

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

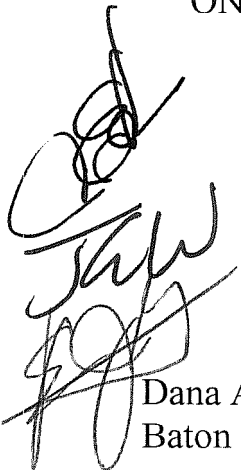
2006 CU 0854

IN THE INTEREST OF THE MINOR CHILD,
POTONG TOM DAVIS

DATE OF JUDGMENT: September 15, 2006

ON APPEAL FROM THE TWENTY-FIRST JUDICIAL DISTRICT COURT
(NUMBER 109925 "E"), PARISH OF LIVINGSTON
STATE OF LOUISIANA

HONORABLE BRENDA BEDSOLE RICKS, JUDGE



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BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

Disposition: REVERSED.

KUHN, J.

Defendant-appellant, Potong Tom Bhramayana, the father of the minor child, Potong Tom Davis, appeals the trial court's judgment, which awards the physical care, custody, and control of his son to the maternal grandmother, Donnie Rene Guillion.¹ The judgment additionally awards specified visitation to the father and sets the matter of father's entitlement to sole custody for review. We reverse.

On November 16, 2005, the father filed a petition for sole custody. Because the only evidence contained in the record is an interview of the minor child by the court, the factual background is limited. The allegations of the petition aver that the minor child was born out of wedlock but the father subsequently acknowledged his paternity. The child resided with his natural mother and his maternal grandmother with the father maintaining frequent visitation. The father paid child support to the mother. In 2000, the mother died. The minor child continued to reside in the maternal grandmother's home along with his half-siblings because, according to the father, he did not prefer to separate the minor from his half siblings. The father paid the maternal grandmother child support and apparently continued regular visitation with his child.

Immediately following Hurricane Katrina, although her premises were not damaged, the maternal grandmother relocated to Pleasant Grove, Alabama. The father of the minor child's half-siblings obtained custody of them and they no longer reside with the maternal grandmother. The father was advised by the

¹ Although throughout the record and in the judgment under review the maternal grandmother is identified as "Renee Guillion," according to her affidavit accompanying an order permitting her to proceed *in forma pauperis*, her full name is Donnie Rene Guillion.

maternal grandmother that neither she nor the minor child would be returning to Louisiana.

On November 29, 2005, the trial court issued an order granting the father provisional custody of his minor child and requiring the maternal grandmother to show cause why sole custody should not be granted to the father. A hearing was held on January 11, 2006. By order of the trial judge, the father picked the child up from school and brought him to the court. The trial judge interviewed the child, which was the only evidence adduced at the hearing.

At the conclusion of the interview, the trial court stated that "it would be in the best interest of the child for him to complete this school year with the grandmother in Alabama." The trial court awarded the father summer visitation and the parties were ordered to work out an arrangement for weekend visitation. Additionally, the trial court ordered a status conference for June 12, 2006, to "review" the custody arrangements.²

A judgment issued on January 31, 2006, in conformity with the trial court's rulings, specifying that the maternal grandmother was "awarded the physical care, custody and control of the minor child" and the father was "granted reasonable visitation." The judgment also ordered "that this matter is set for review on June 12, 2006, 11:00 o'clock a.m." This appeal by the father follows.

The rights of parents to the companionship, care, custody, and management of their children is a fundamental liberty interest warranting great deference and

² The trial court specified that at the June 12, 2006 review, it wanted evidence of the child's grades, activities, church attendance, routine including bedtime, homework assignments, and compliance with restrictions on access to television and computer to ensure that the minor was not viewing any pornography.

protection under the law. *Clark v. Kleidon*, 96-1198, p. 4 (La. App. 3d Cir. 11/6/96), 682 So.2d 887, 890. In a conflict between a parent and a non-parent, the parent enjoys the paramount right to custody of a child and may be divested of that right only for compelling reasons shown by clear and convincing evidence. *Smith v. Tierney*, 2004-2482, pp. 6-7 (La. App. 1st Cir. 2/16/05), 906 So.2d 586, 590. Thus, in an initial custody contest between a parent and a non-parent, the burden of proof is on the non-parent to show that granting custody to the parent would result in substantial harm to the child, thus necessitating an award of custody to a non-parent. La. C.C. art. 133.

The record before us is completely devoid of any evidence demonstrating that substantial harm would result to the child. Because the maternal grandmother failed to present clear and convincing evidence to support her burden of proving that granting custody of the child to the father would result in substantial harm to the child, custody is properly vested in the father. La. C.C. art. 133; *see also Myles v. Moore*, 36,452, p. 6 (La. App. 2d Cir. 8/30/02), 827 So.2d 516, 520.³

The judgment is reversed. Appeal costs are assessed against the maternal grandmother, Donnie Rene Guillion.

REVERSED.

³ It was improper for the trial court to have awarded "physical care, custody and control of the minor child" to the maternal grandmother and to also set the matter "for review on June 12, 2006." There is no authority for a trial court to review a child custody determination *ex proprio motu* and in the absence of the filing of a petition for a change of custody by one of the parties. *See R.J. v. M.J.*, 2003-2676, p. 14 (La. App. 1st Cir. 5/14/04), 880 So.2d 20, 28. While the law grants courts continuing jurisdiction for modification of prior awards, this is only upon an *appropriate showing*. *See Cook v. Cook*, 40,572, p. 4 (La. App. 2d Cir. 1/25/06), 920 So.2d 981, 983. Granting custody to the maternal grandmother and also setting the matter for review at the end of the school year resulted in an inconsistent judgment because it indicates that the trial court had not made a final determination on the father's rule, which is in direct conflict with the rejection of the father's request for sole custody implicit in the purported award of custody to the maternal grandmother.