

NUMBER 06-33

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

DONALD W. CUTTS, ET UX.

VERSUS

JEFFREY WAYNE CUTTS, ET AL.

**Pickett, Judge, dissenting.**

This is a custody dispute between the paternal grandparents and the mother of an eight-year-old child. The paternal grandparents, Donald and Gwendolyn Cutts, have had custody of the child since she was two. In 2003, they filed a Petition for Custody against the mother, Karee Feazell Cutts, and the father, Jeffrey Cutts, who were divorced. Both parents waived appearances and acquiesced to the request by Donald and Gwendolyn. On April 7, 2003, Karee, Jeffrey, Donald and Gwendolyn, as well as the presiding judge, filed a Consent Judgment which awarded Donald and Gwendolyn sole custody of the child subject to reasonable visitation by Karee and Jeffrey.

On August 1, 2005, Karee filed a Rule for Change of Custody seeking revocation of the consent judgment and a judgment awarding custody to her. Following a hearing, the trial court found that the Consent Judgment constituted a voluntary transfer pursuant to La.Ch.Code art. 1510 et seq. Thus, the trial court held that the Karee revoked the voluntary transfer by filing the Rule for Change of Custody, and awarded custody to Karee without any determination of the best interests of the child. The grandparents have appealed.

The majority proposes to affirm the trial court. It decides that is unnecessary to determine if the original Consent Judgment is a voluntary transfer of custody or a non-considered decree. It finds that in either case, the grandparents bear the burden of proving that returning the child to Karee would cause substantial harm to the child, and that Karee does not bear the burden of proving that a change of custody is in the best interests of the child. Finding the record devoid of evidence that Karee would do substantial harm to the child, the majority proposes to affirm.

The question becomes whether the consent judgment should be treated as a voluntary transfer. I have concluded that the answer is unequivocally no. The Children's Code defines "voluntary transfer of custody" in article 1511(4) as follows:

"Voluntary transfer of custody" is a parent's knowing and voluntary relinquishment of legal custody or guardianship to an agency, institution, or individual, subject to residual parental rights retained by the parent and under such terms and conditions that enable the child to receive adequate care and treatment.

Articles 1513 through 1519 explain the procedure to be used in effecting a voluntary transfer. Importantly for this case, article 1515 very specifically sets forth the form of the petition, and article 1516 requires that the individuals accepting custody execute an affidavit indicating that they accept any conditions upon which the transfer of custody is conditioned. Neither form was executed in this matter. The comments indicate that the purpose of these specific forms of pleading is to minimize later disputes. Furthermore, article 1520 is very specific as to the form of the judgment granting a voluntary transfer:

A. The court shall render a written judgment granting or denying the transfer of custody.

B. If the court grants the transfer of custody, the judgment shall recite that:

(1) All necessary parties are involved.

(2) The transfer is knowing and voluntary.

(3) There is a legitimate purpose and a factual basis to support that purpose.

(4) All parties have been advised of and understand the nature and extent of the transfer, including any terms and conditions, and of their respective rights.

(5) The proposed change of custody is in the best interests of the child.

C. In addition, if the order grants the transfer of custody, the judgment shall order the transfer of custody and recite such terms and conditions as requested by the parties.

Even assuming, *arguendo*, that this could be construed as a voluntary transfer of custody, La.Ch.Code art. 1523 clearly states that if the custodians fail to return the child upon revocation of the voluntary transfer, there shall be a contradictory hearing at which the best interests of the child are determined.

Since there is no voluntary transfer, the consent judgment is properly considered a non-considered decree, and should be analyzed under the provisions of La.Civ.Code art. 133. I would remand for a hearing to determine the best interests of the child. For these reasons, I respectfully dissent.