

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 CU 2346

CHRISTY LOU ARMAND

VERSUS

MICHAEL EMANUEL ALTAZAN

DATE OF JUDGMENT: May 2, 2008

ON APPEAL FROM THE EIGHTEENTH JUDICIAL DISTRICT COURT
(NUMBER 53,516 "A"), PARISH OF IBERVILLE
STATE OF LOUISIANA

HONORABLE JAMES J. BEST, JUDGE

* * * * *

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BEFORE: PARRO, KUHN AND DOWNING, JJ.

Disposition: AFFIRMED.

JEK
by RAA
RHP by RAA

RAA

KUHN, J.

Defendant-appellant, Michael Emanuel Altazan, appeals the trial court's judgment, which denies his requests for a modification in custody (naming him the domiciliary parent); a change in the child's name; and an order holding the mother, plaintiff-appellee, Christy Armand Harrison,¹ in contempt of court. We affirm.

By consent judgment, signed on June 14, 2004, the parties, who were never married, agreed to share joint custody of their minor child, naming Harrison as domiciliary parent and awarding to Altazan visitation every other weekend and half of the time during the holidays. In November 2004, Harrison filed a petition seeking *ex parte* temporary custody of the minor child based on allegations of sexual misconduct committed on the child by another biological child of Altazan (the child's half-brother). The trial court granted the order and awarded limited supervised visitation to Altazan on December 29, 2004. The parties subsequently entered into a stipulated judgment, which addressed Harrison's request for *ex parte* custody of their minor child. According to the terms of the stipulated judgment, Altazan had unsupervised visitation in the same manner established in their June 14, 2004 consent judgment, but he could not exercise visitation with the child's half-brother while exercising visitation with the parties' child. The stipulated judgment decreed that Altazan's two children would "not come into contact with each other" until further order of the court.

On October 12, 2005, a hearing officer with the district court issued a recommendation after a "Custody/Visitation" proceeding that was held on October

¹ Subsequent to the filing of the original petition seeking child support, the mother of the child married Gordon Harrison.

4, 2005. Based on the opinion of Dr. Alicia Pellegrin (a court-appointed clinical psychologist) and the fact that Harrison had not completed her evaluation with Dr. Pellegrin, among other considerations, the hearing officer recommended the restrictions on Altazan's visits be lifted and that he resume his visitation "as declared in the previous Judgment of custody and visitation." Because neither party requested a hearing before the district court judge, on October 26, 2005, the recommendation of the hearing officer was decreed a final judgment of the trial court.

On November 15, 2005, Altazan filed the rules presently before the court. After a three-day hearing, held on January 12, 24, and 25, 2007,² the trial court issued a judgment, denying Altazan any of the requested relief. This appeal followed in which Altazan challenges each of the trial court's determinations.³

Every child custody case must be viewed in light of its own particular set of facts and circumstances. *Elliott v. Elliott*, 05-0181, p. 7 (La. App. 1st Cir. 5/11/05), 916 So.2d 221, 226, *writ denied*, 05-1547 (La. 7/12/05), 905 So.2d 293. In a proceeding for custody of an illegitimate child acknowledged by both parents, custody shall be awarded in accordance with the provisions concerning custody incident to divorce, including La. C.C. arts. 131-136. La. C.C. art. 245. The trial

² The matter, which had been set for an earlier hearing date, had been continued when the trial judge to whom it was originally allotted recused himself.

³ Altazan complains that the trial court erred in failing to award him sanctions under La. C.C.P. art. 863 for Harrison's motion *in limine* pleading, ostensibly filed at the commencement of the hearing on his rules, which apparently was denied. Although there is a copy of an opposition memorandum filed by Altazan, the record does not contain a copy of the motion; and nothing in the transcript or the minutes indicate that the motion was filed or the trial court's disposition of the pleading. Appellant was permitted but chose not to timely designate the portions of the record that he desired to constitute the record on appeal. La. C.C.P. arts. 2128 and 2161. More importantly, based on the allegations in his brief and in the opposition memorandum, it is clear the trial court was not manifestly erroneous in denying sanctions. *See Stroscher v. Stroscher*, 01-2769, p. 8 (La. App. 1st Cir. 2/14/03), 845 So.2d 518, 526.

court is in the best position to ascertain the best interest of the child given each unique set of circumstances. Accordingly, a trial court's determination of custody is entitled to great weight and will not be reversed on appeal unless an abuse of discretion is clearly shown. *Elliot*, 05-0181 at p. 7, 916 So.2d at 226.

In most child custody cases, the trial court's determination is based heavily on factual findings. It is well settled that an appellate court cannot set aside a trial court's findings of fact in the absence of manifest error or unless those findings are clearly wrong. *Rosell v. ESCO*, 549 So.2d 840, 844 (La. 1989). If the findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse those findings even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Id.* In order to reverse a fact finder's determination of fact, an appellate court must review the record in its entirety and (1) find that a reasonable factual basis does not exist for the finding, and (2) further determine that the record establishes that the fact finder is clearly wrong or manifestly erroneous. *Stobart v. State*, 617 So.2d 880, 882 (La. 1993).

Altazan claims he is entitled to a presumption that all the allegations asserted in Harrison's petition for *ex parte* temporary custody of the child were false. But he has cited neither jurisprudential nor statutory authority to support such a presumption. Because she dismissed the petition for *ex parte* temporary custody at the outset of the three-day hearing on his rules, Altazan urges that, like the defendant in a malicious prosecution case who bears the burden of showing he acted on probable cause and without malice when the prosecutor dismisses the criminal charges, Harrison should have to prove the validity of the sexual misconduct allegations set forth in the *ex parte* custody petition.

On the record before us, it appears that Harrison's *ex parte* custody petition was the subject matter of the October 4, 2005 proceeding before the hearing officer that resulted in the October 26, 2005 judgment, which "lifted" the restrictions imposed upon Altazan and ordered that his visitation "resume" as declared in the June 14, 2004 consent decree. Thus, on the face of this record, the final judgment signed by the district court judge on October 26, 2005, appears to have addressed Harrison's petition for *ex parte* temporary custody of the child. Neither party appealed that judgment. Moreover, even if we were to assume that Harrison bore the burden of proving the validity of the claims she made, her testimony is sufficient to support that burden.

Altazan next complains that the trial court erred in relying solely on the testimony of Harrison to conclude that sexual misconduct had occurred and that it failed to give proper consideration to the report of a court-appointed expert as well as the in-court testimony of another expert.

A trial court may accept or reject in whole or in part the opinion expressed by any expert. The effect and weight to be given expert testimony is within the broad discretion of the trial court. Further, the rule that questions of credibility are for the trier of fact applies to the evaluation of expert testimony, unless the stated reasons of the expert are patently unsound. *Suazo v. Suazo*, 07-0795, p. 11 (La. App. 1st Cir. 9/14/07), 970 So.2d 642, 650, *writ denied*, 07-2291 (La. 12/14/07), 970 So.2d 539.

Harrison detailed the actions her four-year-old child performed on a two-year-old child. This event was confirmed by the mother of the two year old, who witnessed the event. Harrison explained how she questioned her four-year-old son and testified of his eventual admission of inappropriate sexual conduct with his

older half-brother. Altazan admitted that for over two years, he denied that any sexual misconduct had occurred between the child and the child's half-brother. It was not until the child's half-brother, who is four years older than the child, admitted to Altazan the misconduct had occurred that he believed Harrison's claims. Altazan relies heavily on the experts' distinction between sexual misconduct and sexual abuse, the latter of which both experts believed the child had not suffered. But neither expert had conducted a full evaluation of Harrison before drawing their respective conclusions. And the record clearly supports a finding of sexual misconduct between the child and his half-brother while they were together in the Altazan's physical custody. Thus, the trial court's rejection of the experts' opinions and reliance on the lay testimony was not erroneous.

In his last challenge of the trial court's determination denying a modification in custody to designate him as domiciliary parent, Altazan maintains the trial court failed to consider the evidence submitted in connection with the best interest of the child set forth in La. C.C. art. 134.

Although the parties both present disadvantages in the other acting as domiciliary parent, we find no manifest error in the trial court's factual findings and no abuse of discretion in its decision to deny Altazan's request for a change in custody to designate him as the domiciliary parent. *See Cotton v. Holden*, 422 So.2d 1373, 1375 (La. App. 1st Cir. 1982).

Altazan asserts the trial court erred in its denial of his motion to hold Harrison in contempt of court for violating prior judgments. He complains that Harrison failed to give him advance written notice of a change in address as set forth in the

June 14, 2004 consent judgment. Altazan also challenges the failure of the trial court to hold Harrison in contempt for not allowing him to exercise his visitation.

A constructive contempt of court is any contempt other than a direct one and includes the willful disobedience of any lawful judgment of the court. La. C.C.P. art. 224(2). In order to find a person guilty of constructive contempt, it is necessary to find that she violated the order of the court intentionally, knowingly, and purposely, without justifiable excuse. The trial court is vested with great discretion in determining whether a party should be held in contempt of court and its decision will be reversed only when the appellate court discerns a clear abuse of that great discretion. *Haydel v. Pellegrin*, 07-0922, p. 5 (La. App. 1st Cir. 9/14/07), 970 So.2d 629, 632.

The trial court's finding that Harrison gave Altazan verbal notice is supported by the testimony. Altazan admitted that he had never requested that Harrison reduce verbal notice to writing. Insofar as her failure to permit Altazan visitation with the child, the trial court found that Harrison had "good reason" for her decisions, subsequent to its determination that "some acts of sexual conduct did in fact occur." Given Harrison's reliance on her child's statement indicating that he and his half-brother had engaged in inappropriate sexual behavior and Altazan's admission that he was in "complete denial" that anything of a sexual nature had transpired between his children for over two years, we find no error in the trial court's conclusion that Harrison's violation of the stipulated judgment was justifiable under the facts of this case. The trial court's denial of this rule filed by Altazan is not an abuse of discretion.

Altazan asserts the trial court erred in failing to grant a change of name of the child, urging the parties had previously agreed to do so. He requests an order directing Harrison to institute the necessary steps to change the child's name.

If a child is born outside of marriage, the surname of the child shall be the mother's maiden name. If the father is known and *if both the mother and the father agree*, the surname of the child may be that of the father or a combination of the surname of the father and the maiden name of the mother. La. R.S. 40:34B(1)(a)(iv) as amended by 2003 La. Acts, No. 1239, § 1.

Our review of the record fails to show any "previous agreement" of the parties to change the child's name. As such, Altazan has not established entitlement to a name change. The trial court's denial of his rule requesting the name change is, therefore, not erroneous.

The language used in a brief shall be courteous and free from insulting, abusive, discourteous matter or criticism of any court or judge. Violation of this rule shall subject the author to punishment, including contempt of court. La. U.R.C.A. Rule 2-12.4.

In his zealous representation of his client, counsel for appellant states in his brief that the trial court "failed to appreciate the scope of the issues presented for trial and ignored the larger question of custody and the volume of evidence presented regarding the best interest of the child because of its narrow fixation on the sexual abuse question." He claims that the trial court "initially concluded that there had been sexual abuse of the child and followed a narrow agenda to find evidence to support that conclusion." In brief, counsel for appellant writes,

The Trial Court at the beginning of the trial demonstrated that it did not have an appreciation of the causes of action presented nor the

applicable burdens of proof associated with those causes of action, despite the pleadings filed in the matter including a pre-trial memorandum outlining both causes of action and burdens of proof applicable to the same. The Trial Court's confusion with the causes of action and burdens of proof continued ultimately through its reasons for judgment....

Despite this attack on the trial court, appellant's counsel subsequently acknowledges, "Appellant has not been able to find any jurisprudence to directly address the issue of civil presumptions for the dismissal of allegations of sexual abuse in a custody proceeding." Moreover, our review of the transcript shows us that the trial judge repeatedly stated that he was concerned with the best interest of the child, which clearly indicated an appreciation of the major issue before the court. The brief of appellant's counsel is replete with personal attacks on the trial judge. We find appellant's brief discourteous and insulting toward the trial judge and admonish counsel for this offensive, unprofessional behavior.

DECREE

For these reasons, we issue this memorandum opinion in compliance with La. U.R.C.A. Rule 2-16.1B, affirming the trial court's judgment. Appeal costs are assessed against appellant, Michael Emanuel Altazan.

AFFIRMED.