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

JESSE LEE WAYBRIGHT,

Appellant,

v.

YA'LONNI AYEESHA JOHNSON-SMITH,

Appellee.

_____/

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

CASE NO. 1D12-3376

Opinion filed June 24, 2013.

An appeal from the Circuit Court for Levy County.
Ysleta W. McDonald, Judge.

Jesse Lee Waybright, pro se, Appellant.

No appearance, for Appellee.

PER CURIAM.

Jesse Lee Waybright appeals a final order which establishes visitation and residential custody of S.L.W., the child he fathered with appellee. Because the

trial court erred in excluding certain evidence offered by Waybright and in ordering rotating custody when neither party requested it, we reverse and remand for further proceedings.

S.L.W. was born on May 16, 2008, and the appellee, Ya'Lonni Ayeesha Johnson-Smith, does not deny that Waybright is the natural father; the parties to this appeal have never been married. In January 2012, Waybright, pro se, filed a pleading styled "petition to establish paternity and other relief." By this petition, Waybright sought sole physical custody of the child with Johnson-Smith allowed only supervised visitation. Waybright alleged that the mother had engaged in criminal activity, was unable to financially support the child as she rarely worked, and had a transient life-style.

At the subsequent hearing on the petition, both parties appeared pro se. Waybright offered police reports detailing the acts of violence committed by Johnson-Smith, including domestic violence against him. The trial court, without objection from Johnson-Smith, refused to consider these reports, classifying the reports as hearsay. The court also refused to consider certain written statements without first inquiring as to whether they were admissible as affidavits. Thereafter, the trial court ordered rotating custody on a weekly basis with the onus of transportation falling upon Waybright.

The trial court erred in categorically excluding the police reports, as such records may have been admissible pursuant to section 90.803(8), Florida Statutes (2012). Similarly, concerning the statements offered by Waybright, the trial court erred in failing to even consider their admissibility, especially in view of the lack of objection from Johnson-Smith. See Tallahassee Furniture Co. v. Harrison, 583 So. 2d 744 (Fla. 1st DCA 1991) (unobjected to hearsay is probative as non-hearsay evidence).

Domestic violence and other forms of violent behavior are probative matters in a child custody case. See § 61.13(3)(m), Fla. Stat. (2012). In establishing residential placement of a child, the trial court is to consider at least twenty factors pertaining to the best interests of a child listed in section 61.13(3), even when the parents are unmarried. See A.L.G. v. J.F.D., 85 So. 3d 527 (Fla. 2d DCA 2012). In the order under review, there are no findings to support the weekly rotating custody schedule set by the trial court. Further, neither party requested rotating custody. Moore v. Wilson, 16 So. 3d 222 (Fla. 5th DCA 2009) (the trial court erred in ordering rotating custody when neither party requested it).

REVERSE and REMANDED for further proceedings consistent with this opinion.

VAN NORTWICK and ROWE, JJ., CONCUR, and MAKAR, J., CONCURS WITH WRITTEN OPINION.

Makar, J., concurring.

I agree that the order establishing residential custody and visitation should be reversed and remanded for consideration for the reasons stated. Three additional points warrant mention, each weighing in favor of the relief the father seeks. First, the mother's brother is a registered sexual offender (lewd or lascivious battery; victim age 12-15) with whom S.L.W. sometimes stays. The father raised this as a concern in support of the relief sought. The mother countered that the father was aware of the brother's status yet dropped off S.L.W. with him occasionally; the father explained, however, that he initially thought the brother's status was based on the victim and the brother being 17 and 18 years old, respectively, but that discovery in this case showed a greater age difference. For unknown reasons, the trial court gave no weight to the father's concern—but should on remand. Second, the trial court's consideration of the police reports on remand is important because of the closeness in time of the incidents with the mother's care of S.L.W. See McCann v. Daniels, 650 So. 2d 205, 206 (Fla. 4th DCA 1995) (incidents occurring while parent in custody of child more relevant than those remote in time when child not in parent's custody). Because the record reflects a more stable home environment surrounding the father, the proximity in time of the incidents involving S.L.W. when in the care of the mother becomes more relevant. Finally, it is inequitable to make the mother's current residence the "home base" while

placing the burden of transportation solely on the father; the equities appear to weigh far more heavily in the father's favor on this facet of the dispute.

On the current record, it is a close case whether to simply reverse and remand, ordering that the father be given full custody on a temporary basis. Given that the trial judge must establish specific conditions that a parent must satisfy in order to re-establish time-sharing with the child, see Grigsby v. Grigsby, 39 So. 3d 453, 455 (Fla. 2d DCA 2010), the better course for now is to reverse and remand, allowing the trial court to make these determinations.