

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CU 1340

DIMITRI I. IKONITSKI

VERSUS

KATERYNA IKONITSKI

Judgment Rendered: DEC 27 2013

On Appeal from the
22nd Judicial District Court,
In and for the Parish of St. Tammany,
State of Louisiana
Trial Court No. 2009-11771

Honorable Mary Devereaux, Judge Presiding

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Kuhn, J. concurs with reasons. by TMH

BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

HIGGINBOTHAM, J.

In this highly contentious custody dispute, the mother appeals the trial court judgment awarding sole custody of the children to their father. The mother also challenges the constitutionality of the hearing officer system in the 22nd judicial district court. For the following reason, we affirm the judgment of the trial court.

FACTUAL AND PROCEDURAL HISTORY

Dmitri¹ Ikonitski and Kateryna Ikonitski were married in 2006. During their marriage, they had two daughters, Rebecca Ikonitski, born September 7, 2006 and Rose Ikonitski, born August 3, 2008. In March 2009, Dmitri filed a petition for divorce and requested sole or joint custody of the parties' minor children. In his petition, Dmitri alleged a long history of domestic violence.

Initially, the matter went before a hearing officer and the hearing officer recommended that the parties share joint custody. Dmitri objected to the recommendations. The recommendations were made a temporary order of the court pending a hearing before the judge. On January 4, 2010, Dmitri filed a motion to reset his rule for custody and requested sole custody based on Dr. Alicia Pellegrin's custody evaluation. Again the motion went before the hearing officer who recommended that the parties share joint custody of the minor children, with Dmitri designated as domiciliary parent and Kateryna's custodial periods be limited to during the day. Kateryna objected to the recommendations. The recommendations were made a temporary order of the court pending a hearing before the trial judge.

Dmitri subsequently filed a rule requesting sole custody pursuant to the Post-Separation Family Violence Relief Act, La. R.S. 9:361-369. Kateryna also filed an ex parte motion for sole custody. After continuing the parties' competing motions for sole custody several times, the four day trial finally concluded on July 17,

¹ Dmitri was also spelled as Dimitri throughout the record.

2012. Judgment was signed on November 19, 2012, finding Kateryna's actions established a pattern of perpetrating family violence, granting sole custody of the minor children to Dmitri, and establishing a visitation plan which granted Kateryna visitation every other weekend, every other Wednesday, half of the holidays, and half of the summer.

It is from this judgment that Kateryna appeals, contending that 1) the hearing officer system in the 22nd judicial district court is unconstitutional; 2) the trial court erred in not accepting the testimony of Dr. LeBlanc, and other experts when there was no sound reason for its rejection; and 3) the trial court erred in granting sole custody to Dmitri Ikonitski.

LAW AND ANALYSIS

I. Constitutionality of the 22nd Judicial District Court Hearing Officer System.

Prior to trial, Dmitri and Kateryna attended a hearing officer conference. After the conference, the hearing officer recommended that the parties continue with joint custody, but that Kateryna's custodial periods be reduced to during the day. Kateryna objected to the recommendations. In accordance with local rule 35(F)(6),² the recommendations were made a temporary order of the court pending the hearing before the trial judge. Kateryna filed an emergency writ objecting to the hearing officer's recommendations becoming an interim order of the court pending a hearing. The writ was denied by this court on March 15, 2010³ and by the Louisiana Supreme Court on May 10, 2010.⁴

Kateryna contends that the hearing officer's recommendation that her custodial periods be significantly reduced should not have been made a temporary

² Rule 35(F)(6) of the Local Rules of Court, 22nd Judicial District provides "If a written objection is filed, the Hearing Officer's recommendation shall become a temporary order upon the Judge's signature, and shall remain in effect until the hearing, with the exception that a recommendation on the issues involving...a change in legal custody...remains only a recommendation until the rule date."

³ *Ikonitski v. Ikonitski*, 2010 CW 0454 (La. App. 1st Cir. 3/15/2010)

⁴ *Ikonitski v. Ikonitski*, 2010 CJ-0853 (La. 5/7/2010)

order of the court because it was done with no meaningful hearing, no record was made, and it was based on hearsay evidence all of which denied her due process of law. We find it unnecessary to reach the constitutional issue raised by Kateryna, as the issue has become moot.

It is well settled that courts will not decide abstract, hypothetical, or moot controversies, or render advisory opinions with respect to such controversies. See Louisiana State Board of Nursing v. Gautreaux, 2009-1758 (La. App. 1st Cir. 6/11/10), 39 So.3d 806, 811, writ denied, 2010-1957 (La. 11/5/10), 50 So.3d 806. An issue is moot when a judgment or decree on that issue has been “deprived of practical significance” or “made abstract or purely academic.” **Id.** Thus, a case is moot when a rendered judgment or decree can serve no useful purpose and give no practical relief or effect. **Id.** If the case is moot, there is no subject matter on which the judgment of the court can operate. **Id.**

In this case, regardless of the propriety of the hearing officer’s recommendation becoming a temporary order of the court, a final judgment has been signed by the trial court and the temporary order is no longer in effect. Thus, a ruling on that issue would serve no useful purpose and would give no practical relief or effect. Accordingly, we find Kateryna’s objection to the hearing officer’s recommendations have become moot. This Court will refrain from considering a constitutional issue in instances such as the present one where the resolution of the constitutional issue is not essential to the determination of the case because it can be disposed of on non-constitutional grounds. See Burmaster v. Plaquemines Parish Government, 2007-2432 (La. 5/21/08), 982 So.2d 795, 802.

II. Expert testimony

Kateryna argues that the trial court overlooked and ignored the testimony of her expert witnesses. Kateryna noted that in its written reasons, the trial court addressed concerns over developmental delays in the children and Kateryna not

putting a helmet on Rose to correct the shape of her head despite the deposition testimony of Rose's pediatrician, Dr. Joshua LeBlanc. Dr. LeBlanc testified that he was not concerned about the shape of Rose's head and stated that the use of helmets to correct that issue are most often of no benefit. He further stated that he witnessed no evidence of developmental delays in the children. Kateryna's failure to use the helmet was only one of many concerns that the trial court raised about Kateryna. It was not the sole basis for the trial court's decision. Further, the trial court's reasonable concern was Kateryna's complete disregard of Dr. Daniel Bronfin's recommendation that she use the helmet and Dr. Pellegrin's advice regarding developmental delays. The trial court did not necessarily agree with their assessment, but was concerned that Kateryna did not do anything to address the possibility that there was an issue.

Kateryna further argues that the testimony of her additional experts was not considered. She presented the testimony of two other witnesses who were accepted as experts in their field. Dr. Murphy, a psychologist, performed a psychological evaluation of Kateryna. Dr. Murphy noted that Kateryna's clinical profile is entirely within normal limits and she is free from major debilitating psychological disturbances. Dr. Lucille Perry, a licensed professional counselor, met with Kateryna and her children multiple times. In her opinion, Kateryna had a close connection with her children, and she had no concerns about Kateryna as the custodial parent.

Dr. Alicia Pellegrin was also accepted as an expert and testified as the court appointed custody evaluator. She opined that the children should reside primarily with Dmitri and because of the extreme level of conflict in this case co-parenting would be nearly impossible.

When considering expert testimony, a trial court may accept or reject some or all of the opinion expressed by an expert and may even substitute its own

common sense and judgment for that of the expert, where, in its opinion, the evidence establishes that the substitution is warranted by the evidence as a whole. **Ryan v. Zurich Am. Ins. Co.**, 2007-2312 (La. 7/1/08), 988 So.2d 214, 222. The decision reached by the trial court regarding expert testimony will not be disturbed on appeal absent a finding that the trial court abused its broad discretion. **Morgan v. State Farm Fire and Casualty Company, Inc.**, 2007-0334 (La. App. 1st Cir. 11/2/07), 978 So.2d 941, 946. In its reasons for judgment, the trial court expressly noted that it did not fully rely on any of the experts' testimony because none of the experts had all of the evidence before them. Dr. Perry and Dr. Murphy never met with Dmitri, and Dr. Pellegrin did not hear the entirety of a Skype conversation between Kateryna and Jane Ikonitski, Dmitri's current wife. The trial court was in the unique position of having all the evidence before it in making its decision. We find no abuse of discretion in the decision reached by the trial court regarding the expert testimony.

III. Sole custody award to Dmitri

Kateryna contends that the trial court erred in awarding sole custody of Rebecca and Rose to Dmitri. In her brief, Kateryna asserts that the trial court erroneously relied on the testimony of several of Dmitri's witnesses while ignoring the evidence and testimony offered on her behalf.

Louisiana Civil Code article 132 provides in pertinent part "the court shall award custody to the parents jointly; however, if custody in one parent is shown by clear and convincing evidence to serve the best interest of the child, the court shall award custody to that parent." Every child custody case is to be viewed on its own particular set of facts and the relationships involved, with the paramount goal of reaching a decision which is in the best interest of the child. The trial court is vested with broad discretion in deciding child custody cases. Because of the trial court's better opportunity to evaluate witnesses, and taking into account the proper

allocation of trial and appellate court functions, great deference is accorded to the decision of the trial court. A trial court's determination regarding child custody will not be disturbed absent a clear abuse of discretion. **Martello v. Martello**, 2006-0594 (La. App. 1st Cir. 3/23/07), 960 So.2d 186, 191-92.

This court may not set aside a trial court's finding of fact absence manifest error or unless it is clearly wrong; reasonable evaluations of credibility and reasonable inferences of fact will not be disturbed on appeal. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989).

Considering the particular facts and the relationships involved in this case, we must determine if the trial court abused its discretion in finding by clear and convincing evidence that awarding sole custody of the children to Dmitri is in their best interest. Further, we must determine if the trial court's evaluations of credibility are reasonable.

During their marriage, Dmitri and Kateryna were constantly in conflict. The police were called multiple times for domestic violence, and Kateryna was arrested and charged with domestic abuse battery.⁵ Since filing for divorce, the parties have been involved in a highly contentious and combative custody dispute. Kateryna and Dmitri clearly love their children, but, at times, they have both placed their desire to harm each other before the best interest of their young daughters.

During the trial, Dmitri introduced audio and video recordings of himself and Kateryna arguing during their marriage. It appears that Dmitri set it up so that the fighting would occur in front of the children, or at the very least, he does not effectively try to diffuse the situation. This is a clear example of Dmitri putting his desire to sabotage Kateryna ahead of what is best for his children. Still, Kateryna's behavior was quite disturbing. During one video, Kateryna screamed at Dmitri

⁵ Those charges were subsequently dismissed.

while holding her daughter in her lap and aggressively feeding her by shoveling food in her in mouth.

In a separate video, Kateryna violently hit Dmitri while he was holding their daughter. In one recording, when Dmitri says "not in front of the children", Kateryna responds, "I don't care." Kateryna continued to scream despite her young daughter crying and pleading right next to her. Kateryna also slapped Dmitri, bit him, kicked him, and kneed him in the groin.

Kateryna and Dmitri's neighbor, Carol Ann Lay, testified about her observations of Kateryna and Dmitri. The trial court heavily relied on Ms. Lay's testimony because it found her to be the most credible witness. Ms. Lay witnessed Kateryna hit Dmitri and be extremely rude to her own mother. Ms. Lay also testified that Kateryna cursed and yelled at her and has trouble controlling her anger in front of the children. Ms. Lay observed Kateryna yank Rebecca by the arm, yell obscenities in front of both children, and has witnessed Kateryna "force feed" the children. Ms. Lay's husband, Tim Lay, also observed Kateryna scream at one of their neighbors who was babysitting the children. According to Ms. Lay, she rarely saw Kateryna take her children outside. Ms. Lay noted that there has been an obvious improvement in the children since they have resided primarily with Dmitri.

Similar to Ms. Lay, Jonathon Brown, who is a long time friend of Dmitri, testified that he twice witnessed Kateryna strike Dmitri. He also saw Kateryna force feed and shake Rebecca. Mr. Brown advised Dmitri that he should call the police about the incidents. The trial court found Mr. Brown's testimony to be credible.

Kateryna testified that Dmitri slapped her, handcuffed her and threatened her life. She also testified that the children were returned to her with scratches and bruises. This testimony was not credibly corroborated by any other witnesses.

Dmitri's current wife, Jane Ikonitski, testified. Also, Kateryna introduced a two hour audio recording of a conversation she had with Jane on Skype. During the conversation, Jane said that Dmitri has called her a terrible name, constantly yells at her, tries to buy the children's love, and is trying to manipulate the system. Jane's statements during the conversation were concerning, especially considering Jane's involvement with the children. Jane testified that she needed someone to vent to that day because the Skype conversation was the same day Dmitri called her an ugly name. The trial court determined that Jane was very naïve and was manipulated during the conversation. Jane wants the best for the children but she struggles with anxiety and depression. The trial court noted its concern for Jane's behavior, but stated "any issues Jane Ikonitski has or may have are not likely to have the direct impact on the children that the hostility their mother continues to display does."

Also notable during the Skype conversation, Kateryna ridiculed Dmitri and tried to convince Jane to leave him. On a positive note, Jane stated that she and Dmitri never talk negatively about Kateryna in front of the children.

Linda Phillips and Naquis Barak testified on behalf of Kateryna, and described a loving relationship between Kateryna and her children. The trial court pointed out that they had limited exposure with Kateryna and her children. Kateryna's mother, Ms. Mahdalyna Svirlova, testified that she witnessed bruising on Kateryna. The trial court did not believe her testimony because it was inconsistent and was motivated by her desire to help Kateryna gain custody of the children.

Throughout the record, Kateryna has a pattern of showing up places and being noncompliant, even in front of the children. Kateryna has been banned from two child-care facilities because of her disruptive behavior. Her former neighbors and friends have described her extreme emotional outbursts towards them in front

of Rebecca and Rose. Although Kateryna has denied these allegations or tried to justify them, they are in conformity with the type of behavior shown on the video and audio recordings presented by Dmitri. Co-parenting would be quite difficult considering the hostility displayed by Kateryna and the high level of conflict between her and Dmitri.

The trial court's written reasons for judgment thoroughly discuss the relevant facts of this contentious custody litigation, the applicable law, and the pertinent factors forming the basis of its judgment. The trial court's determinations regarding the credibility of the witnesses were reasonable and its findings of fact were not clearly wrong. Although this court might disagree with the conclusions and the relative weight accorded some factors by the trial court, we simply cannot conclude that its ultimate decision constitutes a clear abuse of discretion. Therefore, we find no error in the trial court's award of sole custody of the minor children to Dmitri.

CONCLUSION

For the foregoing reasons, the judgment of the trial court awarding sole custody of the minor children to Dmitri Ikonitski is hereby affirmed. Costs of this appeal are assessed to appellant, Kateryna Ikonitski.

AFFIRMED.

DIMITRI I. IKONITSKI

FIRST CIRCUIT

VERSUS

COURT OF APPEAL

KATERYNA IKONITSKI

STATE OF LOUISIANA

2013 CU 1340



KUHN, J., concurring.

The paramount consideration in any child custody matter is the best interest of the child. La. C.C. art. 131. Despite the Trial Court's best efforts, this matter became overly contentious because of an unusual approach to the case pursued by some of the appellant's attorneys, which ignored the best interests of the children and provoked further controversy between the parents.