

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CU 0286

CASEY J. CARROLL

VERSUS

REBEKAH T. CARROLL

Judgment Rendered: NOV 13 2013

On Appeal from the Seventeenth Judicial District Court
In and for the Parish of Lafourche
State of Louisiana
No. 119546

Honorable Ashly Bruce Simpson, Judge Presiding

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**BEFORE: WHIPPLE, C.J., GUIDRY, McCLENDON, WELCH, AND
HIGGINBOTHAM, JJ.**

*Higginbotham, J. dissents with reasons.
Guidry, J. dissents.*

*WBW
JEW
AK*

McCLENDON, J.

In this custody case, the father of two minor children appeals the trial court's judgment awarding sole custody of the children to their maternal grandparents. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Casey Carroll and Rebekah Carroll are the parents of A.C., born on August 8, 2002, and C.C., born on November 3, 2004. Casey and Rebekah were married on January 25, 2003, and on January 12, 2012, Casey filed a petition for divorce requesting that the parties be awarded joint custody and that he be named the domiciliary parent. Rebekah answered the petition and filed a reconventional demand, wherein she also asked for joint custody, but sought to be named the domiciliary parent. Thereafter, the parties entered into a consent agreement to share joint custody, with Rebekah being named the domiciliary parent and Casey being given liberal and reasonable visitation. The consent judgment was signed on May 1, 2012.

On July 18, 2012, Casey filed a rule for sole custody, alleging that he currently had the physical custody of the minor children. He further asserted that Rebekah was a habitual user of illegal drugs, that she had entered a drug rehabilitation program, that she could not provide for the general health, education, or welfare of their children, that she could not provide a stable home for the children, and that he feared for the safety and well being of the children. On August 8, 2012, the maternal grandparents, Rodney Torres and Darla Torres, filed a petition for intervention, asserting that an award of joint or sole custody to either parent would result in substantial harm to the children. The Torreses urged that they were able to provide an adequate and stable environment for the children and that they had been a steady, constant, and positive influence throughout the lives of their grandchildren.¹

¹ An interim judgment was signed on August 23, 2012, granting Rebekah interim visitation with her children under the supervision of the Torreses.

A trial was conducted over four days, after which the court took the matter under advisement.² On October 8, 2012, the trial court rendered judgment, with written reasons, awarding custody of the minor children to Rodney and Darla Torres and denying Casey's motion to modify custody. The court also granted Rebekah, who was living with her parents, visitation as agreed upon by the Torreses, and granted Casey specific visitation as set forth in the judgment. Casey and Rebekah were each ordered to pay child support to the Torreses.

Casey now appeals, contending that the trial court erred in awarding custody of the minor children to their maternal grandparents in the absence of substantial evidence to demonstrate that awarding custody to him would cause substantial harm to his children. He also asserts that the award of custody to the grandparents was not in his children's best interest.

DISCUSSION

Custody disputes between a parent and nonparent are governed by LSA-C.C. art. 133, which provides:

If an award of joint custody or of sole custody to either parent would result in substantial harm to the child, the court shall award custody to another person with whom the child has been living in a wholesome and stable environment, or otherwise to any other person able to provide an adequate and stable environment.

The best interest of the child is the guiding principle in all custody proceedings. LSA-C.C. art. 131; **Smith v. Tierney**, 04-2482 (La.App. 1 Cir. 2/16/05), 906 So.2d 586, 590. In a conflict between a parent and a nonparent, the parent enjoys the paramount right to custody of a child and may be divested of that right only for compelling reasons. **Smith**, 906 So.2d at 590. Therefore, the burden of proof is on the nonparent to show by clear and convincing evidence that granting custody to the parent would result in "substantial harm" to the child, thus necessitating an award of custody to a nonparent under Article 133. **Smith**, 906 So.2d at 590. When divestiture of parental custody is

² The trial of this matter was held on August 20, August 21, September 24, and September 25, 2012.

warranted, custody is awarded in the best interest of the child in the following order of preference: to "another person with whom the child has been living in a wholesome and stable environment, or otherwise to any person able to provide an adequate and stable environment." LSA-C.C. art. 133; **Smith**, 906 So.2d at 590.

The concept of substantial harm under Article 133 includes parental unfitness, neglect, abuse, abandonment of rights, and is broad enough to include any other circumstances that would cause the child to suffer substantial harm. **Mills v. Wilkerson**, 34,694 (La.App. 2 Cir. 3/26/01), 785 So.2d 69, 73-74; see also **Smith**, 906 So.2d at 592 n.4.

In custody proceedings, the trial court is in the best position to ascertain the best interest of the child given each unique set of circumstances. Thus, the trial court is vested with vast discretion in matters of child custody because of its superior opportunity to observe the parties and the witnesses. **Smith**, 906 So.2d at 590-91. On appellate review, the determination of the trial court regarding custody is entitled to great weight and should be overturned only when there is a clear abuse of discretion. **Smith**, 906 So.2d at 591.

At the hearing, Casey testified that he and Rebekah separated in December 2011, at which time Rebekah and the children went to live with her parents. He stated that since the separation, the children have primarily been at the Torreses' home with their mother. Casey also testified that he is a military veteran, having served overseas, including in Iraq. He stated that he has been diagnosed with Post Traumatic Stress Disorder (PTSD), but that he does not suffer from it. He stated that he has complied with his treatment for the PTSD and takes medication and undergoes therapy as necessary. After his return from the military, he worked offshore, working 28 days on and 14 off, until about a month prior to the hearing, when he changed employment to be home on a nightly basis.

Casey admitted to prior illegal drug use, including marijuana and cocaine, and experimentation with methamphetamine, but he testified that he had not

used any drugs for the past ~~ten months.~~ He stated that he has never undergone treatment for his prior drug use because it was not a problem. Casey further testified that he lives with Catherine Folse and her three-year old son. Ms. Folse testified that her marijuana use was an issue to Casey, so she stopped on June 19, 2012, approximately two months prior to the commencement of the trial. She also testified that she brings the children to school, picks them up from school, and does the cooking.

At trial, Rebekah freely admitted her issues regarding drug use and that on two separate occasions she entered a rehabilitation program, having only completed the most recent one. She stated that at the time of the trial, she had been clean for two months, the longest time she had been sober in three to four years, and that she was currently participating in intensive outpatient therapy. She also stated she did quite a bit of drugs with Ms. Folse in high school. Rebekah testified that she was the children's primary caretaker after they were born, since Casey was in Iraq for 1½ years. When he returned home, he worked offshore, one month on, one month off. She stated that the majority of their problems began when he returned from Iraq, as he had become distant, short-tempered, and prone to outbursts.

Rodney Torres testified that he and his wife have had the physical custody of the children since December 25, 2011, when Casey and Rebekah separated. He stated that they live in a large four-bedroom house with another daughter, and that they are financially able to take care of their grandchildren. He stated that they intervened to "give the children a stable life while their parents get their acts together." He further stated that while Casey and Rebekah were married, they would often drop off the children "for an extended period of time to babysit."

Darla Torres testified that when Casey and Rebekah got married, they lived in a trailer behind the Torreses' home. She stated that she and her husband have had a consistent relationship by proximity with the children. Ms. Torres further stated that both Casey and Rebekah drank a lot when he returned

from Iraq in 2005. She testified that she firmly believed that neither parent was responsible enough at that time to have the children on a permanent basis. She testified to an unwritten agreement between her family and Casey's family not to leave the children alone with either parent. She also stated that she and her husband have taken care of the children's medical issues, which were not being addressed by either Rebekah or Casey.

Court-ordered hair-follicle drug tests, taken during the course of the hearing, were negative for both Casey and Rebekah, evidencing no drug use for two to three months.

The trial court concluded that an award of custody to either Casey or Rebekah would result in substantial harm to the children. With regard to Rebekah, the trial court recognized that Rebekah admitted to illegal use of controlled dangerous substances throughout her marriage and that she admitted to illegally consuming controlled dangerous substances as recently as July 14, 2012. The court acknowledged that Rebekah completed inpatient substance abuse treatment in August 2012 and is currently attending out-patient treatment. The court concluded that there was clear and convincing evidence that an award of custody to Rebekah would result in substantial harm to the children. The trial court's determination that awarding custody to Rebekah would result in substantial harm to the children has not been disputed by any of the parties, and this issue is not before us on appeal.

As to Casey, the court stated that it observed that Casey repeatedly became agitated during his cross-examination and during the closing statements by counsel for Rebekah and counsel for the Torreses. The trial court then said that due to the absence of corroborating medical evidence and Casey's demeanor, it determined that Casey's PTSD was not well controlled.³ The trial court concluded:

³ While the trial court may have placed an improper burden on Casey to establish that he was continuing to receive treatment for his PTSD diagnosis, based on observation of the witnesses and credibility determinations, sufficient evidence was presented to establish the Torreses' burden of substantial harm to the children.

The evidence proves that Casey Carroll's Post Traumatic Stress Disorder is not well controlled. The evidence proves that Casey Carroll has illegally consumed controlled dangerous substances throughout the marriage, with intermittent periods of non-use. Casey Carroll's repeated resumption of illegal drug use after he was a parent causes the trial court to give less weight to the evidence of current abstinence.

The evidence proves that Catherine Folse has illegally consumed controlled dangerous substances throughout her adult life and while residing with Casey Carroll. The evidence proves that Catherine Folse will be a primary caregiver of the children.

An award of custody to Casey Carroll would result in the children being cared for and supervised by adults who abused drugs throughout their parenthood, and who have not received substance abuse treatment.

For these reasons, there is clear and convincing evidence that the children's continued custody by the father, Casey Carroll, would result in substantial harm to the children.

The trial court rejected Casey's request to be appointed the children's sole custodian. Among the trial court's concerns was Casey's PTSD diagnosis, which the trial court did not believe was under control. The court also had concerns with his drug use throughout the marriage and after he became a parent, although Casey claimed that he was currently drug free. Casey's relationship with Catherine Folse was also a concern to the court, as the trial court found her to be the children's primary caregiver. Ms. Folse has used drugs throughout her adult life and resides with Casey, although they are not married.⁴ Upon our review of the entire record, we cannot disagree with the trial court's determination that granting sole custody to Casey would result in substantial harm to the children.

The trial court determined that the Torreses have provided an adequate and stable environment for the children and that there was clear and convincing evidence that they were able to continue to do so. Our review of the record shows that the Torreses assisted Rebekah with the care of the children during the marriage, particularly when Casey was deployed overseas. Additionally,

⁴ Although Ms. Folse testified that she had not used any illegal substances since June 19, 2012, the trial court specifically found her testimony not to be credible.

since Casey and Rebekah separated, the children have resided with the Torreses, who have provided a "wholesome and stable environment" for their grandchildren. See LSA-C.C. art 133. In contrast, Casey is currently living with Ms. Folse, to whom he is not married and who admitted to prior drug use. Accordingly, we cannot find that the trial court abused its great discretion in determining that an award of sole custody to the Torreses would be in the best interest of the children. See LSA-C.C. art. 131.

CONCLUSION

For the above and foregoing reasons, the October 8, 2012 judgment of the trial court awarding sole custody of the minor children to their maternal grandparents, Rodney and Darla Torres, is affirmed. Costs of this appeal shall be assessed to Casey Carroll.

AFFIRMED.

CASEY J. CARROLL

STATE OF LOUISIANA

VERSUS

COURT OF APPEAL

REBEKAH T. CARROLL

FIRST CIRCUIT

2013 CU 0286

BEFORE: WHIPPLE, C.J., GUIDRY, McCLENDON, WELCH, AND HIGGINBOTHAM, JJ.

 HIGGINBOTHAM, J., DISSENTS AND ASSIGNS REASONS.

HIGGINBOTHAM, J.

I respectfully disagree with the majority opinion in this matter. Parents have a paramount right of custody. They may be divested of that right only for compelling reasons shown by clear and convincing evidence. **Rupert v. Swinford**, 95-0395 (La. App. 1st Cir. 10/6/95), 671 So.2d 502, 505. Thus, when a nonparent seeks to divest a parent of custody, the nonparent bears the burden of proving by clear and convincing evidence that parental custody “would result in substantial harm to the child.” La. Civ. Code art. 133. The concept of substantial harm under art. 133 includes parental unfitness, neglect, abuse, abandonment of rights, and is broad enough to include any other circumstances, such as prolonged separation of the child from its natural parents, that would cause the child to suffer substantial harm. **Mills v. Wilkerson**, 34,694 (La. App. 2d Cir. 3/26/01), 785 So.2d 69, 74.

The Torreses failed to prove by clear and convincing evidence that substantial harm would result to the minor children if Mr. Carroll was awarded custody. Rather, the evidence showed that Mr. Carroll was a good parent who was able to care for his children and did so without issue for months. He was awarded significant custodial time with his children including every other weekend and holidays, without any supervision or restriction. The inherent conflict in the trial

court's ruling in finding substantial harm would come to the children if the father was to be awarded custody, but awarding him significant custodial time, shows that there was no basis for the award of custody to the Torreses. Mr. Carroll is the father of the minor children and there was no compelling reason demonstrating why he should not have been awarded custody of them. Thus, I respectfully dissent.