NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2015 CU 0080

SPENCER A. EGROS

VERSUS

BEVERLY TOUPS

and

No. 2014 CW 1135

SPENCER A. EGROS

VERSUS

BEVERLY TOUPS

Judgment Rendered: SEP 18 2015

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On Appeal from the
18th Judicial District Court
In and for the Parish of Iberville
State of Louisiana
Trial Court No. 65990

Honorable James J. Best, Judge Presiding

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BEFORE: PETTIGREW, HIGGINBOTHAM, AND CRAIN, JJ.

HIGGINBOTHAM, J.

In this child custody dispute, the mother appeals from the trial court's June 27, 2014 judgment granting sole custody of the minor children to the father and awarding no visitation to her.

FACTS AND PROCEDURAL HISTORY

In the summer of 2002, Mr. Spencer Egros and Ms. Beverly Toups began a dating relationship; in 2004, they moved in together. During the time they were living together, Ms. Toups became pregnant. On July 8, 2005, she gave birth to a son, Hines Egros. Three weeks after the birth of Hines, Mr. Egros and Ms. Toups moved to Texas together for Mr. Egros' job as an engineer. They lived together in Texas, but both described their relationship as "very dysfunctional" during that time.

In October 2007, Ms. Toups decided to move back to Louisiana with Hines. The following month, Mr. Egros also moved back to Louisiana and in December he filed an ex parte petition seeking custody of Hines. He was granted sole custody of Hines, and Ms. Toups was awarded supervised visitation. In a stipulated judgment signed March 3, 2008, the parties agreed that Mr. Egros would have sole custody of Hines, and Ms. Toups would exercise visitation every other weekend.

Shortly thereafter, Ms. Toups discovered that she was pregnant again and in March 2008, moved back in with Mr. Egros. On December 8, 2008, she gave birth to a second son, Miles Egros. Ms. Toups and Mr. Egros then got married on July 24, 2010, but quickly separated after about one month of marriage.

After their separation, both Ms. Toups and Mr. Egros filed for divorce and sought custody of Miles and Hines. On May 11, 2011, the parties signed a stipulated judgment in which they agreed to share fifty-fifty custody of the boys.

At some point, Mr. Egros became aware that he was not the biological father of Hines. Mr. Egros was told that John Clancy, who had a "one-night stand" with Ms. Toups while she and Mr. Egros were in a relationship, was the biological father

of Hines. Mr. Clancy intervened in the suit and requested a paternity test. Although the paternity test does not appear in the record, there is no dispute that Mr. Clancy is the biological father of Hines.

Initially, Mr. Egros was resistant to Mr. Clancy being a part of Hines' life, but later decided to work with Mr. Clancy and Ms. Toups toward a custody plan for Hines. In late 2012, Mr. Egros, Ms. Toups, and Mr. Clancy met with a counselor and agreed that Mr. Egros would become less involved in Hines' life, and that Mr. Clancy would take on the role of Hines' father. After that meeting, Hines began to live primarily with Ms. Toups and visited Mr. Clancy every other weekend. Mr. Egros no longer exercised his visitation with Hines. This arrangement was never made a judgment of the court.

Neither party was satisfied with the fifty-fifty custody arrangement and filed motions requesting, among other things, that the custody plan be modified. Ms. Toups sought joint custody of the children and to be named domiciliary parent. Mr. Egros sought sole custody of the children. Mr. Clancy did not seek legal custody of Hines in these proceedings.[1]

The three day trial was held on June 5, 2013 and December 18 and 19, 2013. At the conclusion of the trial, the trial court instructed both parties to file post-trial memoranda. The trial court acknowledged that it would likely award sole custody to one parent and asked that each party include in their memoranda what visitation they thought would be fair. The trial court stated that it would render a judgment after receipt of the memoranda, but did not give a deadline for filing. Ms. Toups and Mr. Egros were instructed to continue under the previous fifty-fifty custody order until a final judgment was rendered.

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[1] Mr. Egros signed the birth certificate of Hines Egros as his father. Mr. Clancy, who testified during the trial, never objected to Mr. Egros seeking custody of Hines. Further, Ms. Toups did not assign error to Mr. Egros being awarded custody of Hines although he is not his biological father.

On February 25, 2014, Ms. Toups' attorney filed a post-trial memorandum and included a proposed final judgment. On April 8, 2014, the trial court signed Ms. Toups' proposed final judgment. As of that date, Mr. Egros' attorney had not filed a post-trial memorandum.

The April 8, 2014 judgment awarded joint custody of Miles to the parties, and sole custody of Hines to Ms. Toups. After receipt of that judgment, Mr. Egros' attorney promptly filed a motion for new trial contending that the judgment was contrary to the law and evidence and granted relief that had not been prayed for. The motion also acknowledged that Mr. Egros was not at fault for a post-trial memorandum not yet being filed on his behalf. The trial court granted Mr. Egros' motion for new trial and ordered that the April 8, 2014 judgment be held in abeyance pending further orders of the court.

The motion for new trial came before the court on May 7, 2014, and was granted solely to allow Mr. Egros' attorney to file a post-trial memorandum. After receipt of both parties' post-trial memoranda, on June 3, 2014, the trial court issued a "Ruling of the Court," which set forth its reasons for awarding sole custody of both children to Mr. Egros, and supervised visitation to Ms. Toups, and ordered the parties to submit a judgment accordingly. The trial court also instructed the parties to attempt to agree to a reasonable visitation schedule.

On June 18, 2014, the parties submitted a judgment in accordance with the trial court's June 3, 2014 ruling, which was signed by both attorneys. Additionally, both parties filed proposed visitation schedules and supporting memoranda. On June 24, 2014, the trial court issued a second "Ruling of the Court" suspending all visitation rights of Ms. Toups until she produced to the court competent, professional testimony regarding her readiness to resume visitation. This "Ruling of the Court" was never made a written judgment of the court; however, on June 27, 2014, the trial court signed the June 18, 2014, judgment submitted by the parties, which granted

sole custody to Mr. Egros, but struck through the provisions in the judgment that awarded supervised visitation to Ms. Toups, thereby denying Ms. Toups any visitation rights with her children. It is from this judgment that Ms. Toups appeals.[2]

STANDARD OF REVIEW

Every child custody case must be viewed in light of its own particular set of facts. **Dettman v. Rablee**, 01-1228 (La. App. 1st Cir. 9/28/01), 809 So.2d 373, 377. The trial court is in the best position to ascertain the best interest of the child given each unique set of circumstances. **Bercegeay v. Bercegeay**, 96-0516 (La. App. 1st Cir. 2/14/97), 689 So.2d 674, 676. The trial court is vested with vast discretion in matters of child custody and visitation. Accordingly, its determination regarding same is entitled to great weight and will not be disturbed on appeal unless an abuse of discretion is clearly shown. **Stephens v. Stephens**, 02-0402 (La. App. 1st Cir. 6/21/02), 822 So.2d 770, 774.

However, where one or more legal errors by the trial court interdict the fact-finding process, the manifest-error standard is no longer applicable and, if the record is otherwise complete, the appellate court should make its own independent de novo review of the record. **Evans v. Lungrin**, 97-0541 (La. 2/6/98), 708 So.2d 731, 735. A legal error occurs when a trial court applies incorrect principles of law and such errors are prejudicial. Legal errors are prejudicial when they materially affect the outcome and deprive a party of substantial rights. **Pruitt v. Brinker, Inc.**, 04-0152 (La. App. 1st Cir. 2/11/05), 899 So.2d 46, 49, writ denied, 05-1261 (La. 12/12/05), 917 So.2d 1084.

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[2] Ms. Toups also filed an application for supervisory writ challenging the judgment, which was referred to this appeal panel. See Beverly C. Toups v. Spencer A. Egros, 2014-1135 (9/23/2014) (unpublished writ action). Because the assignments of error in Ms. Toups' writ application are also raised in her appeal and are addressed herein, we dismiss the writ application as moot. See **Cobb v. Mitchell**, 12-1032 (La. App. 1st Cir. 6/27/13), 121 So.3d 692, 695 n. 1 writs denied, 13-2049 (La. 11/15/13), 126 So.3d 471, and 13-2315 (La. 12/2/13), 126 So.3d 1288.

LAW AND ANALYSIS

In her first and fourth assignments of error, Ms. Toups contends that the trial erred by considering hearsay from Mr. Egros' post-trial memorandum as evidence in rendering its decision, thereby failing to adhere to the "clear and convincing" standard when awarding sole custody to one parent and denying her all rights to visitation/custodial time without just cause, and without having a contradictory hearing.

In this case, the trial concluded nearly six months before memoranda were filed, the trial court issued its ruling, and the final judgment was signed. During that time, the parties alleged several problems that occurred that were not part of this trial on the merits. Mr. Egros' post-trial memorandum included alleged incidents that happened after conclusion of the trial, and Ms. Toups filed an ex parte custody order that included allegations of sexual abuse.

At the end of the three day trial, the trial court stated that because of the parties' hostility toward one another and their inability to communicate, it was likely going to award sole custody to one parent. The trial court further stated the other parent would get "great quality, love and affection and visitation" and said that it did not find either parent unfit to raise the children.

About six months later, after the new trial was granted and the trial court received both parties' post-trial memoranda, the trial court issued a ruling stating that Ms. Toups would be awarded "reasonable but supervised" visitation.

Finally, after receipt of the proposed supervised visitation schedules from both parties, the trial court issued a second ruling suspending all visitation rights of Ms. Toups until such time as she produced competent, professional testimony showing her readiness to resume visitation.

The trial court acknowledged in its "Ruling of the Court" that:

> [C]oncerns of both parties as provided in their most recent memoranda to this court are not evidence to be considered by this Court on the merits of the trial for custody. Nevertheless, information provided by those memoranda, although not in evidence, indicate that both parties have engaged in outrageous conduct. As a result of the parties' hatred toward one another, the children are in grave danger of suffering psychological abuse. Therefore, all visitation rights of Beverly C. Toups are suspended...[3]

The trial court also referenced Ms. Toups' "countless moves" as a reason for its decision. However, the evidence submitted at trial indicated that Ms. Toups had lived at the same address since November 2010. The allegations of her moving around occurred after the trial concluded, and were merely part of Mr. Egros' post-trial memorandum.

Immediately after trial, the court stated that neither parent was unfit and would get meaningful visitation. Then, after receipt of the memoranda, the trial court stated it would order supervised visitation for Ms. Toups. After receipt of the proposed visitation schedules, the trial court awarded Ms. Toups no visitation. It was evident from the record that the trial court considered information contained in the parties' post-trial memoranda and visitation schedules when making his final decision, and he acknowledged that he considered factors not in evidence.

Arguments and pleadings, including allegations made in memoranda, are not evidence. **In re Melancon**, 05-1702 (La. 7/10/06), 935 So.2d 661, 666; **Johnson v. Holden Springs, Inc.**, 01-1366 (La. App. 4th Cir. 2/27/02), 811 So.2d 1123, 1125. While the record is clear that the trial court's ultimate goal has always been the best interest of the children, unsworn and unverified statements in an attorney's memorandum are not appropriate evidence to consider in determining what is in the best interest of Hines and Miles.

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[3] It is well-settled that an appeal is taken from a final judgment, not from written reasons for judgment that are the trial court's explanations of determinations made. See La. Code Civ. P. art. 2083. It is, however, not improper for the court of appeal to consider written reasons for judgment in determining whether the trial court erred. **State in the Interest of Mason**, 356 So.2d 530, 532 (La. App. 1st Cir. 1977); see La. Code Civ. P. art. 1917. In this case, the trial court's "Rulings of the court" are essentially written reasons for judgment.

Having found legal error in the trial court's consideration of the evidence not in the record, we reviewed the record de novo to determine whether the trial court's award of sole custody to Mr. Egros and denial of visitation rights to Ms. Toups was supported by the evidence.

Louisiana Civil Code article 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." Louisiana Civil Code article 136A provides, "A parent not granted custody or joint custody of a child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would not be in the best interest of the child." (Emphasis added.)

Given the precepts set forth in La. Civ. Code arts. 132 and 136, the first issue before the court is whether the record supports the conclusion that joint custody is not in the best interest of the children and whether the record shows, by clear and convincing evidence that the award of sole custody to Mr. Egros is in the best interest of the children. **Walet v. Caulfield**, 02-2009 (La. App. 1st Cir. 6/27/03), 858 So.2d 615, 622-623.

I. Sole Custody

During the custody hearing, Ms. Toups and Mr. Egros testified about their difficulties co-parenting. It was evident from the record that Ms. Toups and Mr. Egros are unable to settle their differences amicably and cannot communicate with each other. Further, the parties have not been able to insulate the children from their battles, as many of the worst incidents occurred during exchange of the children. The police have been called on several occasions because of their disagreements. The parties' hostility toward each other has made it impossible for them to co-parent their children together in any meaningful way. The trial court acknowledged that

"these parents have not and cannot work together in any way to raise their children." At the end of the three day trial, the trial court stated, that because of the parties' hostility toward one another and their inability to communicate, it was likely going to award sole custody to one parent.

Although Mr. Egros has let his disdain for Ms. Toups interfere with his parenting, he presented as the more stable parent of the two. He has maintained steady, well-paying employment, is married, and has good support from his current wife to help with the children. Mr. Egros coaches his sons' sports teams and has made it a priority to eat lunch with Hines at school on Fridays.

In comparison, Ms. Toups has changed jobs at least seven times and has never held a single job for more than one year. She has also been in involved in numerous romantic relationships. When in her care, the children have missed extra-curricular activities, and Hines was often late for and/or missed school.

Additionally, Ms. Toups demonstrated an unwillingness to follow the orders of the court. This was evidenced in her statement to the court when instructed to follow the previous orders of the court that, "I'm not---I'm not gonna do it. Hold me in contempt."

Considering the evidence introduced, and excluding any allegations included only in memoranda, we find the record supports by clear and convincing evidence that sole custody to Mr. Toups is in the best interest of the children.

II. Visitation

The second issue before this court is whether the trial court erred in awarding no visitation to Ms. Toups. We must review the evidence to determine whether the record supports an award.

The Louisiana Supreme Court has emphasized that the right of visitation is not without its limitations, and the rights of any parent are always subservient to the best interests of the child. **Maxwell v. Leblanc**, 434 So.2d 375, 377 (La. 1983). A

parent is entitled to reasonable visitation rights unless it is proven conclusively that visitation would seriously endanger the child's physical, mental, moral, or emotional health. **Maxwell**, 434 So.2d at 379. The paramount consideration in the setting of visitation privileges for the non-custodial parent is the best interest or welfare of the children. **Hebert v. Schexnayder**, 12-1414 (La. App. 1st Cir. 2/15/13), 113 So. 3d 1097, 1101.

While there is ample evidence in the record to support the trial court's award of sole custody to Mr. Egros, the evidence introduced into the record does not demonstrate that Ms. Toups is unfit to exercise visitation with her children. The record was devoid of any evidence to suggest that Ms. Toups has ever injured the minor children while they were in her care. During Mr. Egros' testimony, he never indicated that the children would be in danger if the children had visitation with Ms. Toups. In his closing comments at the conclusion of the trial, the trial court stated that he did not find either parent unfit to raise the children.

Additionally, the trial court's change in position, with no additional evidence being introduced, violates La. Civ. Code art. 136, which states that a parent not granted sole custody is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would not be in the best interest of the child.

We acknowledge that the trial court may be aware of information that was not introduced at trial, and we sympathize with the positon of the trial court. However, unsubstantiated, unverified allegations in a memorandum are not proper evidence to consider to deprive someone of visitation rights with their minor children.

Thus, the portion of the judgment striking through Ms. Toups' visitation award is vacated, and this matter is remanded to the trial court to promptly have a

contradictory hearing so that evidence can be introduced on the record in order to determine what, if any, reasonable visitation rights Ms. Toups should be awarded.[4]

III. Post-Separation Family Violence Relief Act

In her second assignment of error, Ms. Toups contends that the trial court erred in awarding sole custody to Mr. Egros after finding that he had the propensity to not be truthful about certain issues and had committed acts of violence against Ms. Toups on at least one occasion, which was in direct contrast to Post-Separation Family Violence Relief Act, La. R.S. 9:364 et. seq. (PSFVRA). Ms. Toups further contends that Mr. Egros should not have been given custody because of his history of drug use.

The PSFVRA was specifically designed to protect the child's interest by restricting the right of visitation of the abusing spouse in families with a history of family violence. Louisiana Revised Statutes 9:364 A provides "[t]here is created a presumption that no parent who has a history of perpetrating family violence shall be awarded sole or joint custody of children. The court may find a history of perpetrating family violence if the court finds that one incident of family violence has resulted in serious bodily injury or the court finds more than one incident of family violence."

Ms. Toups never urged the PSFVRA at trial and never requested sole custody. In this case, there was evidence that each party provoked verbal and sometimes physical altercations with the other; however, there was no evidence that any serious bodily injury occurred during any altercation. After review of the evidence, we find

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[4] In her third assignment of error, Ms. Toups contends that the trial court erred by way of its sua sponte amendment to the July 1, 2014 considered decree because it altered the substance of the judgment without first setting a contradictory hearing in violation of La. Code Civ. P. art. 1951. Ms. Toups' final assignment of error states that the trial court's ruling should be reversed to avoid continued and irreparable harm, and the April 2014 judgment should be reinstated. This final assignment of error is more in the nature of a prayer for relief. Because we are remanding the matter back to the trial court for a contradictory hearing on visitation, we need not address these assignments of error.

that the trial court was not manifestly erroneous in not invoking the presumption in the PSFVRA, because a history of perpetrating family violence was neither urged nor proven.

As far as illegal drug use, there was some testimony that Mr. Egros may have used marijuana in the past. However, the court's drug screen was negative, and nothing in the record indicated that he was currently using marijuana. The trial court is not bound to give more weight to one factor over another, and, when determining the best interest of the child, the factors must be weighed and balanced in view of the evidence presented. **Harang v. Ponder**, 09-2182 (La. App. 1st Cir. 3/26/10), 36 So.3d 954, 963, writ denied, 10-0926 (La. 5/19/10), 36 So.3d 219. The allegation that Mr. Egros may have used marijuana in the past is one of many things that the court considered in making its determination, and the testimony alone that he used marijuana does not mandate that the court not award him sole custody.

CONCLUSION

For these reasons, we affirm the portion of the judgment awarding sole custody to Mr. Egros. This matter is hereby remanded to the trial court to hold a contradictory hearing as soon as possible, but within thirty days, to determine what, if any, reasonable visitation should be awarded to Ms. Toups. Additionally, Ms. Toups application for writ of supervisory review is denied as moot.

Costs of the appeal are divided between Spencer Egros and Beverly Toups.

AFFIRMED IN PART; REMANDED FOR A HEARING; WRIT APPLICATION DENIED AS MOOT.