NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CU 2329

HERTY L. HANNON

VERSUS

SHANNON R. HANNON

DATE OF JUDGMENT: JUN 25 2010

ON APPEAL FROM THE FAMILY COURT OF
THE PARISH OF EAST BATON ROUGE, NUMBER 153,424, DIV. D
STATE OF LOUISIANA

HONORABLE ANNETTE LASSALLE, JUDGE

* * * * * *

Bernard Hampton
Baton Rouge, Louisiana

Counsel for Plaintiff-Appellee
Herty L. Hannon

Marcus T. Foote
Baton Rouge, Louisiana

Counsel for Defendant-Appellant
Shannon R. Hannon

* * * * * *

BEFORE: PARRO, KUHN, AND McDONALD, JJ.

Disposition: VACATED IN PART; AMENDED AND, AS AMENDED, AFFIRMED IN PART; REMANDED.

R.H. Parro, J. Concurs and assigns reasons.
J.M. McDonald, J. Concurs

KUHN, J.

Appellant-mother, Shannon R. Hannon, appeals a judgment dismissing her petition seeking joint custody of her two minor children based on the trial court's determination that her allegations failed to state facts sufficient to sustain her burden of proof in this proceeding against appellee-father, Herty L. Hannon. For the following reasons, the trial court's judgment is vacated in part; amended and, as amended, affirmed in part; and remanded.

FACTUAL AND PROCEDURAL BACKGROUND

Shannon and Herty were divorced in May 2006. They were awarded joint custody of their two minor children pursuant to a stipulated judgment that also set out a physical custody schedule. On April 25, 2007, Herty filed a petition seeking sole custody of the children based on allegations that Shannon, who had a history of illegal drug use, had again begun to abuse illegal drugs. A hearing was set for May 29, 2007. Prior to that hearing, on May 3, 2007, Herty filed a petition for emergency temporary sole custody of the minor children based on allegations that after a violent confrontation with her mother, with whom she resided, Shannon took the children to a motel. The petition averred that the children had not been in school all week and that Shannon was abusing illegal drugs. Fearing for the safety and well-being of the children, Herty requested immediate ex-parte custody of the children; that Shannon be ordered to submit to drug testing, and a hearing.

At a May 15th hearing on Herty's petition for temporary custody, Shannon was neither present nor represented by counsel. The record showed that Shannon had been personally served with the petition for temporary custody on May 7, 2007, by a sheriff's deputy. Herty's testimony was the only evidence admitted at

the hearing. He stated that his former mother-in-law had advised him Shannon was doing drugs and was not doing well. He stated that his six-year-old child had recently called 911 after Shannon and her mother had a verbal confrontation. According to Herty, his child told him that he had seen Shannon smoking a strange cigarette, "a plastic kind of cigarette." Shannon's mother confirmed to Herty that she had found a pipe, presumably to smoke crack cocaine, in her residence. Herty relayed how Shannon had attempted to purchase crack cocaine from an undercover policeman, with the children apparently waiting for her in the car. Although Shannon was supposed to spend two years in a rehabilitation center, according to Herty, she was there for one year. The trial court granted Herty temporary sole custody of the minor children in a judgment signed on May 15, 2007.

Subsequently, Shannon was neither present nor represented by counsel at the previously-scheduled May 29, 2007 hearing on Herty's petition for sole custody. The record established that the petition had been served on Shannon through domiciliary service on April 30, 2007. Again, the only evidence admitted into the record at the hearing was the testimony of Herty, essentially reiterating the same account of Shannon's illegal drug use. As of the date of the hearing, Herty believed that Shannon was in a drug rehabilitation center in Monroe. He requested sole custody of the children, reserving Shannon's rights to supervised visitation. He also asked that Shannon be required to submit to drug testing. At the conclusion of the hearing, the trial court stated, "[s]ince this is a rule day, this can only be an interim judgment," determined Herty had met his burden of proof, and awarded to him sole custody of the minor children with supervised visitation

in favor of Shannon. Shannon was also ordered to undergo drug testing. A judgment in conformity with the trial court's rulings was signed on May 29, 2007.

On July 6, 2007, Shannon filed an objection to the relocation of the minor children, averring that Herty wanted to move to Houston, Texas. Shannon's pleading also alleged that she had entered into a rehabilitation program in Monroe and that despite the award of sole legal custody of the minor children to Herty, Shannon's mother had exercised a significant portion of the physical custody of the children. On July 25, 2007, Herty filed a motion to relocate the children.

After a hearing on January 23, 2008, the trial court issued detailed written reasons for judgment on April 10, 2008, concluding that Herty was in good faith and that it was in the best interest of the children to allow them to relocate with their father. A judgment granting the motion to relocate was signed on April 30, 2008.

On August 28, 2008, Shannon filed a petition seeking, among other things, joint custody of the minor children, the elimination of supervised visitation, and more extensive visitation. She averred that, during the summer subsequent to the trial court's approval of the relocation, she had been afforded no visitation with her children. On February 25, 2009, Shannon filed a rule to reset the joint custody matter for hearing, which was heard on May 5, 2009, at which the transcripts from the May 15, 2007 and May 29, 2007 hearings were admitted into evidence and the matter was submitted on argument. On June 17, 2009, the trial court signed a judgment, which states that "based on the fact that the May 29, 2007 judgment is hereby declared a considered decree, [Herty's] oral motion to dismiss is granted."

Shannon appeals the June 17, 2009 judgment, asserting that the trial court erred in concluding that the May 29, 2007 judgment, granting Herty sole custody of the minor children, was a considered decree.

DISCUSSION

Although we initially note that nothing in the transcript from the May 5, 2009 hearing establishes that Herty made an oral motion to dismiss Shannon's rule seeking joint custody of the minor children, nevertheless, a court may raise an exception of no cause of action on its own motion. ***See*** La. C.C.P. art. 927B. Thus, we treat the appeal of the judgment of dismissal of Shannon's petition for joint custody as a review of the trial court's action of sustaining an objection of no cause of action it raised on its own motion.

Each child custody case must be viewed in light of its own particular set of facts and circumstances. ***Perry v. Monistere***, 2008-1629, p. 3 (La. App. 1st Cir. 12/23/08), 4 So.3d 850, 852. There is a distinction between the burden of proof required to change a custody plan ordered pursuant to a considered decree and the burden of proof required to change a custody plan ordered pursuant to a non-considered decree (or stipulated judgment). A "considered decree" is an award of permanent custody in which the trial court receives evidence of parental fitness to exercise care, custody, and control of children. By contrast, a non-considered decree or stipulated judgment is one in which no evidence is presented as to the fitness of the parents, such as one that is entered by stipulation or consent of the parties, or that is otherwise not contested. ***Id.***, 2008-1629 at p. 4, 4 So.3d at 853.

Once a considered decree of permanent custody has been rendered by a court, the proponent of a change of custody bears the heavy burden of proving that

a change of circumstances has occurred, such that the continuation of the present custody arrangement is so deleterious to the child as to justify a modification of the custody decree, or that the harm likely to be caused by a change of environment is substantially outweighed by its advantages to the child. ***Id.***, 2008-1629 at pp. 4-5, 4 So.3d at 853 (citing ***Bergeron v. Bergeron***, 492 So.2d 1193, 1200 (La. 1986)). In cases where the underlying custody decree is a stipulated judgment, and the parties have consented to a custodial arrangement with no evidence as to parental fitness, the heavy burden of proof rule enunciated in ***Bergeron*** is inapplicable. Rather, a party seeking a modification of a consent decree must prove that there has been a material change of circumstances since the original (or previous) custody decree was entered and that the proposed modification is in the best interest of the child. ***Id.***, 2008-1629 at p. 5, 4 So.3d at 853.

The best-interest-of-the-child test under La. C.C. arts. 131 and 134 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***, 2006-0594, p. 5 (La. App. 1st 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.***, 2006-0594 at p. 5, 960 So.2d at 191-92.

In this case, the May 29, 2007 judgment was rendered after the introduction of hearsay evidence. The issue of primary concern was the fitness of the mother. ***See*** La. C.C. art. 134(6) & (7). Shannon complains on appeal that she was neither present nor represented at the hearing. Although the record clearly establishes that she was served with Herty's pleading, ***see*** La. C.C.P. art. 1231 and 1234, Shannon has correctly pointed out that the evidence on which the judgment was based was limited in that nothing about Herty's parental fitness or any of the other factors articulated in La. C.C. art. 134 were considered. Because there was a lack of competent evidence about both Herty's and Shannon's parental fitness, we find that the trial court erred in concluding the May 29, 2007 judgment was a considered decree. Accordingly, that portion of the June 17, 2009 judgment so stating is vacated.

Our inquiry does not end here however. The record establishes that at the January 23, 2008 relocation hearing, at which Shannon was both present and represented by counsel, evidence was adduced. The trial court subsequently issued written reasons for judgment on April 10, 2008, in which it applied the factors set forth in La. R.S. 9:355.12 and the burden of proof stated in La. R.S. 9:355.13 to determine that Herty could relocate with the children to Houston, Texas. To the extent ***Bergeron*** is applicable to a determination of a relocation request and corresponding change in custody, the standards are inherent within the statutory relocation factors and the requirements of good faith and best interest of the children as set forth in La. R.S. 9:355.12 and 355.13 respectively. ***Rao v. Rao***,

2005-1523, p. 3 (La. App. 1st Cir. 11/4/05), 927 So.2d 391, 392. Thus, at the January 23, 2008 hearing, Shannon had ample opportunity to present evidence of both her parental fitness and any lack of Herty's parental fitness. Shannon did not appeal the trial court's judgment granting Herty's motion to relocate and in this appeal does not address the effect that judgment has had on the custody issue. Because the April 30, 2008 judgment granting Herty's motion to relocate was a considered decree, the trial court correctly concluded that the ***Bergeron*** standard applied to any changes in custody subsequent to its April 30, 2008 judgment, including the rules Shannon filed in August 2008 and February 2009, which were heard on May 5, 2009.

In her rules seeking joint custody of the minor children, Shannon has not alleged facts that conform to the ***Bergeron*** standard. Based on a finding that she has failed to allege a cause of action, we affirm that portion of the trial court's judgment, which dismissed her claims. ***See D'Aquilla v. D'Aquilla***, 2003-2212, pp. 5-6 (La. App. 1st Cir. 4/2/04), 879 So.2d 145, 148-49, ***writ denied***, 2004-1083 (La. 6/25/04), 876 So.2d 838. But Shannon must be given the opportunity to amend her pleading to allege any additional facts necessary to state a cause of action. ***See*** La. C.C.P. art. 934 and R.S. 9:315.17.[1] Accordingly, the judgment of the trial court is amended to so permit.

[1] According to La. C.C.P. art. 934, when the grounds of the objection pleaded by peremptory exception may be removed by amendment of the petition, the judgment sustaining the exception shall so order. And La. R.S. 9:315.17 provides that if the court grants authorization to relocate, the court may retain continuing, exclusive jurisdiction of the case after relocation of the child as long as the non-relocating parent remains in the state.

DECREE

The trial court's June 17, 2009 judgment is vacated insofar as it declares that the May 29, 2007 judgment is a considered decree. That portion of the judgment which states "Herty Hannon's oral motion to dismiss is granted" is amended to state "Shannon Hannon's petition filed on August 28, 2008, and the February 25, 2009 motion to reset joint custody hearing are dismissed for failing to state a cause of action." The judgment is further amended to provide that the matter is remanded to the trial court to allow Shannon an opportunity to amend her petition to state, if she can, a cause of action against Herty within twenty-one days from the date this opinion becomes final, in default of which her claims shall be dismissed. Appeal costs are assessed against Shannon R. Hannon.

VACATED IN PART; AMENDED AND, AS AMENDED, AFFIRMED IN PART; REMANDED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CU 2329

HERTY L. HANNON

VERSUS

SHANNON R. HANNON

BEFORE: PARRO, KUHN, AND McDONALD, JJ.

PARRO, J., concurring.

Since no determination had been made that the May 29, 2007 judgment was a considered decree until after the August 28, 2008 petition by Shannon for joint custody had been filed and a hearing held in May 2009, the trial court erred in dismissing Shannon's petition without first complying with the provisions of LSA-C.C.P. art. 934. See LSA-R.S. 9:355.17. Therefore, I respectfully concur with the result reached.

R. H. P. by JMM