NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 CU 1982

WENDY T. WALLACE

VERSUS

LEVI JOSHUA SANDERS

Judgment Rendered: February 13, 2009

Appealed from the
Eighteenth Judicial District Court
In and for the Parish of Iberville, Louisiana
Docket Number 2002-002690

Honorable William C. Dupont, Judge Presiding

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BEFORE: CARTER, C.J., WHIPPLE AND DOWNING, JJ.

WHIPPLE, J.

In this appeal, the father of twin boys appeals the trial court's judgment allowing the mother of the boys to relocate with them to Pennsylvania. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

Levi Sanders and Wendy Miller[1] are the parents of twin boys, Noah and William ("Will"), who were born on February 3, 2001. Mr. Sanders and Mrs. Miller were never married. By stipulated judgment dated April 26, 2002, the parties were awarded joint custody of the boys with Mrs. Miller designated as the domiciliary parent.

As required by LSA-R.S. 9:355.3, Mrs. Miller informed Mr. Sanders, by letter dated March 28, 2008, that she and her husband intended to relocate to Pennsylvania with Noah and Will because Mrs. Miller's husband, Jacob, had accepted a job offer with Lockheed Martin at its King of Prussia, Pennsylvania facility. Thereafter, on April 11, 2008, Mr. Sanders filed a rule in opposition to the relocation, formally objecting to the relocation and setting forth reasons why he believed the relocation would not be in the boys' best interests.[2]

Following a hearing on the issue of relocation, the trial court signed a judgment, dated July 21, 2008, granting Mrs. Miller's request to relocate to Pennsylvania and granting Mr. Sanders physical custody of the boys for the full summer vacation until one week before school started and all holidays except Christmas, which was to be split between the parties.

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[1]Although the caption of this matter refers to Mrs. Miller as Wendy Wallace, she subsequently married. Thus, she is referred to herein by her married name, Wendy Miller.

[2]We note that several days prior to Mr. Sanders filing his objection to the relocation, Mrs. Miller also filed a pleading entitled "Objection to Proposed Relocation of Child With Rule to Show Cause," in an apparent effort to have the matter decided by the court, given Mr. Sanders's opposition to the proposed relocation.

From this judgment, Mr. Sanders appeals, contending that: (1) the trial court committed prejudicial legal error in failing to consider all twelve factors set forth in LSA-R.S. 9:355.12 in making its determination to allow relocation of the children; (2) the trial court committed prejudicial legal error when it considered whether Mrs. Miller would relocate to Pennsylvania without the children should the requested relocation be denied; and (3) the trial court's decision to grant the requested relocation was a clear abuse of discretion in that the evidence presented did not support a finding that such relocation was in the boys' best interests.

BURDEN OF PROOF AND STANDARD OF REVIEW

In a child relocation case, the relocating parent has the burden of proving: (1) that the proposed relocation is in good faith; and (2) that it is in the best interest of the children. LSA-R.S. 9:355.13. Louisiana Revised Statute 9:355.12 sets forth twelve factors a court shall consider when determining a relocation issue, as follows:

> (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 parent.
> (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 party 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.

Prior to amendment in 2003, by La. Acts 2003, No. 676, § 1, LSA-R.S. 9:355.12 contained eight factors, rather than twelve, that a trial court was required to consider in determining a relocation issue. The first seven factors of the current version of LSA-R.S. 9:355.12 retained their original numbering. The original factor number eight was retained, but was renumbered as "(12)". Thus, the four new factors added by La. Acts 2003, No. 676, § 1 are those currently numbered as "(8)" through "(11)." See H.S.C. v. C.E.C., 2005-1490 (La. App. 4th Cir. 11/8/06), 944 So. 2d 738, 740 & n.5.

In the instant case, the pleadings raising the relocation issue were filed in April 2008, almost five years after the amendment to LSA-R.S. 9:355.12. Nonetheless, in its reasons for judgment, the trial court listed the eight factors of LSA-R.S. 9:355.12 prior to amendment in 2003, rather than the current twelve factors, as the factors it was required to consider in making its determination regarding relocation. Thus, it appears from the record before us that the trial court committed legal error in applying the pre-amendment version of LSA-R.S. 9:355.12 to its determination of the relocation issue herein.

It is well settled that a court of appeal may not set aside a trial court's findings of fact in the absence of manifest error or unless it is clearly wrong.

Stobart v. State, Department of Transportation and Development, 617 So. 2d 880, 882 (La. 1993). Additionally, a trial court's determination regarding family matters is entitled to great weight. Richardson v. Richardson, 2001-0777 (La. App. 1st Cir. 9/28/01), 802 So. 2d 726, 734, writ denied, 2001-2884 (La. 11/16/01), 802 So. 2d 618.

However, where one or more trial court legal errors interdict the fact-finding process, the manifest-error standard is no longer applicable, and, if the record is complete, the appellate court should make its own independent *de novo* review of the record and determine a preponderance of the evidence. Evans v. Lungrin, 97-0541 (La. 2/6/98), 708 So. 2d 731, 735.

A legal error occurs when a trial court applies incorrect principles of law and such errors are prejudicial. Legal errors are prejudicial when they materially affect the outcome and deprive a party of substantial rights. Pruitt v. Brinker, Inc., 2004-0152 (La. App. 1st Cir. 2/11/05), 899 So. 2d 46, 49, writ denied, 2005-1261(La. 12/12/05), 917 So. 2d 1084. When such a prejudicial error of law skews the trial court's finding a material issue of fact and causes it to pretermit other issues, the appellate court is required, if it can, to render judgment on the record by applying the correct law and determining the essential material facts *de novo*. Evans, 708 So. 2d at 735.

However, the above approach need not be considered when a trier of fact has made some factual findings favorable to each party, and when the legal error affected only one of the findings, but does not interdict the entire fact-finding process. In such a case, the appellate court should proceed to evaluate each affected finding to determine the applicability of the manifest error rule to each. See Rideau v. State Farm Mutual Automobile Insurance Company, 2006-0894 (La. App. 1st Cir. 8/29/07), 970 So. 2d 564, 571, writ denied, 2007-2228 (La. 1/11/08), 972 So. 2d 1168.

Accordingly, in the instant case, the fact that the trial court did not consider each separate factor listed in LSA-R.S. 9:355.12 does not mandate a reversal on that ground alone. Rather, the appellate court may remedy the deficiency by a *de novo* review. H.S.C., 944 So. 2d at 743. Thus, we now conduct a *de novo* review of the record to determine whether relocation was appropriate herein.[3]

DISCUSSION

Turning first to the question of whether the proposed relocation is being made in good faith, we conclude that the record before us supports the finding that Mrs. Miller indeed proposed the relocation in good faith. Mrs. Miller married Jacob Miller in April 2007, and she worked to support the family while Mr. Miller completed his bachelor's degree at L.S.U. in electrical engineering. Mr. Miller concentrated his coursework on a specialization in signal processing and communication systems design, with the goal that he be able to obtain a job in the space industry upon graduation. As his May 2008 graduation approached and after unsuccessful efforts to obtain employment in his area of specialization in Louisiana, Mr. Miller was offered and accepted a job in his area of specialization with Lockheed Martin in King of Prussia, Pennsylvania. Lockheed Martin offered Mr. Miller a starting salary of $63,000.00 per year, with full medical, dental, and vision insurance.

Our jurisprudence has established that improved job prospects of the

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[3]The trial court's legal error in failing to consider the additional four factors of LSA-R.S. 9:355.12 added by 2003 amendment clearly did not interdict the trial court's specific findings of fact under the other remaining eight factors. See generally Picou v. Ferrara, 483 So. 2d 915, 917-918 (La. 1986). However, because the ultimate determination regarding relocation is dependent upon consideration of all twelve factors, we will conduct a complete *de novo* review herein.

relocating parent **or of that parent's new spouse** is sufficient to establish good faith. Nelson v. Land, 2001-1073 (La. App. 1st Cir. 11/9/01), 818 So. 2d 91, 94. Accordingly, because the record supports the finding that the proposed relocation was in good faith, the relocation issue turns on whether the proposed relocation was also in the best interests of Noah and Will, a determination which requires consideration of the factors listed in LSA-R.S. 9:355.12. Nelson, 818 So. 2d at 97.

(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.

The record before us demonstrates that Mrs. Miller and Mr. Sanders lived together with the boys for about nine months after the boys' birth and that after the relationship between Mrs. Miller and Mr. Sanders ended, the boys continued to reside with Mrs. Miller. Thus, Mrs. Miller has been the primary caregiver for the twins since their birth seven years before the trial of this matter and has been active in all the boys' activities.

Mr. Sanders has had frequent visitation with the boys and has been involved in many of their activities, especially since his move from Mobile, Alabama to Baton Rouge in 2006.[4] He is involved with the boys' school and Cub Scouts activities, and he has coached the boys' basketball and baseball teams. With regard to siblings of the boys, Mr. Sanders and his wife have a son who was almost one year old at the time of trial, and Mr. Sanders also has a daughter from a former relationship with whom he and the twins have had little or no contact.

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[4]When the boys were two years old, Mr. Sanders moved to Mobile, Alabama, where he lived for three years until his move to Baton Rouge in 2006. By judgment rendered July 27, 2006, and signed November 2, 2006, Mr. Sanders was awarded physical custody of the boys for one week and one alternating weekend each month, for alternating holidays, and for an extensive period during the summer.

(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.

As stated above, the boys were seven years old at the time of trial and have always primarily resided with Mrs. Miller. At trial, Mrs. Miller expressed some concern about Mr. Sanders's relationship with Will. She explained that while Noah's relationship with Mr. Sanders has been strong, she viewed Will as being "left out." She felt that Will's desires were not considered by Mr. Sanders regarding extracurricular sports activities and, rather, that Noah's wishes prevailed. Additionally, she related concerns about Mr. Sanders's handling of medical situations with Will, who has asthma.

(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.

The record demonstrates that the distance between Baton Rouge, where Mr. Sanders resides, and Paoli, Pennsylvania, where Mrs. Miller proposed to relocate with the boys, is approximately 1248 miles, a considerable distance. Traveling such a distance would obviously involve some expense, an expense which Mr. Sanders indicated would be difficult. However, Mrs. Miller testified that she would do anything possible to facilitate Mr. Sanders's continued relationship with the boys, including allowing him to have physical custody of the boys every holiday and summer. She also testified that he would be welcome to come visit them and that she would allow him time with the boys whenever she visited Louisiana.

Indeed, Mr. Sanders acknowledged at trial that Mrs. Miller has always been good about facilitating his relationship with the boys and allowing him free access to the children for activities.

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

There is no evidence of record regarding the boys' preference as to where they would like to live, undoubtedly given their tender age.

(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 parent.

As discussed above, the record before us supports the finding that Mrs. Miller has always promoted the relationship between Mr. Sanders and Noah and Will and that she will continue to do so.

(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.

The record before us clearly reveals that the proposed relocation would benefit both Mrs. Miller and the boys financially. At the time of trial, Mrs. Miller was working to support the family while Mr. Miller completed his college education. The salary Mr. Miller will earn in Pennsylvania will improve the Miller's standard of living and will enable Mrs. Miller to quit working, giving her more time with the boys and the opportunity to complete her master's degree in psychology. Additionally, Mr. and Mrs. Miller and the boys would be living in a four-bedroom home with a large yard, as opposed to the apartment in which they were living at the time of trial. Mr. Miller would also have educational opportunities with Lockheed Martin, through the University of Pennsylvania, to further his education, which could also enhance the family's financial situation.

Moreover, regarding Noah and Will's educational opportunities, while the boys appeared to have sound educational opportunities in Baton Rouge,[5] Mrs. Miller testified that the public school system in Pennsylvania is one of the top ten school systems in the nation. Moreover, the Pennsylvania school district where Noah and Will would be attending school had been ranked in the top ten in the state, and the particular elementary school they would be attending was ranked third out of over 1,000 elementary schools in Pennsylvania. Accordingly, the educational opportunities for the boys in Pennsylvania appear to be excellent.

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

As discussed in depth above, Mrs. Miller is seeking relocation because of the job opportunity available there to her husband in his chosen field, an opportunity that will enhance their lives in numerous ways. Mr. Sanders obviously opposes relocation because the relocation will likely reduce his physical custody and personal contact with the boys.

(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.

Again, Mrs. Miller, at the time of trial, was working to support her family while Mr. Miller completed his education. Mr. Miller now has a unique job opportunity, not available in Louisiana, in his particular subspecialty of electrical engineering, which will greatly enhance the family's circumstances. As well as economically benefitting the family, this career move for Mr. Miller, as discussed above, will clearly benefit Mrs. Miller, and also the boys, by allowing her to be a stay-at-home mom and to pursue completion of her master's degree.

[5]At the time of trial, Will was attending the Baton Rouge Center for Visual and Performing Arts, and Noah was attending Westdale Heights Magnet Program.

Mr. Sanders was employed by Dresser Rand, a company which apparently conducts business worldwide, as a client service representative.

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

The record demonstrates that Mr. Sanders has not always timely fulfilled his financial obligations to Mrs. Miller in paying child support for the boys. The record contains numerous rules filed by Mrs. Miller to enforce Mr. Sanders's child support obligation, eventually resulting in an income assignment order. Nonetheless, Mrs. Miller testified that, despite the income assignment order, Mr. Sanders was again delinquent in his child support obligation at the time the issue of relocation arose. In fact, she testified that right after she filed her rule regarding the requested relocation, Mr. Sanders gave her a check for approximately $1,300.00 and then two more "big checks" to catch up on his child support arrears. According to Mrs. Miller, this was a pattern with Mr. Sanders, where he would become in arrears in his payments, but would then catch up on the arrears when a court date approached.

With respect to the most recent problem regarding arrears, Mr. Sanders averred that the problem occurred because he changed positions within his company at the beginning of 2008 and that he first noticed that his child support obligation was no longer being taken out of his check at the end of February. According to Mr. Sanders, it then took some time to have the problem resolved.

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

The record reveals that the company for whom Mr. Sanders works, Dresser Rand, has a facility in Pennsylvania approximately fifteen to thirty miles from where Mr. and Mrs. Miller were proposing to relocate with the

boys. When questioned about relocation to Pennsylvania, Mr. Sanders stated that while it was a possibility, the facility in Pennsylvania was a repair center that did not employ client service representatives. He acknowledged that the facility there did employ repair mechanics, a job for which he would qualify. However, he noted that such a move within the company would not be a lateral move.

(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.

There was no evidence of substance abuse or violence by either parent presented at the hearing on the issue of relocation.

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

Our review of the record does not disclose any other significant factor affecting the best interests of the boys not discussed above.

In considering the factors above and reviewing the record as a whole, this court concludes that Mrs. Miller established that Noah and Will's relocation with her and her husband to Pennsylvania is in their best interests.[6] While it is clear from the record that both Mrs. Miller and Mr. Sanders are loving and involved parents and that their respective spouses also have the boys' best interests at heart, it is equally clear that Mrs. Miller has always been the primary caregiver for the boys and that there will be many opportunities and benefits that relocation will provide to Mrs. Miller and the boys.

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[6]With regard to Mr. Sanders's second assignment of error wherein he avers that the trial court committed legal error in considering whether Mrs. Miller would relocate to Pennsylvania without the boys in making its determination of the relocation issue, we observe that because this court conducted a *de novo* review of the issue of the propriety of relocation, this assignment of error was rendered moot. Nonetheless, we find no merit to the assertion that the trial court's statement that "[t]o not allow relocation or to change the domiciliary parent would in the court's opinion be more detrimental to the children" demonstrates that the trial considered Mrs. Miller's intentions regarding relocation without the boys in making its determination.

Additionally, we note that the judgment on review has awarded Mr. Sanders liberal time with the boys, within the constraints of their school schedule. Accordingly, while the trial court may have committed legal error in its failure to specifically analyze all twelve factors listed in LSA-R.S. 9:355.12, we conclude that the judgment granting relocation was nonetheless correct.

CONCLUSION

For the above and foregoing reasons, the July 21, 2008 judgment granting Mrs. Miller's request for relocation and awarding Mr. Sanders liberal physical custody is affirmed. Costs of this appeal are assessed against Mr. Sanders.

AFFIRMED.