

### REASONS FOR RULING

Before the Court is Scott C. Frank ("Scott") on his Motion for Change of Custody. This Motion arises out of a Considered Decree from a hearing held in September 2002 wherein Scott's ex-wife, Carol Rae Frank ("Carol") was granted domiciliary status of their minor children, Wyatt Frank ("Wyatt"), age eight, and Chandler Frank ("Chandler"), age six.

Given that this Motion for Change of Custody arises from a Considered Decree, the mover must first overcome the heightened standard set forth in *Bergeron v. Bergeron*, 492 So.2d 1193 (La. 1986). In *Bergeron* the Louisiana Supreme Court held that a party seeking to modify a considered decree of custody:

...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.

*Id.* at 1200. The Louisiana Supreme Court has consistently held this standard consists of two separate prongs independent of each other. A mover need satisfy only one prong to effectuate a change in custody.

After numerous hearings, the presentation of many witnesses and exhibits, as well as receiving numerous pre and post trial memos by each parties respective counsel, the Court holds that Scott has satisfied the heavy burden established by *Bergeron*. It is this Court's opinion that Scott has satisfied both prongs of *Bergeron*. While not doubting that Carol is a caring mother who loves her children, Scott has presented sufficient evidence of deleterious circumstances and that any harm Wyatt and Chandler may experience by having custody changed from Carol to their father is clearly outweighed by the benefit they will receive.

One of the most troubling accusations against Carol by Scott in his Motion to Change Custody was her leaving the two minor children unattended at her apartment. While Carol has claimed that she was leaving the children under the supervision of a neighbor, the Court was presented with evidence and testimony by neighbors and private investigators hired by Scott

separate occasions. The Court finds this testimony credible and is convinced that Carol has left the minor children alone on numerous occasions. It is important to note that leaving the children alone is neglect of the minor children.

While a parent may have difficulty finding adequate care and supervision for a child, the Court finds it troubling that two children so young would be left alone for any amount of time. Increasing the Court's concern is the fact that the private investigator was able to lure Wyatt out of the apartment on one of the occasions when Carol was not present.

Carol testified that she remedied this situation by moving into a new home. However this normally commendable act is complicated when the Court considers whom jointly purchased the home with Carol. Carol purchased her new home with Mr. Pat Guidry, who is the father of her youngest child. This Court has previously prohibited Pat Guidry from being in the presence of Wyatt and Chandler. This court has previously found that it is not in the children's best interest for him to be in their presence. Carol does claim that Mr. Guidry leaves the home when her two older children, Wyatt and Chandler, are present. Credible evidence including testimony to the contrary has been presented to the Court. One of Carol's own neighbors, Benjamin Stacks, testified that he had seen Pat Guidry in the home when at least one child was present.

Specifically, he observed Chandler playing in the front yard with Mr. Guidry working in the yard. In addition, the children's counselor, Louise Theall, testified before the Court that Chandler confided to her that Mr. Guidry is in the home when they (the children) are there. Chandler went so far as to say that he saw Mr. Guidry going into the home on the security camera monitors that Mr. Guidry himself installed in the home. The Court has been presented with enough evidence to convince it that Carol is exposing the children to Mr. Guidry.

The Court also takes notice of actions taken by Mr. Guidry during the course of these proceedings that further affirms its holding that he should not be around Wyatt and Chandler. Testimony was presented regarding a confrontation between Mr. Guidry and his neighbor Benjamin Stacks upon Mr. Guidry learning that Benjamin Stacks would be testifying in this proceeding. In addition, evidence was submitted concerning threatening and demeaning e-mails received by Scott and his sponsor at work that originated from Mr. Guidry's home with Carol as well as his previous residence. Mr. Guidry testified that these e-mails could have come from



anyone. However testimony was presented by Mr. Craig Casper who was certified as an expert on computers contradicting Mr. Guidry's claim. Mr. Casper testified that the IP addresses, a number designating certain computers for being at a certain specific location, from the e-mail sender were all from addresses in which Mr. Guidry resides. The Court is convinced from this testimony that the e-mails came from Mr. Guidry. While these acts pale in comparison to what lead the Court to prohibit his contact with the minor children, Mr. Guidry continues to engage in shenanigans that only affirm the Court's belief that his presence is not in the best interest of Wyatt and Chandler.

Over the course of several days of trial, numerous school personnel including teachers testified regarding the boys' academics. Evidence submitted from the first three nine (9) week grading periods for Wyatt from his first grade classes at Plantation Elementary School shows that Wyatt had grade point averages of 1.5, 1.25, and 2.25 on a 4.0 scale. This averaged to a cumulative grade point average of 1.66. These grades were all attained under Carol's supervision. While under the temporary care and custody of Scott during his last nine-week period, Wyatt's grade point average was 3.25 and he was named to the school's honor roll. This was a dramatic improvement from his previous grades. The next school year Wyatt continued to struggle in school when returned to the care of his mother and again was in danger of failing.

Carol did take steps to assist Wyatt academically. With the possibility of his being held back after completing the second grade, Carol retained the services of a tutor to assist Wyatt with his academics. After summer testing, Wyatt was ultimately promoted to the third grade. However it must be noted that Scott also assisted with Wyatt's academic work during the summer by hiring a tutor and enrolling Wyatt in a summer reading program. Unfortunately the progress made by Wyatt over the summer has not continued to his present school year.

After receiving tutoring over the summer and being promoted to the third grade, Wyatt still struggles academically. His first nine-week grade period for the third grade was a 1.00 grade point average. Again, Wyatt's grades have seriously declined while under his mother's supervision.

The Court cannot ignore the fact that Wyatt has consistently underperformed in school while under the care and custody of Carol. In the short time Wyatt has attended school, the Court was shown only one grading period when Wyatt, while in his mother's care, earned above a "D"

average. The Court cannot ignore the fact that Wyatt has been in danger of failing in school except for the semester under his father's care when Wyatt attained a "B" average and was named to the honor roll. Carol has taken steps to help her son, but he has continued to regress academically. Wyatt is clearly not of low intelligence; otherwise, he would not have ever achieved honor roll status. Wyatt's academic struggles could continue if left in Carol's care and would detrimentally affect his future.

In addition to Wyatt's struggles, Chandler has exhibited serious behavioral problems at school. Chandler was disciplined numerous times while in Kindergarten. His outbursts included hitting his classmates, spitting, obscene gestures, and cursing at his teacher. Chandler was eventually suspended for these actions and was ultimately threatened with expulsion. Kids will be kids and occasionally act out, but for a child so young to exhibit negative behavior to such degree concerns the Court. Only extreme behavior could warrant the expulsion of a Kindergarten student. The Court cannot ignore the fact that these problems occurred while Chandler was in Carol's custody. Carol has always met with Chandler's teachers when these problems arose, but the problems still did not cease. Yet, testimony was presented of Chandler's improved behavior while in Scott's custody. Chandler's school bus driver testified that Chandler became a model passenger and had a complete turn in behavior during the time he was in Scott's care.

This Court finds that Scott has satisfied both prongs of *Bergeron*. Concerning the first prong of *Bergeron*, the Court finds that Scott has proven that the present custody is so deleterious to the two minor children to justify a modification of custody. Scott has convinced the Court that Carol left Wyatt and Chandler unsupervised at home. One of the children was even coaxed from the home. Leaving the minors alone at such a young age is neglect on the part of Carol. In addition, Carol further continues to live with and expose the children to a man this Court has prohibited from being around Wyatt and Chandler; as, his presence is against their best interests. More than enough evidence was presented to the Court to convince it that Carol has the children in the presence of Mr. Guidry and will likely continue to do so. Finally, Wyatt's academic problems and Chandler's behavior problems in school while in Carol's custody in comparison to the improvement of these problems while in Scott's care is evidence of a serious harm that may drastically affect their futures. These children have only begun their scholastic careers and



already appear to be heading down a dangerous path. Wyatt is in constant danger of failing or being held back, and Chandler has exhibited severe and antisocial behavioral problems that nearly lead to his expulsion. Each of these circumstances alone is harmful to Wyatt and Chandler individually. A combination of these factors rises to the high level of harm established by the first prong of *Bergeron* to justify a modification of custody.

Having satisfied the first prong of *Bergeron*, Scott also meets the burden of the second prong as established by the Supreme Court of Louisiana. Any harm that could befall Wyatt and Chandler by transferring custody from their mother Carol to Scott will be outweighed by its benefits. Additionally, the vast scholastic improvement Wyatt attained while in Scott's custody illustrates a benefit that clearly outweighs any harm that may be caused by a change of environments. Wyatt has consistently been in danger of failure while in Carol's care. He was named to the honor roll while in Scott's care. Chandler's behavioral problems exhibited in school leads the Court to believe that he will inherit his brother's academic problems unless a change in custody is accomplished. Lastly the Court cannot ignore the incidents where Carol left Wyatt and Chandler alone at home. These acts could very well be considered neglect. It is clear to this Court that a change from the minor children's current environment would be beneficial.

Having satisfied the heavy burden established by *Bergeron*, this Court believes that a change of custody could be warranted on that fact alone. However the Court will also defer to a best interest analysis under Louisiana C.C. Art. 134. The factors listed in Art. 134 are by no means nonexclusive and the weight given to the factors is left to the discretion of the Court.

With the ample evidence and testimony submitted to the Court, an analysis of every factor is unneeded. Many of the factors would favor neither Scott nor Carol. For example the court has no doubt that both Carol and Scott share the same love, affection, and emotional ties with their minor children and each can adequately provide food and shelter. Louisiana C.C. Art. 134(2) and (3). Additionally the Court does not feel it necessary to weigh the needs of the child as they have given no preference and are too young for the Court to consider any preference they would have as reasonable. However the Court does find that some factors favor one parent more than the other. In light of the following factor's, it is this Court's opinion that it would be in the best interests of the minor children to be in the custody of their father, Scott.

Weighing most heavily in this Court's determinations of custody are factors (2), (4), (6),

and (8) of Art. 134. The second factor of Art. 134 deals with each party "capacity and disposition . . . to give the child love, affection, and spiritual guidance and to continue the education and rearing of the child." While each party has the capacity to give the two minor children love and affection and does not question their ability to spiritually guide Wyatt and Chandler, the Court believes there is a definite separation between Scott and Carol concerning the children's education. Under the care and custody of Carol, Wyatt has consistently underperformed academically and Chandler has noted discipline problems. While under the temporary care of Scott, Wyatt performed quite well academically and testimony was presented of Chandler's improved behavior in school and on the school bus.

The fourth factor concerns the time the children have lived in a stable environment and the desirability of maintaining said environment. Louisiana C.C. Art. 134(4). While Wyatt and Chandler have lived the majority of their lives with Carol, the Court finds that this time recently has not been stable. At her previous residence Carol left the two minor children alone at least four times, one of which Wyatt was lured from the home. Carol sought to remedy this by buying a new home. However she has bought this home with a man the Court has forbidden to be around the children. The Court finds that sufficient evidence was produced that Mr. Guidry has been in the home with the children and that Carol has left the children unattended. These facts fail to convince the Court that Carol's home is a stable environment that is desirable of maintaining. This factor also favors custody be given to Scott.

The moral fitness of the parties and its effects on the welfare of the children also weighs heavily in this Court's decision. Louisiana C.C. Art. 134(6). On its face the evidence before the Court does not bring into the question of the moral fitness of either party themselves. Neither Scott nor Carol has done anything morally reprehensible that could harm the children in the eyes of the Court. However the Court must take notice that Carol does live with a man whose continuing actions affirm the Court's determination that it is against the best interest of the children to be around him. Believing that Mr. Guidry's presence around Wyatt and Chandler is detrimental to their best interests, the Court has forbidden him to be around the children. This order has subsequently been ignored by Carol. Mr. Guidry's testimony was impeached by the computer technical expert. This Court is convinced that it was Mr. Guidry or his agent who attempted to sabotage Scott's professional welfare through defamatory e-mail addressed to his




work sponsor. This Court is also convinced that Mr. Guidry attempted to intimidate one of the witnesses, Mr. Stacks. Mr. Guidry's testimony, his defamatory actions against Scott, as well as his behavior regarding his neighbor together causes the Court to question his moral fitness around the children. Mr. Guidry is a very important part of Carol's life in that he shares a home and a child with her. The Court cannot ignore him when conducting a best interest analysis. Consequently, while not questioning the moral fitness of either parent, the Court questions the moral fitness of Carol's paramour and its effects on Wyatt and Chandler. Louisiana C.C. Art. 134(6). This factor favors Scott.

The last factor weighing heavily in this Court's decision is the eighth factor of Art. 134 concerning the home, school, and community history of the children. In the current custody arrangement, Wyatt and Chandler have no stability at home, school, and in the community. Both children are struggling in school: Wyatt academically and Chandler behaviorally. These problems both improved when placed temporarily in the care of Scott. This factor, as well, favors Scott.

This Court has been provided ample evidence to prove that not only has Scott satisfied his burden under *Bergeron*, but it would also be in the best interest of Wyatt and Chandler to be in the custody of their father Scott under Art. 134. As such it is so ordered that Scott Frank and Carol Frank be given joint custody of their two minor children with Scott named domiciliary parent with reasonable visitation given to Carol. A judgment in accordance with these reasons as well as a joint custody implementation plan agreed upon by the parties shall be presented for a signature to this Court by counsel for Scott Frank.

So ordered this 8th day of March 2006, in Lafayette, Louisiana.

  
PHYLLIS M. KEATY  
DISTRICT COURT JUDGE