NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 CU 0224

BURK ANTHONY CHUTER

VERSUS

SHANON LEIGH HOLLENSWORTH

Judgment Rendered: May 2, 2008

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Appealed from the Family Court
In and for the Parish of East Baton Rouge
State of Louisiana
Suit Number 158,737

Honorable Luke Lavergne, Judge

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Nancy Sue Gregorie Emily G. Andrews Baton Rouge, LA	Counsel for Plaintiff/Appellant Burk Anthony Chuter
Lisa Woodruff-White Baton Rouge, LA	Counsel for Defendant/Appellee Shanon Leigh Hollensworth

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BEFORE: WHIPPLE, GUIDRY, HUGHES, JJ.

GUIDRY, J.

In this action to modify child custody, appellant, Burk Chuter, appeals from the judgment of the trial court awarding him and appellee, Shanon Hollensworth, joint custody of their minor child, with Mr. Chuter designated as the domiciliary parent. For the reasons that follow, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

Ms. Hollensworth and Mr. Chuter were involved in a romantic relationship between May 2003 and November 2004, but were never married. On March 5, 2004, a child was born of this relationship and Mr. Chuter was listed as the child's father on the birth certificate.

On June 16, 2006, Mr. Chuter filed a petition to establish paternity, wherein he requested that Ms. Hollensworth be ordered to submit to DNA testing to determine if the minor child was Mr. Chuter's biological child and that he be awarded sole custody of the child, subject to supervised visitation by Ms. Hollensworth, or alternatively, that he be awarded joint custody, with himself being designated as the domiciliary parent. Thereafter, the parties entered into a stipulation regarding custody on June 26, 2006. The trial court subsequently signed a consent judgment ordering that the parties shall share the physical custody of the minor child in alternating seven day increments, exchanging the child every Sunday.

Thereafter, the parties entered into another stipulation regarding custody of the minor child and the trial court signed a stipulated judgment on February 5, 2007, wherein the court declared Mr. Chuter to be the minor child's biological father and ordered the parties to continue to share physical custody of the minor child in alternating seven day increments, but changed the day of exchange to Wednesday. The parties also submitted a plan for implementation of order of joint custody, which was adopted by the trial court. The plan for implementation

designated the parties as co-domiciliary parents. Additionally, the plan contained a "decompensation" clause, which provided that if Ms. Hollensworth's physical or mental condition became such that it became apparent to Mr. Chuter, upon a reasonable belief, that Ms. Hollensworth was unable to care for the parties' minor child, he shall have the right to unilaterally take physical custody of the child pending a hearing or an emergency rule to be filed within twenty-four hours.

On February 21, 2007, Mr. Chuter filed a rule to change custody, asserting that circumstances had changed to such an extent that it was in the best interest of the minor child that Mr. Chuter be awarded sole custody, or alternatively, that Mr. Chuter be named as the domiciliary parent. Additionally, Mr. Chuter requested that Ms. Hollensworth be ordered to pay child support. Mr. Chuter asserted that he was filing the rule to change custody pursuant to the decompensation clause in the implementation order following a February 18, 2007 incident wherein Ms. Hollensworth's mother called him and advised him that Ms. Hollensworth had that day threatened to commit suicide in front of Ms. Hollensworth's teenage daughter, and while the minor child was playing in another room. The police were called to Ms. Hollensworth's home and Ms. Hollensworth was taken to Earl K. Long Medical Center for examination. Mr. Chuter also filed an application for ex-parte temporary custody on the same date.

The trial court signed an order granting temporary custody of the minor child to Mr. Chuter and granted Ms. Hollensworth supervised visitation, both pending a hearing set for March 6, 2007. On March 6, 2007, the hearing was continued pursuant to a written stipulation. On April 19, 2007, the trial court signed a consent judgment, which reflected the parties' agreement that Mr. Chuter be awarded temporary custody of the minor child pending a trial on the merits, and that Ms. Hollensworth be awarded supervised visitation every Saturday from 12:00 p.m. to 5:00 p.m.

On August 22, 2007, the date of the trial on the rule to change custody, counsel for Ms. Hollensworth filed a motion to continue and for indefinite extension of discovery due to counsel's inability to communicate with Ms. Hollensworth due to an alleged medical condition of Ms. Hollensworth. The trial court denied the motion and following a trial on the merits, the trial court signed a judgment on October 5, 2007, ordering that Mr. Chuter and Ms. Hollensworth shall have joint custody and control of the minor child, with Mr. Chuter designated as the domiciliary parent, and ordering visitation reserved to Ms. Hollensworth until such time when she can show that she is no longer in any institution or that she is stabilized from her diagnosed condition. The trial court pretermitted the issue of child support pending such time as Ms. Hollensworth shows she is gainfully employed. Finally, the trial court specified that the judgment be entered as a default judgment. Mr. Chuter now appeals from this judgment, asserting that the trial court erred in rendering the judgment as a default judgment rather than as a considered decree under Bergeron v. Bergeron, 492 So. 2d 1193 (La. 1986), and that the trial court further erred in failing to award him sole custody of the minor child.

DISCUSSION

It is well settled that a court of appeal may not set aside a trial court's finding of fact in the absence of manifest error or unless it is clearly wrong. Rosell v. ESCO, 549 So. 2d 840, 844 (La. 1989). However, where one or more legal errors by the trial court interdict the fact-finding process, the manifest error standard no longer applies. Evans v. Lungrin, 97-0541, p. 6 (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 of the case and deprive a party of substantial rights. Evans, 97-0541 at p. 7, 708 So. 2d at 735. When a prejudicial error of law skews

the trial court's finding of 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, 97-0541 at p. 7, 708 So. 2d at 735.

In the instant case the trial court rendered the custody judgment as a default judgment based on its determination that sufficient evidence was presented to establish that Ms. Hollensworth was unable to be present for the trial. However, the instant action was before the trial court on a rule to change custody, which is a summary proceeding. See La. C.C.P. arts. 2591, 2592 (8), and 2593. The Louisiana Code of Civil Procedure articles relating to default judgments are inapplicable to summary proceedings, as those articles apply only in ordinary proceedings where an answer is required, but has not been filed,[1] and an answer is not required in a summary proceeding. See La. C.C.P. art. 2593, Official Revision Comment-1960 (d); Succession of Barron, 345 So. 2d 995, 997 (La. App. 2nd Cir. 1977).

Further, even if a default judgment was a proper means by which to render a judgment in a summary proceeding, there is no evidence in the record that the requirements for obtaining a default judgment were complied with. See La. C.C.P. arts. 1701 and 1702. Therefore, we find that the trial court legally erred in rendering the instant judgment as a default judgment.

Generally, when the trial court has committed a legal error that interdicts the fact-finding process, and the record is otherwise complete, the reviewing court should conduct a de novo review. Franklin v. Franklin, 05-1814, p. 8 (La. App. 1st Cir. 12/22/05), 928 So. 2d 90, 94, writ denied, 06-0206 (La. 2/17/06), 924 So. 2d 1021. However, pursuant to La. C.C.P. art. 2164, courts of appeal have the power to remand a case when the interests of justice so require. See Barnhill v. A-1

[1] See La. C.C.P. arts. 1701, 1702, and 1843.

Remodeling, 02-0357, p. 6 (La. App. 1st Cir. 7/2/03), 858 So. 2d 661, 665, writ denied, 03-2159 (La. 11/14/03), 858 So. 2d 419; see also Heyman v. Lewis, 414 So. 2d 787, 792-793 (La. App. 3rd Cir. 1979) (on rehearing). Whether a particular case is remanded to the trial court is a matter over which the appellate court has much discretion and is governed by the particular facts and circumstances of each case. Barnhill, 02-0357 at p. 7, 858 So. 2d at 665.

According to the record, the instant case arises from a February 18, 2007 incident wherein Ms. Hollensworth allegedly threatened to commit suicide while the minor child was in her physical custody. Prior to the February 18, 2007 incident, the parties had entered into a consent judgment whereby they agreed to a joint custody arrangement, sharing equal time with the minor child and with both parties serving as co-domiciliary parents. Mr. Chuter, however, requested in his rule to change custody that he be awarded sole custody of the minor child, or alternatively, that he be designated as the domiciliary parent. Of particular importance to Mr. Chuter was that he receive a custody determination from the trial court which would have the effect of a considered decree under Bergeron.

At the trial on Mr. Chuter's rule, Mr. Chuter presented limited testimony from himself and his mother as to the minor child's general health and happiness and Mr. Chuter's ability to care for the child. Additionally, Mr. Chuter presented the testimony of the officer who was called to Ms. Hollensworth's home on February 18, 2007. Finally, Mr. Chuter introduced a copy of the transcript containing Ms. Hollensworth's testimony from the February 21, 2007 hearing on Mr. Chuter's ex-parte application for temporary custody wherein she refuted all of Mr. Chuter's allegations and testified that she loved and provided care for the child.

However, from February 2007 to the time of trial, Ms. Hollensworth did not have contact with Mr. Chuter or the minor child. According to testimony and

documents introduced into evidence, Ms. Hollensworth had been out of state since late February 2007 with friends and family and had been receiving medical treatment for drug dependency and had recently been diagnosed with bi-polar disease. Although there is no concrete evidence in the record, such as a doctor's opinion or hospitalization records, Mr. Chuter acknowledged in his testimony that he had been made aware of Ms. Hollensworth's recently diagnosed mental condition from a mutual friend that was caring for her and from Ms. Hollensworth's mother. Counsel for Ms. Hollensworth stated that she had communicated via email with a friend with whom Ms. Hollensworth was staying who stated that because of Ms. Hollensworth's condition and treatment, she was unable to return to Louisiana at that time for the trial.

From our review of the limited record and the special circumstances of this case, we find that the interests of justice and the best interest of the minor child require that we remand this matter to the trial court for a determination of custody based upon a more complete record and a current presentation of the facts, particularly regarding Ms. Hollensworth's mental state and her ability to care for the minor child. See Bishop v. Bishop, 457 So. 2d 264, 270-271 (La. App. 3rd Cir), writ denied, 460 So. 2d 1048 (La. 1984); Gilcrease v. Gilcrease, 438 So. 2d 658, 663 (La. App. 2nd Cir.), writ denied, 442 So. 2d 461 (La. 1983). Accordingly, we reverse the judgment of the trial court and remand this matter for a new trial.

CONCLUSION

For the foregoing reasons, the judgment of the trial court awarding joint custody to the parties and designating Mr. Chuter as the domiciliary parent is reversed and this case is remanded to the trial court for a new trial. All costs of this appeal are to be borne equally between the parties.

REVERSED AND REMANDED.