

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CU 0515

KENTLEY R. FAIRCHILD

VERSUS

CYNTHIA HUGGINS FAIRCHILD

Judgment Rendered: NOV 01 2013

*TMH*  
*AMH*  
*CF*

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On Appeal from the  
32nd Judicial District Court,  
In and for the Parish of Terrebonne,  
State of Louisiana  
Trial Court No. 144,104

Honorable John R. Walker, Judge Presiding

\* \* \* \* \*

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Defendant-Appellant,  
In Proper Person

\* \* \* \* \*

BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ

## HIGGINBOTHAM, J.

In this child custody case, the mother appeals a judgment in which the trial court granted sole custody of the parties' minor children to the father, subject to very limited visitation for the mother. For the following reasons, we affirm in part, reverse in part, and render.

### FACTS AND PROCEDURAL HISTORY

Cynthia Huggins Fairchild and Kentley R. Fairchild were married on June 20, 1988. Three children were born of the marriage, namely Candace Fairchild, who is now a major, Katie Fairchild, and Catherine Fairchild. The parties physically separated in November 2004 and were divorced by a judgment signed on June 16, 2005. In June 2005, the parties stipulated on the record to joint custody of Katie and Catherine on a seven-and-seven day basis with Mr. Fairchild designated as "the primary custodian." This stipulation was never reduced to writing nor made a judgment of the court, but is found in the transcript of the proceeding.

In 1987, prior to her marriage to Mr. Fairchild, Ms. Fairchild was in an automobile accident that resulted in serious injuries, including a severe head injury. She was diagnosed with post-traumatic psychosis. Ms. Fairchild has struggled intermittently with seizures and visual and auditory hallucinations since the accident. According to Ms. Fairchild, her issues worsened due to the stress of going through a divorce and the custody litigation. Ms. Fairchild has attempted suicide three times and is on several medications for seizures, anxiety, hallucinations, and panic attacks.

On November 12, 2010, Ms. Fairchild's son<sup>1</sup> took her to Terrebonne General Medical Center because she was complaining about hearing voices. The emergency room physician at Terrebonne General described Ms. Fairchild as "gravely disabled" and "dangerous to self." She was transferred from Terrebonne General to St. James Behavioral Health Hospital where she was judicially committed. She was discharged

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<sup>1</sup> Her son was not of the marriage between she and Mr. Fairchild but was adopted by Mr. Fairchild.

on December 3, 2010. Ms. Fairchild did not tell Mr. Fairchild she was admitted to the hospital.

After Mr. Fairchild discovered Ms. Fairchild was hospitalized, he filed an *ex parte* request for sole custody of the children on November 30, 2010. In his petition he alleged that Ms. Fairchild has “severe medical issues, both mental and physical,” has “experienced psychotic episodes with auditory and visual hallucinations,” and the minor children would be in imminent danger if they were allowed to remain with Ms. Fairchild. On that day, an order was signed giving Mr. Fairchild temporary sole custody of the minor children with no visitation awarded to Ms. Fairchild. On December 22, 2010, Ms. Fairchild filed a petition requesting that she be granted sole custody of the minor children. In an interim judgment signed on January 10, 2011, Mr. Fairchild retained sole custody of the minor children and Ms. Fairchild was given visitation every Saturday from 2:30 p.m.-6:00 p.m.

The matter came for a full custody trial on May 9, 2011, May 10, 2011, and June 9, 2011. After trial, judgment was signed on June 23, 2011, granting sole custody to Mr. Fairchild. Ms. Fairchild was granted five hours of visitation per week and alternating visitation on the major holidays.

It is from this judgment that Ms. Fairchild appeals, contending that the trial court erred in awarding sole custody to Mr. Fairchild and erred in awarding her limited visitation.

## **DISCUSSION**

### **I. CUSTODY**

Louisiana Civil Code article 132 provides as follows:

If the parents agree who is to have custody, the court shall award custody in accordance with their agreement unless the best interest of the child requires a different award.

In the absence of agreement, or if the agreement is not in the best interest of the child, the court shall award custody to the parents jointly; however, if custody in one parent is shown by clear and convincing

evidence to serve the best interest of the child, the court shall award custody to that parent.

Only in exceptional controversies is the clear and convincing standard applied in civil cases where there is thought to be special danger of deception, or where the court considers that the particular type of claim should be disfavored on policy. **Talbot v. Talbot**, 2003-0814 (La. 12/12/03), 864 So.2d 590, 598. To prove a matter by clear and convincing evidence means to demonstrate that the existence of a disputed fact is highly probable, that is, much more probable than its nonexistence. **Harper v. Harper**, 33,452 (La. App 2d Cir. 6/21/00), 764 So.2d 1186, 1190.

In determining the best interest of the child, the court shall consider all relevant factors, and such factors may include those enumerated in La. Civ. Code art. 134:

1. The love, affection, and other emotional ties between each party and the child.
2. The capacity and disposition of each party to give the child love, affection, and spiritual guidance and to continue the education and rearing of the child.
3. The capacity and disposition of each party to provide the child with food, clothing, medical care, and other material needs.
4. The length of time the child has lived in a stable, adequate environment, and the desirability of maintaining continuity of that environment.
5. The permanence, as a family unit, of the existing or proposed custodial home or homes.
6. The moral fitness of each party, insofar as it affects the welfare of the child.
7. The mental and physical health of each party.
8. The home, school, and community history of the child.
9. The reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference.
10. The willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party.
11. The distance between the respective residences of the parties.
12. The responsibility for the care and rearing of the child previously exercised by each party.

The best interest of the child test is a fact-intensive inquiry, requiring the weighing and balancing of factors favoring or opposing custody in the competing parties on the basis of the evidence presented in each case. Every child custody case is to be viewed on its own particular set of facts and the relationships involved, with the paramount goal of reaching a decision which is in the best interest of the child.

The trial court is vested with broad discretion in deciding child custody cases. Because of the trial court's better opportunity to evaluate witnesses, and taking into account the proper allocation of trial and appellate court functions, great deference is accorded to the decision of the trial court. A trial court's determination regarding child custody will not be disturbed absent a clear abuse of discretion. **Martello v. Martello**, 2006-0594 (La. App. 1st Cir. 3/23/07), 960 So.2d 186, 191-92.

In awarding sole custody to Mr. Fairchild, the trial court reviewed each of the factors of Article 134 and concluded that the clear and convincing evidence before the court proved that awarding sole custody to Mr. Fairchild was in the children's best interest. In so concluding, the trial court discussed its concern with Ms. Fairchild's physical and mental health. The trial court was especially concerned about Ms. Fairchild having a seizure while the children were in her care. According to the record, Ms. Fairchild frequently speaks negatively about Mr. Fairchild to the children and others, makes accusations about him, and is unwilling to cooperate with Mr. Fairchild. The trial court found this behavior by Ms. Fairchild has made co-parenting with her very difficult. The trial court was also concerned about Ms. Fairchild's financial well-being.

Since the parties divorced, Ms. Fairchild has accused Mr. Fairchild of poisoning the children, kidnapping the children, physically abusing Catherine, and molesting Katie. None of these accusations have been verified. Recently, Ms. Fairchild missed Katie's award ceremony speech despite being reminded of the event by Katie. Ms. Fairchild currently has no relationship with her oldest child Candace, and has not since Ms. Fairchild pushed Candace out of her van at Mr. Fairchild's parents' house in 2005.

The trial court heard from several witnesses regarding custody of Katie and Catherine. Many witnesses discussed the amount of time that Ms. Fairchild sleeps, including her having to pull off the road to rest when driving, and sleeping during the

children's athletic events. Ms. Fairchild's son in April 2010 took her to the doctor and said she was walking around "like a zombie." Ms. Fairchild's condition has made her unable to obtain work.

Judge Bethancourt, whose daughter is a friend of Katie, testified that Ms. Fairchild was "not very reliable or responsible." He further stated she once sent a threatening email to his wife stating that her son would "take care of business." Mr. Richard Barber, who coaches the girls in softball, also described Ms. Fairchild's unusual behavior at the children's softball games where on one occasion Ms. Fairchild called Mr. Fairchild and accused him of kidnapping the children. Ms. Kimberly Chauvin, Mr. Fairchild's sister, testified that after the parties divorced, she went to Ms. Fairchild's home and found it in complete disarray with Ms. Fairchild balled up on the couch saying, "I can't take care of the kids." She also witnessed Ms. Fairchild attempt suicide by rubbing a knife across her wrist while repeating, "I can't take it anymore." Mr. Fairchild testified that Ms. Fairchild's erratic behavior has made it very difficult for the to make any decisions regarding the children together. Mr. Fairchild also stated that Ms Fairchild tried to bribe the children with clothes and pets to come live with her.

Dr. Kenneth Gaddis, Ms. Fairchild's neurologist, admitted during cross examination that it would be dangerous if Ms. Fairchild stopped taking her medication. Dr. Susan Glade, Ms. Fairchild's psychologist, stated that in the past she has had trouble getting Ms. Fairchild to take her medication. Ms. Fairchild admitted in brief she was "off the voices medication." However, Dr. Glade also testified that Ms. Fairchild has never done anything to harm her children and loves them very much.

As stated by the trial court, this is a very difficult case. Ms. Fairchild clearly loves her children very much and wants to be involved with them. However, the standard by which this court is bound is the best interest of the children. Ms.

Fairchild struggles with mental and physical health problems that are not her fault, and as a result of her health issues, she has exhibited impulsive and unpredictable behavior that has negatively affected the children and made co-parenting difficult. Further, Ms. Fairchild's behavior is not conducive to promoting a close and continuing relationship between the children and their father.

Based on the evidence, we cannot find that the trial court's award of sole custody to Mr. Fairchild was a clear abuse of discretion.

## II. VISITATION

Ms. Fairchild also contends that the trial court was in error in awarding her limited visitation. In the judgment, Ms. Fairchild was awarded "at least five hours a week," and was ordered not to drive with the minor children or leave Terrebonne Parish. The judgment further stated that the "minor children shall be able to visit with their mother at other times mutually agreed upon by the parties." No specific times were set for the weekly visitation to occur. A holiday visitation schedule was also implemented, which gave Ms. Fairchild daytime visitation on several enumerated holidays on an alternating schedule.

Louisiana Civil Code article 136(A) provides, "a parent not granted custody or joint custody of a child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would not be in the best interest of the child." Our jurisprudence emphasizes that the best interest of the child is the sole criterion for determining a noncustodial parent's right to visitation. **Anderson v. Brown**, 34,474 (La. App. 2d Cir. 2/28/01), 781 So.2d 744, 747. The trial court has discretion to impose conditions on visitation, including ordering supervised visitation, in order to minimize the risk of harm to a child. See Harper v. Harper, 33,452 (La. App. 2d Cir. 6/21/00), 764 So.2d 1186, 1191. See also Fountain v. Fountain, 93-2176 (La. App. 1st Cir. 10/7/94), 644 So.2d 733, 737-38.

The trial court did not give reasons for granting Ms. Fairchild a minimal amount of time with the children, and it appeared from the record that it continued with the pre-trial visitation schedule without considering whether giving Ms. Fairchild's additional visitation would be in the children's best interest. The trial court did not order Ms. Fairchild's visitation to be supervised, and thus must not have considered Ms. Fairchild as a danger to the children. As noted by the trial court, the children are of sufficient age that if Ms. Fairchild has health issues in their presence, they are able to take care of themselves.

Although we do not find that the trial court abused its discretion in awarding five hours a week and any additional time the parties mutually agree to, such an award left the time the visitation was to occur solely to Mr. Fairchild's discretion. Because of the acrimonious relationship between Mr. and Mrs. Fairchild and this bitterly contested custody battle there is no reason to believe that the parties are capable of agreeing on specific times for the visitation<sup>2</sup>. Under these circumstances, we conclude that the trial court abused its discretion in failing to implement a specific visitation schedule for the parties.

For these reasons, we remand this matter to the trial court to implement a specific visitation schedule for Ms. Fairchild that is in the best interest of the children. See Humphrey v. Humphrey, 614 So.2d 837, 846 (La. App. 2nd Cir. 1993).

### **CONCLUSION**

For the foregoing reasons, the case is remanded for a determination of a specific visitation schedule. In all other respects, the judgment of the trial court is affirmed. All costs of the appeal are assessed equally to the parties.

**AFFIRMED IN PART, REVERSED IN PART AND REMANDED.**

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<sup>2</sup> We understand that the trial court was trying to allow the parties flexibility because of the busy schedule of the minor children; however, because of the nature of this case we do not find that justifies not providing a specific visitation schedule.