

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2021 CU 0530

PMC by JEW

JEW

mt

LINNZI ZAORSKI

VERSUS

NICHOLAS USNER

Judgment Rendered: DEC 22 2021

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On Appeal from the Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket No. 2017-13865

Honorable Patrice W. Oppenheim, Judge Presiding

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BEFORE: McCLENDON, WELCH AND THERIOT, JJ.

McCLENDON, J.

In this custody case, the mother appeals the trial court's judgment that changed the domiciliary parent from the mother to the father. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

Linnzi Zaorski and Nicholas Usner were never married, but during their relationship had a daughter, who was born on March 3, 2015. On August 18, 2017, Ms. Zaorski filed a petition to establish paternity, custody, and child support and to relocate from St. Tammany Parish to Lafayette Parish. On September 12, 2017, the trial court signed a consent judgment, which in relevant part recognized Mr. Usner as the biological father of the child, awarded the parents joint custody with Ms. Zaorski designated as the domiciliary parent, allowed Ms. Zaorski to permanently relocate with her daughter to Lafayette Parish, and granted Mr. Usner physical custody every other weekend. The consent judgment included other provisions, including a monthly child support amount to be paid by Mr. Usner, a holiday custody schedule, and language encouraging the parties to be flexible with the custody schedule.

On May 29, 2018, Mr. Usner filed a petition to nullify and set aside the consent judgment, in which he asserted that he entered into the consent judgment based on vices in form and substance, including duress, misrepresentations, and error, as well as fraud and ill practices. That same day, Mr. Usner also filed a petition for a temporary restraining order/injunction, seeking to prevent Ms. Zaorski's relocation, a rule to modify custody, a rule to decrease child support, and a request that Ms. Zaorski submit to drug testing.

In response, Ms. Zaorski filed an answer and reconventional demand, a rule for contempt, a rule for sanctions, a request for supervised visitation and psychological evaluation of Mr. Usner, and, in the alternative, a request for sole custody. Thereafter, the parties filed numerous pleadings back and forth, and on August 31, 2018, Mr. Usner filed an amended and supplemental petition to nullify and set aside the consent judgment, an amended and supplemental rule to modify custody, and an amended and supplemental rule to decrease child support.

On October 4, 2018, the trial court signed an order appointing Kristen Luscher, Ph.D., PLLC, to conduct a custody evaluation of the parties. The custody evaluation was completed on August 8, 2019, and Dr. Luscher recommended that Mr. Usner be given domiciliary status.

Meanwhile, the parties continued to file various pleadings and responses thereto, including requests addressing discovery, contempt, and sanctions. With regard to custody, on September 12, 2019, Mr. Usner filed a rule to increase visitation, in light of the report issued by Dr. Luscher. Additionally, on January 21, 2020, Mr. Usner filed a supplemental motion to modify custody, requesting authorization to relocate the child from Lafayette back to St. Tammany Parish based on the evaluator's recommendation that he be provided the "predominant amount of physical custody." Also, on March 16, 2020, Mr. Usner filed an expedited rule to implement Dr. Luscher's recommendations, or alternatively, to increase visitation.

On July 1, 2020, and July 13, 2020, the trial court held a trial on the motions seeking to modify custody.¹ After hearing the testimony and receiving evidence, the matter was taken under advisement. On July 27, 2020, the trial court provided oral reasons and determined that custody of the minor child should be modified and granted Mr. Usner domiciliary status. On October 19, 2020, the trial court signed a judgment in accordance with its reasons.²

Ms. Zaorski timely appealed the trial court's judgment and assigned the following as error:

- I. The trial court clearly erred as a matter of law, and manifestly abused its discretion, in finding that a material change of circumstances occurred since the prior stipulated judgment for the purposes of modifying the parties' stipulated judgment.
- II. The trial court clearly erred as a matter of law, and manifestly abused its discretion, in finding that the custody modification was in the best interests of the parties' daughter.

¹ These were the motions that were filed by Mr. Usner on May 29, 2018, August 31, 2018, September 12, 2019, January 21, 2020, and March 16, 2020.

² Additionally, the judgment recognized that, prior to trial, the parties either resolved or stipulated to several pending matters including Mr. Usner's petition to nullify and set aside the consent judgment.

DISCUSSION

In child custody matters, each case must be viewed in light of its own particular set of facts and circumstances. **Moore v. Moore**, 18-1713 (La.App. 1 Cir. 5/1/19), 276 So.3d 1063, 1067. The best interests of the child is always the paramount consideration in determining child custody. **Id.** Louisiana Civil Code article 134 provides a non-exclusive list of factors that the trial court shall consider, along with all other relevant factors, for the determination of the best interest of the child, and the determination as to the weight given each factor is left to the discretion of the trial court.³ **Hodges v. Hodges**, 15-0585 (La. 11/23/15), 181 So.3d 700, 703.

A trial court's determination of a child's best interests is usually based heavily on factual findings. The trial court is in the best position to ascertain the best interests of the child given the 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. **Moore**, 276 So.3d at 1067-68.

Moreover, it is well settled that an appellate court cannot set aside a trial court's factual findings in the absence of manifest error or unless the findings are clearly wrong. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). If the trial court's findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse those findings even though convinced it would have weighed the evidence differently had it been the trier of fact. **Id.**

With regard to issues concerning the credibility of witnesses, we recognize where there is conflict in testimony, reasonable evaluations of credibility and reasonable inferences of fact made by the trial court are not to be disturbed. **Olivier v. Olivier**, 11-0579 (La.App. 1 Cir. 11/9/11), 81 So.3d 22, 28. Additionally, where the

³ Such factors may include: (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; and (12) the responsibility for the care and rearing of the child previously exercised by each party. LSA-C.C. art. 134.

factfinder's conclusions are based on determinations regarding the credibility of witnesses, the manifest error standard demands great deference to the trier of fact because only the trier of fact can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said. **Rosell**, 549 So.2d at 844.

In cases, such as the instant case, where the underlying custody decree is a stipulated judgment, a party seeking a modification must prove that: (1) there has been a change in circumstances materially affecting the welfare of the child since the original (or previous) custody decree was entered; and (2) that the proposed modification is in the best interest of the child. **Tinsley v. Tinsley**, 16-0891 (La.App. 1 Cir. 1/18/17), 211 So.3d 405, 412. Thus, the burden of proof to change the consent judgment fell on Mr. Usner to show that there had been a material change of circumstances affecting the child's welfare since the original custody decree was entered and that the particular proposed modification was in the best interest of the child. See Moore 276 So.3d at 1068.

In her appeal, Ms. Zaorski maintains that the record fails to support the trial court's findings regarding the material change of circumstances affecting the child's welfare and the child's best interest. Therefore, she argues, the judgment must be reversed.

In its reasons, the trial court stated:

Since the September 12th, 2017, date of their consent judgment on custody, the Court finds many circumstances have occurred that the Court now finds materially affect the welfare of the child. These are substantial material changes in circumstances. These include, but are not limited to, the following: A complete breakdown in the co-parenting relationship between the parents resulting in protracted litigation[,] which has involved and adversely, in the opinion of the Court, affected this child.

No. 2, unresolved alcohol and substance abuse and/or dependency issues[,] which also affect the mother's ability to safely care for the child and also fosters unnecessary continued conflict between the parents.

The father's inability, despite his best efforts, to pursue a loving and substantial relationship with the child due to the mother's failure to facilitate a relationship between the child and her father. This includes the mother's disregard of court orders, disruption of a school placement, her fabrication of false allegations about the father, an exhibition of extremely negative, hostile, and angry conduct toward him and his girlfriend.

So the Court, therefore, looks to whether or not it's in the best interest of the child ... to modify the parties' earlier consent judgment.

Testimony and evidence was offered by both parties and by several experts. However, the Court finds the most complete objective and well-reasoned opinion was that offered by the Court's appointed evaluator, Dr. Kristen Luscher. The report is extensive. It totals over 90 pages.

Her factual findings were borne out by the evidence submitted at trial of these matters. She interviewed the parties and their witnesses extensively. She made significant findings based upon her expertise, concerning the parties' relative mental health and substance abuse and dependency issues. She applied the factors of best interest as set out in Louisiana Civil Code Article 134 to those facts and made recommendations.

The Court attributes great weight to her opinions in this case.

The Court as well applied all of the factors of Louisiana Civil Code Article 134 independently to the evidence submitted herein and, accordingly, adopts Dr. Luscher's conclusions on the factors as the Court's opinion as well.

If an application of the state relocation factors are also necessary, the Court also has examined and applied to each of those and attributed weight to those that are significant in reaching this opinion today.

Therefore, based upon all of the above, the Court finds that it is in the best interest of the child to modify custody. The parents are to continue to remain to have joint custody of [the child], but the father is now to be made the primary domiciliary parent.

The schedule of nonholiday time and restrictions thereon, including a restriction on alcohol use by Ms. Zaorski when she has the child with her as set out in Dr. Luscher's recommendation, No. 1, Page 80, are made the orders of the Court.

The transportation arrangements are to be as set out in Dr. Luscher's recommendation [No.] 6, Page 80, except that on the Wednesday exchanges all transportation is to be handled by the mother.

The Court adopts as a court order Dr. Luscher's recommendations [Nos.] 7, 10, 14, 16, 17, and 18 as well. All other court orders not modified herein are continued to be in effect. ...

The other recommendations that Dr. Luscher makes, which mainly concern treatment and evaluation by Ms. Zaorski, are recommendations also by the Court. She is not ordered to participate or do any of those things, but they are highly recommended.

So those are the reasons of the Court.

In accordance with Dr. Luscher's recommendation No. 1, the trial court ordered Ms. Zaorski physical custody of the child every other weekend beginning on Friday at 3:00 p.m. until Sunday at 4:00 p.m. Additionally, Ms. Zaorski was allowed custody of

the child every Wednesday from 3:00 p.m. to 7:00 p.m. The distance between parental homes limited the ability to provide Ms. Zaorski with overnight custody on Wednesdays and Sundays, particularly when the child was in school. Further, time that Ms. Zaorski spends with the child was to be predicated on complete abstinence from alcohol.

The transportation arrangements in Dr. Luscher's recommendation No. 6, set forth that the parents were to meet in Baton Rouge, which is the halfway point between residences, to conduct exchanges. Additional recommendations adopted by the trial court included provisions for daily telephone/video calls, the use of the Our Family Wizard program for communication between the parents, the recommendation that Ms. Zaorski undergo random alcohol and drug screening for twelve months at a frequency of twice per month, emergency evacuations, and contact with teachers, coaches, or other individuals, as well as information related to the child's responsibilities and activities.

We have thoroughly reviewed the record, and find no merit to Ms. Zaorski's assignments of error. On review, we find that the factual findings of the trial court regarding Ms. Zaorski's unresolved history of alcohol and substance abuse, false or unproven allegations against Mr. Usner, and Ms. Zaorski's interference with Mr. Usner's ability to pursue a loving and substantial relationship with the child are reasonable and supported by the record. Further, the record reflects that the trial court specifically looked at and considered all of the relevant factors in Civil Code article 134 regarding the best interest of the child. Accordingly, we find no error in the trial court's conclusion that a material change in circumstances affecting the welfare of the child had occurred since the September 12, 2017 consent judgment and that joint custody, with Mr. Usner being designated as the domiciliary parent, was in the best interest of the child.

CONCLUSION

For the above and foregoing reasons, the October 19, 2020 judgment of the trial court is affirmed. Costs of this appeal are assessed to Linnzi Zaorski.

AFFIRMED.