

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2018 CU 1192

TODD ANTHONY FORET, JR.

VERSUS

SARAH GRAVOIS FORET

Judgment rendered December 21, 2018.

Appealed from the
32nd Judicial District Court
In and for the Parish of Terrebonne, State of Louisiana
Trial Court No. 174792
Honorable Randall L. Bethancourt, Judge

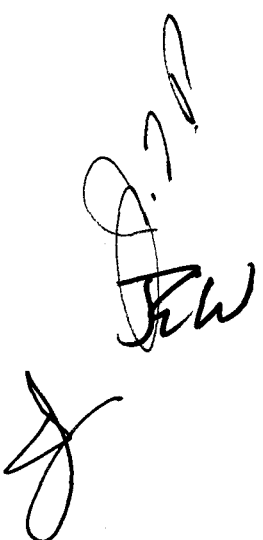
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TODD ANTHONY FORET, SR. AND
TANYA FORET

BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.



PETTIGREW, J.

In this case involving a petition for grandparent visitation, the father of the minor child appeals a trial court judgment ordering visitation with both the paternal grandparents and a paternal aunt. For the reasons set forth herein, we amend the judgment to remove the provision granting visitation with the child to the paternal aunt, and, as amended, affirm.

FACTS AND PROCEDURAL HISTORY

Todd Anthony Foret, Jr. (T.J.) and Sarah Gravois Foret Gaspard were married on October 16, 2010, and had one child, Liam Aaron Foret, born April 30, 2013. They were divorced by judgment dated April 14, 2016, and had joint custody of Liam.

Liam's paternal grandparents, Todd Anthony Foret, Sr. ("Todd") and Tanya Foret ("Tanya"), were very involved in his life from the time of his birth. Tanya was in the delivery room when Liam was born, and thereafter saw him several times a week. Tanya frequently babysat Liam while T.J. and Sarah worked, and T.J. and Sarah also brought Liam to visit Todd and Tanya whenever Todd was not working. When T.J. and Sarah filed for divorce in June 2015, T.J. and Liam moved in with Todd and Tanya for approximately three months, and Tanya continued babysitting Liam while T.J. worked. In August 2015, T.J. met his second wife, Mikki, and frequently left Liam with Todd and Tanya on the weekends so that he could spend the weekend at Mikki's house. T.J. and Liam moved in with Mikki in September 2015.

In the summer of 2016, shortly after T.J. and Mikki were married, T.J. became angry with Todd and Tanya. T.J. stopped speaking to them and refused to allow them to see Liam anymore. However, Todd and Tanya maintained a good relationship with Sarah and were still able to see Liam when he was with Sarah, despite the fact that T.J. instructed Sarah not to allow his parents to see Liam.

On November 3, 2016, after Liam returned from Sarah's house with bruises, T.J. filed a Petition for Protection from Abuse against Sarah, alleging that Sarah "knowingly or unknowingly allowed physical abuse to [Liam]." Sarah and her husband were arrested and charged with cruelty to juveniles, a felony. T.J. was awarded temporary custody of

Liam and filed a rule for sole custody of Liam based on the alleged abuse. Sarah and her husband were eventually found not guilty of the felony charges, and although Sarah regained joint custody and attempted reconciliation with Liam, the parties ultimately entered a consent judgment in October 2017, whereby T.J. was awarded sole legal and physical custody of Liam, with visitation by Sarah at T.J.'s discretion.

Amid the allegations of abuse against Sarah and her husband, T.J. reconciled with Todd and Tanya and allowed them to see Liam again. T.J. explained that the problems he had with his parents had not been resolved, but he needed their help babysitting Liam during that time. T.J. also asked his parents for financial help with the costs of the custody litigation, but said they did not offer to help him. T.J. also went to his parents when he had problems with his marriage to Mikki. On one occasion, T.J. called his mother to tell her that he and Mikki had been fighting and that she punched him in the mouth. In June 2017, T.J. asked Tanya if he and Liam could move back in with her and Todd because he might be getting a divorce. Todd and Tanya agreed, but T.J. and Mikki reconciled, and T.J. did not move back in.

In July 2017, T.J. became angry that his parents were intruding into his life and cut off all contact with his parents once again. On October 27, 2017, Todd and Tanya filed a petition for intervention requesting visitation with Liam. The petition alleged that Todd and Tanya had always had "very liberal" visitation with Liam, often keeping him many days a month, and Liam had lived in their house for several months. Todd and Tanya alleged that T.J.'s unilateral decision to remove them from Liam's life was detrimental to the child, and they requested that the trial court grant them visitation with Liam.

An interim consent judgment was signed by the trial court on December 13, 2017, granting visitation to Todd and Tanya every other weekend; ordering the parties not to harass each other or disparage each other in front of Liam; and ordering T.J. to allow Todd and Tanya reasonable and frequent communication with Liam via phone or Facetime.

A contradictory hearing was held on Todd and Tanya's petition for visitation on February 27, 2018, at which the trial court heard testimony from T.J., Mikki, Sarah, Todd,

Tanya, Nicole Foret Boquet (T.J.'s sister), Angela Portier (Tanya's sister), and Dawn Toups, L.P.C.

T.J. testified that from the time Liam was born, he had disagreements with his mother because she was overbearing, undermined his authority with Liam, and did not respect his parenting decisions. T.J. said that Tanya did not respect his instructions not to talk to Liam about religion; did not comply with his requests that Liam sleep by himself and feed, bathe, and dress himself; and refused to follow his instructions for the care of Liam's eczema. T.J. explained that he "tried to confront her about it a couple of times . . . [a]nd every time that I would go talk to her, I couldn't get through to her to understand . . . what she was doing. So I'd usually back down and just leave it be until the next time." Despite his testimony that he had problems with Todd and Tanya from the time of Liam's birth, T.J. lived with them for several months, went to them with his marital problems, and used them as babysitters for much of Liam's life.

Once T.J. moved in with Mikki, he allowed her to take over Liam's care, despite awareness of her mental health and other serious health issues. T.J. testified that Mikki takes Xanax "as needed" for depression and anxiety, and that she has told him that she is bipolar. T.J. also testified that during his marriage to Mikki, she suffered a stroke and was diagnosed and treated for breast cancer, but he did not know who her doctors were or any details of her conditions because he does not like to pry. T.J. admitted that he settled his custody case with Sarah on the advice of his former attorney because of a concern that Mikki could not pass a psychological evaluation.

T.J. testified that visitation two weekends a month and frequent telephone or Facetime communication between Liam and his grandparents was an invasion into his family's life. T.J. explained that the weekend visitation schedule ordered by the trial court has been burdensome for his family because Liam is in school during the week, so T.J. does not see him very much on weekdays. However, T.J. admitted that he works extra shifts on the weekends to make more money, and usually tries to do this on the weekends that his parents have Liam. T.J. also complained that the weekend visits make Liam more difficult to handle when he gets home, because Todd and Tanya do not follow

his rules, requiring him to retrain Liam when he gets home. Although T.J. admitted that Liam seemed to like visiting his grandparents at first, he said that Liam eventually got tired of it because he realized he was missing out on other things during those weekends. T.J. also claimed that Liam became aggravated by his grandparents calling all the time when he was playing video games or did not want to talk, so T.J. told him that he could just say goodbye and hang up on them when he did not want to talk.

Sarah testified that Todd and Tanya's relationship with Liam was "beautiful" and that they saw him frequently since the day he was born and did everything possible for him. Sarah admitted that Tanya was a bit overbearing, but she felt that Tanya was just a concerned grandparent, so she never lashed out at her. After T.J. and Sarah were divorced, Sarah maintained a good relationship with Todd and Tanya and continued to let them see Liam during her custody periods, because Liam loved being with his grandparents and she believed it would be harmful to Liam if they were removed from his life. Sarah testified that she ultimately agreed to give sole custody of Liam to T.J. because T.J. and Mikki had falsely accused her and her husband of abusing Liam, and even after they were finally acquitted of the felony charges, she "lived in fear that stories would be fabricated against us." Sarah believes Mikki had mental health issues and fears for Liam's safety in her care.

Although Tanya kept Liam while his parents worked for most of his life, once T.J. and Mikki got married, Mikki became one of Liam's primary caregivers. Regarding her mental health, Mikki testified that she takes Xanax daily for anxiety; she suffers from depression, but does not take medication for it; and she has talked to a doctor about "possibly having bipolar disorder." Additionally, she was banned from flying after she "freaked out" during a flight, which resulted in the plane having to land so that she could be removed, and she carries a knife in her purse for protection due to fear of being mugged. In addition to mental health issues, Mikki testified that she has had several serious health problems since she began caring for Liam. She testified that she suffered a stroke at age 27 or 28, which did not leave any permanent damage, and for which the treatment was "[p]retty much nothing," except the doctor telling her to "take it easy."

Mikki also testified that she was diagnosed with breast cancer in December 2016, and although she was unable to remember her doctor's name, she testified that she had "one round of chemo, and . . . surgery to remove the tumor" at Mary Bird Perkins Cancer Center.

Mikki testified that Liam has behavioral problems, which are exacerbated by being with Todd and Tanya. She claimed Todd and Tanya manipulate Liam, causing anxiety; tell him to lie about their refusal to follow T.J.'s rules; and tell him that he does not have to call her "mama" and does not have to love her. Mikki has told family members that she was considering reform school or a psychiatric facility for four-year-old Liam, due to his disciplinary issues.

Mikki described Tanya as very controlling, overbearing, malicious, and nosy. Despite this, Mikki testified that she has always been kind to Todd and Tanya. Mikki testified that Liam has told her that he hates Todd and Tanya, and she believes that he does not love them and does not want to spend time with them. She denied that she had done anything to turn Liam against them. Despite her assertion that she does not attempt to alienate Liam from his grandparents, she admitted that she does not encourage Liam to talk to them on the phone or go to visits with them, because it is not her job. Mikki also denied that she ever told Liam that the litigation instituted by Todd and Tanya is the reason that they cannot afford to go places or do things, and is the reason that they may lose their house and car, but she said that he is smart and has figured that out for himself. Additionally, Mikki told Liam that he could not see his other family members for Christmas because the judge said he had to go visit Todd and Tanya; she refused to give Todd and Tanya Liam's coat for a visit when it was cold, and told them in front of Liam that they had money and could buy their own coat; and she accused Tanya in front of Liam of not caring that she was making Liam's eczema worse by not following their rules about laundry detergent.

Tanya testified that from the time he was born, she and Todd saw Liam at least twice a week and babysat him while his parents worked. Her family spent holidays together, went to a family camp together, and had Sunday dinners together. After T.J. and

Sarah separated, T.J. and Liam moved into her house, so she saw him even more frequently. She and Todd had their house set up for a child, since Liam spent so much time there.

Once Mikki came into the picture, their relationship with T.J. started to change, and he started pulling away from his parents. Tanya was concerned about things T.J. told her about his marital problems with Mikki and about an incident where Mikki threatened to leave Liam home alone. In July 2017, T.J. cut off all contact with his parents and refused to allow them to see Liam after becoming angry when Tanya showed up at his house uninvited. T.J. told Tanya that he believed she called too much, texted too much, was overly involved, and was overly religious. After several months of being unable to resolve matters so that they could see Liam, Todd and Tanya filed the petition seeking visitation.

Since the court proceedings began and Todd and Tanya were able to see Liam again, Tanya testified that she has noticed a change in Liam's behavior towards them. Although he was initially excited to Skype with them, more recently, when they called to talk to Liam, he told them he did not want to talk to them and hung up on them. Liam told Tanya that T.J. and Mikki said that she calls too often. Liam also told Tanya that he had family day at his school and he wanted them to go, but no one came. Todd and Tanya were also excluded from Grandparents' Day at Liam's school and from his baptism.

Todd testified that he has always had a good relationship with Liam, and used to keep him six to eight days a month until T.J. cut off contact. Todd denied that he and Tanya had ever intentionally undermined T.J., and said that they are willing to follow his rules for Liam; they just want to be a part of Liam's life as they always have been.

Nicole Foret Boquet, T.J.'s sister, testified that her parents were very involved with Liam his entire life, and they had him almost every weekend since he was a baby. Prior to Mikki coming into T.J.'s life, Nicole said their family was very close, but she believes that Mikki manipulated T.J. into cutting his family out of Liam's life. Although Nicole once lived with T.J., Mikki, and Liam, she moved out after a few days because she was uncomfortable around Mikki. T.J. eventually cut off contact with Nicole as well, telling her she did not deserve to see Liam.

Angela Portier, Tanya's sister and T.J.'s godmother, testified that she was very close to T.J. until he met Mikki and eventually cut off all contact with her. Prior to this, the family spent a lot of time together. Angela would see Liam two or three times a month or more, and she said that Todd and Tanya kept him six to eight times a month on average. She described Liam's relationship with Todd and Tanya as a loving relationship and said that Liam adores his grandparents.

Dawn Toups, L.P.C., first began seeing Liam when the abuse allegations were made against Sarah and her husband. She testified that she began seeing him again when "Liam was being forced to go and visit or . . . something by TJ's parents." Toups met with T.J., Mikki, and Liam during the course of her counseling of Liam, but admitted that she never met Todd and Tanya. She observed that Liam spoke negatively about Todd and Tanya and he told her that he wanted a break from the visits with his grandparents. Dawn suspected that Liam has overheard things at home about the litigation and is trying to be loyal to T.J. She believed that the things he has overheard are having a detrimental effect on him and are causing anxiety. At the hearing, Dawn testified that she believed T.J. and Mikki were "fit parents;" and although she did not think the grandparents should be cut out of Liam's life, she did not think it was in a child's best interest to be forced to do things they do not want to do, such as visiting and talking on the phone to his grandparents.

After the contradictory hearing, the trial court issued an Interim Judgment, appointing an attorney to represent Liam pursuant to La. R.S. 9:345, and setting a status hearing for May 7, 2018. The Interim Judgment awarded visitation every other weekend to Todd and Tanya, ordered the parties not to disparage one another, not to attempt to estrange Liam from one another, and not to discuss the court proceedings or money with or in front of Liam. The court also ordered that Todd, Tanya, and Nicole be invited to all school events and be allowed to have lunch at school with Liam, when allowed by the school.

After a review hearing, at which the trial court heard a report from the attorney appointed to represent Liam, the trial court found that extraordinary circumstances exist

and it was in Liam's best interest for Todd and Tanya to have visitation with him every other weekend and for one week during the summer. The trial court awarded visitation to Todd and Tanya every other weekend and for one week during the summer, and ordered Todd and Tanya to notify T.J. if they were leaving the parish with Liam during a visit. The remaining provisions of the judgment were essentially the same as the Interim Judgment.

T.J. appealed, assigning the following trial court errors:

1. The Judgment of the trial court was manifestly erroneous and clearly wrong in finding that "extraordinary/exceptional circumstances" existed which justified granting the paternal grandparents' visitation rights over the objection of the father who had been granted the sole custody of the minor child.

2. The Judgment of the trial court was manifestly erroneous, clearly wrong and an abuse of discretion in that by allowing the paternal grandparents' visitation rights over the objection of the father, it intrudes upon a fit parent's constitutionally protected fundamental right of privacy in child rearing.

DISCUSSION

Every child custody case must be viewed within its own peculiar set of facts. **Galjour v. Harris**, 00-2696, p. 5 (La.App. 1 Cir. 3/28/01), 795 So.2d 350, 353, **writ denied**, 01-1238 (La. 6/1/01), 793 So.2d 1229, and **writ denied**, 01-1273 (La. 6/1/01), 793 So.2d 1230, **cert. denied**, 534 U.S. 1020, 122 S.Ct. 545, 151 L.Ed.2d 422 (2001). The trial court is vested with vast discretion in matters of child visitation, and its determination regarding same is entitled to great weight and will not be disturbed on appeal unless an abuse of discretion is clearly shown. **Shaw v. Dupuy**, 06-0546, pp. 2-3 (La.App. 1 Cir. 2/9/07), 961 So.2d 5, 6, **writ denied**, 07-0505 (La. 3/21/07), 951 So.2d 1092. 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.**

The judgment being appealed in this matter states that "the court finds that pursuant to La. R.S. 9:344 and La. C.C. Article 136, exceptional [sic] circumstances exist,

and it is in the best interest of the minor child, Liam Foret, that the grandparents, Todd and Tanya Foret, shall have visitation.”

Initially, we note that La. R.S. 9:344 is inapplicable to the facts of this case, since Liam’s parents are divorced. Section 9:344 provides for grandparent visitation where a parent has died, is interdicted, or is incarcerated, or in extraordinary circumstances where “the parents of a minor child of the marriage have lived apart for a period of six months.” Section 344(D) is not intended to apply once the parents of the child have filed for divorce. See **McGovern v. McGovern**, 15-737, p. 4 (La.App. 5 Cir. 3/30/16), 189 So.3d 503, 505, n.2 (La. R.S. 9:344 applies to visitation with a minor child “of the marriage,” which contemplates a situation where the parents of the child have not yet filed a petition for divorce.)

Article 136(B), on the other hand, provides for grandparent visitation under certain circumstances where the parents of the child are not married and not living in concubinage or they have filed a petition for divorce. Although at the time of the hearing in this matter, Article 136 did not explicitly state that it is only applicable to cases where the parents of the child are either not married or cohabiting in the manner of married persons, or have filed a petition for divorce, Article 136 has been held to be inapplicable in situations where the parents of the child are not separated or divorced and no suit for custody of the children is pending. See **Galjour**, 00-2696 at pp. 6-7, 795 So.2d at 355 (holding that Article 136, which is located in Title V of the Civil Code, dealing with divorce, contemplates a grant of visitation to relatives upon the parents’ divorce, if it is in the best interest of the children, and is inapplicable to situations where the parents are not separated or divorced); see also **Lingo v. Kelsay**, 94-1038, p. 2 (La.App. 3 Cir. 3/1/95), 651 So.2d 499, 500 (holding that Article 136 is inapplicable to situations where the parents are not separated or divorced); and **McCarty v. McCarty**, 559 So.2d 517, 518 (La.App. 2 Cir. 1990) (holding that a grandparent visitation article located in Title V of the Civil Code, dealing with separation and divorce, is inapplicable to situations where the parents are not separated or divorced and no suit for custody is pending).

Furthermore, Article 136 was amended after the filing of the petition in this matter by 2018 La. Acts, No. 383, § 1, effective August 1, 2018, to explicitly state that grandparent visitation may be granted under the article where the parents of the child are not married, are not living in concubinage, or have filed for divorce; but where the parents of the child are married and have not filed for divorce, or where they live in concubinage, the provisions of La. R.S. 9:344 apply to the issue of grandparent visitation. La. C.C. art. 136(B)(1) & (E).

Article 136(B) provides that a court may grant reasonable visitation rights to a grandparent, if the court finds that it is in the best interest of the child. La. C.C. art. 136(B). Additionally, under extraordinary circumstances, any other relative may be granted reasonable visitation rights if the court finds that it is in the best interest of the child. La. C.C. art. 136(C). In determining the best interest of the child for these purposes, the court is to consider the following factors:

1. The length and quality of the prior relationship between the child and the relative.
2. Whether the child is in need of guidance, enlightenment, or tutelage which can best be provided by the relative.
3. The preference of the child if he is determined to be of sufficient maturity to express a preference.
4. The willingness of the relative to encourage a close relationship between the child and his parent or parents.
5. The mental and physical health of the child and the relative.

La. C.C. art. 136(D)¹

A grandparent, as a statutorily designated person permitted to seek visitation under Article 136, is not required to prove extraordinary circumstances, but must only show that the visitation sought is reasonable and in the child's best interest. See

¹ The list of factors for the court to consider in determining the best interest of the child for purposes of visitation was amended by 2018 La. Acts, No. 383, §1, effective August 1, 2018. This amendment stated that the enumerated factors were to be the only factors considered by the court, and added as a factor for the court to consider "A parent's fundamental constitutional right to make decisions concerning the care, custody, and control of their own children and the traditional presumption that a fit parent will act in the best interest of their children." The amendment also removed "[t]he willingness of the relative to encourage a close relationship between the child and his parent or parents" as a factor for the court to consider.

McGovern, 15-737 at p. 7, 189 So.3d at 507-08. The trial court is in the best position to ascertain the best interest of the child given each unique set of circumstances. **Galjour**, 00-2696 at p. 5, 795 So.2d at 354. Given the particular circumstances of this case, especially the length and quality of the prior relationship between Todd, Tanya, and Liam, we cannot say that the trial court erred in concluding that visitation with Todd and Tanya was in Liam's best interest. And considering the significant amount of time that Liam spent with Todd and Tanya for most of his life prior to the estrangement between T.J. and Todd and Tanya, we cannot say that the visitation awarded is unreasonable.

Although Todd and Tanya were not required to prove the existence of extraordinary circumstances in order to be eligible for visitation under Article 136, the threshold requirement of extraordinary circumstances was still required for the court to award visitation under the Article to "any other relative," such as Nicole. Although Nicole was not a party to the proceedings and the petition did not include her request for visitation, the trial court, after finding that extraordinary circumstances existed and that it was in Liam's best interest, ordered T.J. to allow Nicole to visit with Liam at school, when allowed by the school.

Article 136 does not define "extraordinary circumstances." However, this court has held that the "extraordinary circumstances" sufficient to warrant an award of visitation under Article 136 should be those that constitute a highly unusual set of facts not commonly associated with a particular thing or event. **Shaw**, 06-0546 at p. 4, 961 So.2d at 7. Although we agree with the trial court's finding that extraordinary circumstances exist in this case, the record supports a finding of extraordinary circumstances only as to Todd and Tanya. Although Nicole testified that her family used to be very close and that she was "very involved" with Liam as he grew up, her testimony did not amount to a highly unusual set of facts, especially considering the fact that she visits with Liam now during her parents' visitation periods. Because we believe that the trial court's finding that extraordinary circumstances exist with respect to Nicole is not supported by the evidence, the portion of the judgment awarding visitation to Nicole is in error. As such,

the judgment of the trial court is amended to remove the requirement that T.J. allow Nicole to visit Liam at his school.

T.J. also argues that the trial court's award of visitation intrudes upon his constitutionally protected fundamental right of privacy in child rearing. This court has held that, in considering the best interest of the child, the trial court must be aware that as nonparent visitation increases, the infringement and burden on the parent's fundamental right of privacy in child rearing increases proportionally. Visitation that unduly burdens parental rights would be unconstitutional, regardless of the provisions of statutory law. **Wood v. Wood**, 02-0860 (La.App. 1 Cir. 9/27/02), 835 So.2d 568, 573, **writ denied**, 02-2514 (La. 3/28/03), 840 So. 2d 565. T.J. has argued that the visitation awarded by the trial court is burdensome and intrusive into his family's life because it limits the amount of time he can spend with Liam on the weekends. This argument seems disingenuous, considering the amount of time T.J. has allowed Liam to spend with Todd and Tanya for babysitting when it suits his needs. For instance, the first time T.J. refused to allow his parents to see Liam, he relented after several months, not because they had resolved their differences, but because he needed a babysitter more often, since Liam was no longer allowed to see Sarah due to the abuse allegations. Additionally, T.J. testified that he works extra shifts on the weekends to make more money, and since the visitation was ordered, he tries to schedule those extra shifts on the weekends when Liam is with his parents. Under the unique facts of this case, we do not find that the visitation awarded by the court is unduly burdensome so as to be unconstitutional. This assignment of error is without merit.

DECREE

For the reasons set forth herein, the judgment is amended to remove the provision granting visitation to Nicole Foret Boquet, and as amended, affirmed. Costs of this appeal are to be shared equally by appellant, Todd Anthony Foret, Jr., and appellees, Todd Anthony Foret, Sr. and Tanya Foret.

AMENDED IN PART; AFFIRMED AS AMENDED.