IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D04-3342

KRISTI JORDAN DUDLEY,

Appellant,

v.

ALEXANDER J. DUDLEY,

Appellee.
_____/

Opinion filed April 15, 2005.

An appeal from the Circuit Court for Jackson County, William L. Wright, Judge.

Kristin Adamson of Novey, Mendelson & Adamson, Tallahassee, for Appellant.

Russell S. Roberts of Roberts, Roberts & Roberts, Marianna, for Appellee.

HAWKES, J.

Kristi Dudley, the mother, appeals a final judgment of dissolution of marriage awarding primary physical residence for the parties' minor child to Alexander Dudley, the father. We affirm.

We review a trial court's decision regarding primary physical residence for an abuse of discretion. See Miller v. Miller, 842 So. 2d 168, 169 (Fla. 1st DCA 2003). Because of this highly deferential standard, in a case such as that before us, where the evidence is in conflict, "'an appellate court will not disturb the trial court's custody decision unless there is no substantial competent evidence to support that decision.'" Id. (quoting Adair v. Adair, 720 So. 2d 316, 317 (Fla. 4th DCA 1998)).

Following an extensive evidentiary hearing regarding primary physical residence, the lower court entered judgment for the father, in relevant part, finding "the [mother] has repeatedly violated the Court's previous orders in an effort to frustrate the [father's] visitation with the minor child. The Court finds that the [mother] would in all likelihood frustrate the [father's] visitation in the future."

The record shows that, after the trial court entered an order granting the mother temporary custody, she relocated from Sneads, Florida to Starke, Florida, without notifying the father of the move or of her new address. She also cancelled the child's regularly scheduled doctor's appointment and scheduled an appointment with a new pediatrician in Starke without the father's knowledge. At a second temporary hearing, the mother testified she applied for jobs outside the area, and declined a teaching position and other job offers in the area. She later moved back into the marital home, but immediately went to the post office and closed the parties' joint post office box

without the father's knowledge.

Evidence was offered to show that, when the father attempted to coordinate with the mother on routine parenting issues, such as when the child should begin sleeping in her own bed instead of with a parent, the mother was uncooperative and gave vague answers or changed her mind on issues previously agreed upon.

Additionally, the record indicates the mother and members of her family, on several occasions, made derogatory comments toward the father in the presence of the child when the father picked up the child for visitation. When the father arrived to pick up the child, the mother held the child tightly and, during most exchanges, would tell the child "Mommy's working hard for you and fighting for you."

One of the statutory factors a trial court must consider when determining primary custody, is which parent is more likely to allow the child frequent and continuing contact with the nonresidential parent. See §61.13(3)(a), Fla. Stat. (2003). The trial court, sitting as the finder of fact, has the responsibility of determining the weight, credibility and sufficiency of the evidence, and its findings are clothed with a presumption of correctness. See Smiley v. Greyhound Lines, Inc., 704 So. 2d 204, 205 (Fla. 5th DCA 1998). It is axiomatic that, when the trial court sits as the finder of fact, its findings are based on the weight it has given the evidence, and the inferences it has reached from the evidence.

Here, from the examples discussed above, the trial court could reasonably infer the mother was uncooperative and would be likely to attempt to frustrate future visitation. Because this finding is supported by competent, substantial evidence, the trial court's order concluding it was in the best interest of the child for the father to be awarded primary physical residence is AFFIRMED.

DAVIS J., CONCURS, ERVIN, J., DISSENTS WITH WRITTEN OPINION.

ERVIN, J., dissenting.

While conceding that competent, substantial evidence supports the trial court's decision to place primary residential custody of the parties' 3-1/2-year-old daughter with the former husband, I find nothing in the record to support the court's factual determination that the former wife repeatedly violated the court's previous orders, which the court cited as the basis for its conclusion that the wife would in all likelihood frustrate the husband's visitation in the future. Given the fact that the error is significant, I consider it impossible for us to decide that absent the erroneous finding, the lower court would have nonetheless reached the same result.

Most of the examples cited in the majority's opinion to justify the lower court's visitation-frustration-finding have nothing to do with visitation, and are therefore irrelevant to such consideration. Regarding the wife's decision to seek employment as a teacher outside the Sneads area, where the parties resided, the record reveals that the position offered to her in Starke paid considerably more than the job offers she had received in Sneads. Indeed, the trial court commented upon this fact at the hearing. Despite her acceptance of out-of-town employment on the advice of previous counsel, the mother did not interfere with the father's weekly visitation with the child in any way. In fact, she resigned her teaching position and moved back to Sneads upon learning that her re-location could affect the court's decision regarding residential

custody. Finally, nothing exists in the record in the form of pleadings, orders, or testimony remotely suggesting the mother violated any prior court orders relating to visitation. Under the circumstances, I consider that an informed review of the issue requires nothing less than reversal of the custody order and a remand of the case to the trial court for it to address separately each of the criteria of section 61.13(3), Florida Statutes (2003), that is applicable to the facts at bar.

Although I acknowledge that our review of a custody decision turns on the highly deferential standard of whether the trial court abused its discretion, nevertheless, this court's substantial case law has repeatedly recognized that if such decision rests in part on an erroneous finding or on matters outside the record, remand may be required for clarification or for consideration of the record evidence without reference to the erroneous finding. See, e.g., Collins v. Collins, 873 So. 2d 1261, 1264 (Fla. 1st DCA 2004) (where court was unable to determine whether trial court's primary residential custody decision was influenced by unauthorized testimony, cause was remanded for revision of final judgment by limiting review of professional's testimony to that allowed by Family Law Rule 12.363(a)(1)); Clark v. Clark, 825 So. 2d 1016, 1017 (Fla 1st DCA 2002) (court reversed, finding the supplemental final judgment erroneous as a matter of law, because it relied, at least in part, on matters outside the record); Packard v. Packard, 697 So. 2d 1292, 1293 (Fla. 1st DCA 1997)

(court found it could not review trial court's custody determination without resorting to speculation concerning the court's intended definition of a "traditional family environment," and reversed and remanded for clarification).

For the above reasons, I would reverse the lower court's custody determination and remand the case for further proceedings consistent with this dissent.