

NOT DESIGNATED FOR PUBLICATION

ANGELA PEOPLES, WIFE OF GEORGE CHRISTOPHER DUBOIS	*	NO. 2004-CA-0062
	*	COURT OF APPEAL
VERSUS	*	FOURTH CIRCUIT
GEORGE CHRISTOPER DUBOIS	*	STATE OF LOUISIANA
	*	

**APPEAL FROM
25TH JDC, PARISH OF PLAQUEMINES
NO. 44-016, DIVISION "B"
Honorable William A. Roe, Judge**

Judge David S. Gorbaty

(Court composed of Judge David S. Gorbaty, Judge Leon A. Cannizzaro Jr.,
Judge Roland L. Belsome)

CANNIZZARO, J., DISSENTS WITH REASONS

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AFFIRMED

In this appeal, George Christopher Dubois contends that the trial court erred in denying his rule to change custody and ordering that the minor children be returned to Angela Peoples Dubois. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

On November 4, 1999, the parties were divorced. Mrs. Dubois was originally designated the domiciliary parent of all three children, Rebecca, Devon, and Emily, by a consent judgment rendered in Plaquemines Parish on that same day.

In February 2001, Mr. Dubois filed a motion to reduce child support based on the allegation that the youngest of the three children, Emily, was not his biological child. In support of that proposition, Mr. Dubois presented a judgment from the Civil District Court for the Parish of Orleans from a petition of disavowal filed there. The petition was filed in 2001. Mrs. Dubois appeared at the hearing without counsel and did not object to the disavowal, nor to the venue.

As a result of the February 2001 rule, a consent judgment was entered on February 28, 2001, reducing Mr. Dubois's child support obligation based on the fact that Emily was not his biological child, even though she was born

during his marriage to Mrs. Dubois. According to Mrs. Dubois, because of the reduced child support she was receiving, she agreed to let the two other children stay with Mr. Dubois on a temporary basis beginning in August 2001 and to attend school in Mr. Dubois's school district in Jefferson Parish for that school year. Mrs. Dubois claims that the agreement was that the children would be returned to her in December; Mr. Dubois says that they were to be returned to her in May.

Near the end of the school year, Mr. Dubois filed a petition for modification of custody in Jefferson Parish and obtained temporary custody at a hearing where Mrs. Dubois appeared without counsel. The judgment provided for only supervised visitation by Mrs. Dubois and ordered that a custody evaluation be performed.

Mrs. Dubois retained counsel and excepted to the proceedings in Jefferson Parish on jurisdictional grounds, and the case was transferred to Plaquemines Parish by judgment dated July 11, 2002. On January 16, 2003, Mrs. Dubois filed a motion in that court to determine custody and enforce prior judgments of the court. A hearing on these motions was held on March 13, 2003. On June 25, 2003, the trial court rendered judgment denying Mr. Dubois's petition for modification of custody, and granting Mrs. Dubois domiciliary status of the three children. Mr. Dubois subsequently filed this

appeal.

DISCUSSION

Mr. Dubois asserts that the trial court erred in not recognizing and applying the major changes in circumstances that occurred after the original custody decree, as well as not recognizing that those significant changes in circumstances materially affect the children's well-being. The trial court should have concluded that there was clear and convincing evidence that the advantages gained by the children from living with Mr. Dubois would outweigh any potential harm that was caused by the change, he argues. Mr. Dubois points out that he had physical custody of the children from August 2001 through June 2003, and that this in and of itself is a change in circumstances sufficiently extraordinary to justify upsetting the original custody decree.

Mr. Dubois also argues that the trial court erred in not recognizing that the proposed modification sought by Mr. Dubois is in the best interest of the minor children. The trial court further erred in disregarding the testimony and recommendations of the court-appointed custody evaluator who participated at the trial, appellant urges. Mr. Dubois further asserts that the trial court erred in finding that it would not be in the best interest to separate two of the minor children from another half sibling, given that Mrs. Dubois

had consented to this arrangement for one and one-half years. Additionally, appellant avers that the trial court erred in considering the disavowal as improper venue and factoring such as a basis to determine Mr. Dubois's willingness to facilitate a relationship between the half siblings. Mr. Dubois also contends that the trial court erred in considering the filing of the rule to modify custody as a violation of an agreement between the parties. Ultimately, appellant concludes that the trial court erred in ordering the initial return of the children to Mrs. Dubois.

The standard of review to be employed in cases involving the custody of children was set forth by this court in *Mire v. Mire*, 98-1614, pp.3-4 (La. App. 4 Cir. 3/24/99), 734 So.2d 751, 753:

It is well settled that a court of appeal may not set aside a trial court's or a jury's findings of facts in the absence of "manifest error" or unless it is "clearly wrong". *Rosell v. ESCO*, 549 So.2d 840, 844 (La.1989). When the factual findings are based on the credibility of witness's testimony, the fact finder's decision to credit a witness's testimony must be given "great deference" by the appellate court. *Id.* The trial judge is in the best position to ascertain the best interest of the child given each unique set of circumstances. Accordingly, a trial court's determination of custody is entitled to great weight and will not be reversed on appeal unless an abuse of discretion is clearly shown. *Thompson v. Thompson*, 532 So.2d 101 (La.1988) (per curiam); *Bercentage v. Bercentage*, 96-0516, p. 5 (La.App. 1 Cir. 2/14/97), 689 So.2d 674, 676.

Similarly, in *Aucoin v. Aucoin*, 2002-0756, pp.4-5 (La. App. 3 Cir. 12/30/02), 834 So.2d 1245, 1248, the Third Circuit wrote:

This court has clearly stated the standard of review for an appellate

court in child custody matters. "The trial court is in a better position to evaluate the best interest of the child from observances of the parties and witnesses; thus, a trial court's determination in a child custody case is entitled to great weight on appeal and will not be disturbed unless there is a clear abuse of discretion." *Hawthorne v. Hawthorne*, 96-89 p. 12 (La.App 3 Cir.); 676 So.2d 619, 625, writ denied, 96-1650 (La.10/25/96); 681 So.2d 365; *Cooley v. Cooley*, 94-251 (La.App. 3 Cir. 10/5/94), 643 So.2d 408; *Mayeux v. Mayeux*, 93-1603 (La.App. 3 Cir. 6/1/94); 640 So.2d 686.

Appellant argues that appellee's neglectful conduct and lack of interest in the welfare and well-being of the minor children dictate that he be awarded custody. In the case at bar, the trial court specifically chose to believe the testimony of Mrs. Dubois, and found her to be credible. The record supports the conclusion that Mrs. Dubois was able to provide a safe and nurturing home for her children. Mrs. Dubois testified that she was able to provide a home that was childproof and child-friendly; that she kept the house clean and free of any dangers; and that when the children were living with her, she was able to maintain a normal schedule to bring the children to and from school, and to take care of them. Mrs. Dubois further explained that at the time of trial, she had a full-time job as an office manager, and that she believed that the children would benefit from attending Belle Chasse Middle School.

The trial court found Ms. Darby, the custody evaluator, to lack credibility, and chose to reject her testimony. At trial, he informed her, "You

will never qualify in this Court again [as an expert witness].” She replied,

“Maybe I don’t want to.” In his reasons for judgment, the trial court stated:

That expert, Mary Darby, was qualified by this Court reluctantly and, in hindsight, should not have been. She was performing her third custody evaluation after being certified from a three day seminar; got into this field on the recommendation of a friend to make more money; was openly antagonistic toward Angela and her family based, I believe, on her perception that the appointing judge favored the mover or that the mover, Chris, was responsible for her appointment; was disrespectful and evasive to the Court; and offered nothing objective or construction [sic] to the process or the decisions to be made by the Court. In short, she was the worst “expert” witnesses this Court has ever seen and her testimony and recommendations are rejected in their entirety.

Based on these well-articulated reasons, we cannot say that the trial judge was manifestly erroneous in rejecting the testimony of Ms. Darby. The trial judge’s rejection of her recommendations is further supported by the testimony and evidence presented at trial.

La. Civil Code art. 131 provides that the paramount consideration in the determination of child custody is the best interest of the child. In cases where the original custody decree is a stipulated judgment and the rule of *Bergeron v. Bergeron*, 492 So.2d 1193 (La. 1986), is inapplicable, the party seeking modification must prove (1) that there has been a material change in circumstances since the original custody decree was entered, and (2) that the proposed modification is in the best interest of the child.

According to La. C.C. art. 134, the relevant factors to be considered in

determining the best interest of the child may include: (1) the love, affection, and other emotional ties between each party and the child; (2) the capacity and disposition of each party to give the child love, affection, and spiritual guidance and to continue the education and rearing of the child; (3) the capacity and disposition of each party to provide the child with food, clothing, medical care, and other material needs; (4) the length of time the child has lived in a stable, adequate environment, and the desirability of maintaining continuity of that environment; (5) the permanence, as a family unit, of the existing or proposed custodial home or homes; (6) the moral fitness of each party, insofar as it affects the welfare of the child; (7) the mental and physical health of each party; (8) the home, school, and community history of the child; (9) the reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference; (10) the willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party; (11) the distance between the respective residences of the parties; and (12) the responsibility for the care and rearing of the child previously exercised by each party.

The court is not bound to make a mechanical evaluation of all of those factors and is not bound to give more weight to one factor over another. In

determining the best interest of the child, the factors must be weighed and balanced in view of all of the evidence presented. Moreover, the factors are not exclusive and the relative weight given to each factor is left to the discretion of the trial court.

The separation of children of a family, though sometimes necessary, is a custodial disposition that courts seek to avoid. *Howze v. Howze*, 99-0852 (La. 5/26/99), 735 So.2d 619. Normally, the welfare of the children is best served by leaving them together, so they can have the full benefit of companionship and affection and, when feasible, a custody order should be shaped in order to maintain family solidarity. *Id.*

Mr. Dubois knew before Devon was born that Devon was not his biological child. Devon was conceived during a period when the parties were separated. When the parties reconciled, Mr. Dubois agreed to accept Devon and raise him as his own. It was disputed as to when Mr. Dubois discovered Emily was not his biological child. Mr. Dubois wishes to break up the three siblings. He does not want custody of Emily because she is not his biological child, but urges his entitlement to custody of Devon, who has the same status. Thus, to grant Mr. Dubois custody of Rebecca and Devon means that the three siblings will be separated, and that Devon will live with a non-biological parent. A grant of custody to Mrs. Dubois means that the

three siblings will live together.

The trial court weighed and analyzed the factors set forth in La. C.C. art. 134 and concluded that “when it is considered that Chris attempts to tear the family apart and wants nothing to do with one of the children born during his marriage to Angela, the decision weighs overwhelmingly in Angela’s favor.” The court further found that Mr. Dubois “has sought to manipulate the legal system and his ex-wife and, in doing so, attempts to separate the children forever, with the Court being left with no assurance that he will ever agree to encourage a close and continuing relationship between the children.”

We find that the evidence and testimony presented at trial support the trial court’s findings, and hold that his conclusions, which are largely based upon his evaluation of the witnesses, are not manifestly erroneous.

CONCLUSION

Accordingly, for the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED