art. 136 controls and governs visitation. This article grants visitation to a parent not granted custody or joint custody of a child and, under extraordinary circumstances, to relatives, former step-parents and step-grandparents, when in the best interest of the child.[3]

(Continued . . .)

(b) To the extent it is feasible and in the best interest of the child, physical custody of the children should be shared equally.

(3) The implementation order shall allocate the legal authority and responsibility of the parents.

[3] Louisiana Civil Code art. 136 provides as follows, in pertinent part:

Art. 136. Award of visitation rights

A. A parent not granted custody or joint custody of a child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would not be in the best interest of the child.

B. Under extraordinary circumstances, a relative, by blood or affinity, or a former stepparent or stepgrandparent, not granted custody of the child may be granted reasonable visitation rights if the court finds that it is in the best interest of the child.