

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2014 CU 0254

JOSEPH SEGURA

VERSUS

ERIKA KRISTEN SEGURA

AMT.
JEK by AMT.

Judgment Rendered: JUL 24 2014

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**On Appeal from the
22nd Judicial District Court,
In and for the Parish of St. Tammany,
State of Louisiana
Trial Court No. 2012-12221**

Honorable Mary C. Devereux, Judge Presiding

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Hammond, Louisiana**

**Attorney for Plaintiff/Appellee,
Joseph Segura**

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**Attorney for Defendant/Appellant,
Erika Kristen Segura**

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BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

Higginbotham, J. dissents and assigns reasons.

THERIOT, J.

In this child custody case, the mother, Erika Kristen Segura, appeals a judgment in which the trial court granted sole custody of the parties' minor child to the father, Joseph Segura. For the following reasons, we affirm the judgment of the trial court.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Mr. Segura and Ms. Segura were married on May 14, 2003, in the state of Virginia. The parties subsequently established their matrimonial domicile in Mandeville, Louisiana. Ms. Segura had a two-year-old child named Christopher at the time of the parties' marriage. Christopher was not Mr. Segura's child and was never adopted by Mr. Segura, but his last name was changed to Segura. During the marriage, Gabriella Janessa Segura was born on June 22, 2003. The parties separated on or about December 7, 2011 and were divorced by a judgment signed on April 15, 2013.

On April 18, 2012, Mr. Segura filed a "Petition for Divorce, Rules to Show Cause for Custody and Temporary Restraining Orders, and Injunctions" in which he requested sole custody of Gabriella and Christopher. On May 9, 2012, after a conference with the hearing officer, Mr. Segura and Ms. Segura stipulated to joint custody of both Gabriella and Christopher. During the school year, Mr. Segura had physical custody of the children during the week, and Ms. Segura had physical custody of the children on the weekends from Friday 5 p.m. to Sunday 7 p.m. and three evenings per week from 5 p.m. to 7 p.m. During the summer, the parties alternated custody of the children from week to week. The parties also submitted to a custody evaluation with the court appointed custody

evaluator, Dr. Peter Clark. After the evaluation, the parties appeared before the hearing officer again. In accordance with the recommendations of Dr. Clark, the hearing officer recommended that the parties share joint custody of Christopher and Gabriella on a week-to-week basis. Ms. Segura objected to the recommendations of the hearing officer and the matter was set for hearing before the trial court.

Prior to the hearing, Mr. Segura, on behalf of Gabriella, filed a “Petition for Protection from Abuse.” In the petition, Mr. Segura requested temporary sole custody of Gabriella. On the hearing date for the protective order, the trial court conducted a *Watermeier* hearing with Gabriella.¹ After the trial court’s conversation with Gabriella, on March 20, 2013, the trial court signed an “Order of Protection” for six months which granted sole custody of Gabriella to Mr. Segura and granted Ms. Segura visitation every other Saturday from 11 a.m. to 6 p.m. It was further ordered that the parties attend family counseling with Dr. Stephen Thompson.

During this time, Christopher began to reside solely with Ms. Segura.² On August 13, 2013, the parties appeared before the trial court for a hearing to determine custody of Gabriella. After the hearing, the trial court signed a judgment on August 29, 2013 that awarded sole custody of Gabriella to Mr. Segura with Ms. Segura granted visitation the first three weekends a month from Friday after school until Saturday at 6 p.m. and alternating holidays. It is from this judgment that Ms. Segura appealed.

¹ *Watermeier v. Watermeier*, 462 So.2d 1272 (La. App. 5 Cir.), writ denied, 464 So.2d 301 (La.1985).

² According to the record, Christopher was made aware for the first time that he was not Mr. Segura’s son. At that point, Christopher stopped going to Mr. Segura’s house and custody of Christopher was no longer an issue before the trial court.

ASSIGNMENT OF ERROR

Ms. Segura alleges that the trial court committed reversible error in awarding sole custody of Gabriella to Mr. Segura.

STANDARD OF REVIEW

The court shall award custody of a child in accordance with the best interest of the child. La.C.C. art. 131. In determining the child's best interest, the court shall consider all the factors that are relevant to that specific case. La.C.C. art. 134. The trial court's decision in child custody matters is entitled to great weight and it will not be overturned absent a clear showing of an abuse of discretion. *Bergeron v. Bergeron*, 492 So.2d 1193, 1196 (La. 1986).

LAW AND ANALYSIS

Ms. Segura contends that the trial court erred in awarding sole custody to Mr. Segura when he did not show by clear and convincing evidence that sole custody was in the best interest of Gabriella. Generally, 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. La.C.C. art. 132. 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. Appellate courts must be vigilant to not retry cases. 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. 1 Cir. 3/23/07), 960 So.2d 186, 191-92. This court may not set aside a trial court's finding of fact absent 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 Gabriella to Mr. Segura is in the child's best interest. Further, we must determine if the trial court's evaluations of credibility are reasonable.

During the custody hearing, Mr. Segura testified regarding the reasons he requested sole custody. First, he said Gabriella told him that her mother was verbally and physically abusing her. According to Mr. Segura, Gabriella said her mother yells at her and calls her names if she tries to talk to Christopher about seeing Mr. Segura. Mr. Segura stated that Gabriella missed school during the LEAP exam while in Ms. Segura's custody, causing Gabriella to have to attend summer school. Mr. Segura testified that Ms. Segura did not see Gabriella on Mother's Day, despite his offering Ms. Segura that time and did not come to Gabriella's softball game after being made aware that it was very important to Gabriella.

Mr. Segura also complained that Ms. Segura was not communicating on Our Family Wizard in accordance with a prior judgment.³ Mr. Segura stated that since Gabriella began residing primarily with him, "[s]he's flourishing," has perfect attendance, and is no longer having problems in

³ "Our Family Wizard" is an online service used by separated or divorced parents to facilitate communication associated with child custody issues.

school. He testified that he was the assistant coach on her softball team, and they enjoyed doing that together. The allegations of abuse were not discussed during the custody hearing, but the trial court considered the conversation it had with Gabriella during the protective order hearing.

Further, the letter, signed by Dr. Elisha-Rose Bayer Neal, attached to the petition for protective order, indicated that Ms. Segura constantly questioned Gabriella regarding what goes on when she is with her father and said mean things to her about her father. According to Dr. Neal, Gabriella feared staying with her mother.

Ms. Segura testified that she and Gabriella enjoyed doing many activities together, and she would like for the custody to go back to a week-to-week schedule. She testified that she had to work on Mother's Day, and Mr. Segura did not ask her about it until the night before. According to Ms. Segura, she was unaware that not using Our Family Wizard was an issue because the parties were communicating via text message. Ms. Segura said she missed Gabriella's softball game because she forgot and was tired.

In oral reasons for judgment, the trial court pointed out that the parties were not communicating well and found serious credibility issues with Ms. Segura's testimony. The trial court relied heavily on its conversation with Gabriella during its protective order hearing. The trial court stated Gabriella was not coached and was clearly afraid of her mother.

In her appellate brief, Ms. Segura takes issue with the trial court's apparent failure to consider any evidence from the court-appointed counselors, Dr. Clark and Dr. Thompson, prior to making its ruling on custody. At trial, counsel for Ms. Segura attempted to introduce Dr. Clark's evaluation into evidence. Counsel for Mr. Segura objected to Dr. Clark's

evaluation report as hearsay. The trial court sustained the objection, noted that Dr. Clark had not been subpoenaed as a witness, and allowed the evaluation report to be proffered. A report prepared by an expert is generally not admissible because it is hearsay. *Guzzardo v. Town of Greensburg*, 563 So.2d 424, 426 (La. App. 1 Cir. 1990). Hearsay is an out-of-court statement or writing offered to prove the truth of the matter asserted and thus relying upon the credibility of an out-of-court witness. *Id.* See also La. C.E. art. 801(C). Dr. Clark was not subpoenaed for the trial and did not appear. The evaluation would therefore fit the definition of hearsay, and the court correctly sustained the objection to hearsay.

In the case of Dr. Thompson, the final report had not been submitted to the trial court in time for the trial. As a result, the trial court proceeded without Dr. Thompson's report. The trial court's discretion in controlling the admission of expert testimony is well established in Louisiana jurisprudence. *Southern Casing of Louisiana, Inc. v. Houma Avionics, Inc.*, 2000-1930 (La. App. 1 Cir. 9/28/01), 809 So.2d 1040, 1055. Dr. Thompson, and especially Ms. Segura, would have been well aware of the date on which the trial was to begin. If neither Dr. Thompson nor his report were available for the trial, the trial court was well within its discretion to proceed without Dr. Thompson.

We recognize that the trial court is in the best position to observe the parties, and much can be gleaned from a person's demeanor and attitude during a proceeding. It is clear that both parties love Gabriella. However, Ms. Segura's behavior towards Gabriella and Gabriella's fear of Ms. Segura is troubling. We simply cannot conclude that the trial court's decision constitutes a clear abuse of discretion. Therefore, we find no error in the

trial court's award of sole custody of the minor child, Gabriella Segura, to Mr. Joseph Segura.

CONCLUSION

For the foregoing reasons, the judgment of the trial court awarding sole custody of Gabriella Segura to Mr. Joseph Segura is affirmed. Costs of this appeal are assessed to appellant, Ms. Erika Segura.

AFFIRMED.

JOSEPH SEGURA

STATE OF LOUISIANA

VERSUS

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 **BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.**

HIGGINBOTHAM, J., DISSENTS AND ASSIGNS REASONS.

HIGGINBOTHAM, J.

I respectfully disagree with the decision of the majority. Louisiana Civil Code art. 132 provides in pertinent part: “In the absence of agreement, or if the agreement is not in the best interest of the child, 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.” (Emphasis added.) The record does not support by clear and convincing evidence that sole custody to Mr. Segura was in the best interest of Gabriella.

During the custody hearing, Mr. Segura’s brief testimony was the only evidence offered in favor of sole custody. Mr. Segura admitted that despite filing the protective order, he gave additional custodial time to Ms. Segura. Further, although the reports were not made a part of the record, the testimony and evidence in the record show that both Dr. Clark and Dr. Thompson, who met with the parties at different times to do custody evaluations, recommended that the parties share joint responsibility for the minor child.

Ms. Segura has been actively involved in Gabriella’s life since her birth. Ms. Segura testified that she and Gabriella enjoy spending custodial time together, and do many activities together. Further, Ms. Segura has custody of Gabriella’s

brother Christopher, whom Gabriella said she misses when she is at her dad's house.

Ms. Segura was awarded significant custodial time with Gabriella, including three weekends a month and alternating holidays. This shows that the trial court trusted Ms. Segura to care for and make decisions regarding her daughter, Gabriella.

It is apparent from the record that both of these parties have occasionally made poor decisions regarding Gabriella. However, they are both loving parents. There was nothing in the record to suggest that Mr. and Ms. Segura are not capable of putting their personal differences aside and working together to make decisions that are in the best interest of Gabriella. The evidence falls short of proof, by clear and convincing evidence, that taking all decision making authority and responsibility from Ms. Segura regarding Gabriella, by granting sole custody to Mr. Segura, is in the best interest of Gabriella. Therefore, I respectfully dissent.