

**NOT DESIGNATED FOR PUBLICATION**

**DAVID BRENT LESTER, II**

\*

**NO. 2008-CA-0283**

**VERSUS**

\*

**COURT OF APPEAL**

**JOY LEONA PROVANCE  
LESTER**

\*

**FOURTH CIRCUIT**

\*

**STATE OF LOUISIANA**

\*\*\*\*\*

APPEAL FROM  
25TH JDC, PARISH OF PLAQUEMINES  
NO. 52-738, DIVISION "A"  
HONORABLE ANTHONY D. RAGUSA, JUDGE

\*\*\*\*\*

**JAMES F. MCKAY III  
JUDGE**

\*\*\*\*\*

(Court composed of Chief Judge Joan Bernard Armstrong, Judge James F. McKay III, Judge Roland L. Belsome)

DAVID M. HUFFT  
PIVACH, PIVACH, HUFFT, THRIFFILEY & NOLAN, L.L.C.  
Belle Chase, Louisiana 70037  
Counsel for Plaintiff/Appellant

MICHAEL D. CLEMENT  
LAW OFFICES OF MICHAEL D. CLEMENT  
Belle Chase, Louisiana 70037  
Counsel for Defendant/Appellee

**AFFIRMED**

In this child custody dispute, the father, David Brent Lester, II, seeks to have the judgment of the trial court overturned as it pertains to the designation of the mother, Joy Leona Provance Lester, as domiciliary parent. For the reasons that follow, we affirm.

#### **FACTS AND PROCEDURAL HISTORY**

David Brent Lester, II, filed a petition for divorce on July 28, 2005. A hearing date of September 21, 2005 was initially set by the trial court; however, as a result of Hurricane Katrina, all ancillary matters including child custody were reset for a hearing on December 12, 2005.

On December 12, 2005, the parties stipulated into the record a consent judgment pursuant to La. C.C. art. 3071. The trial court awarded the parents joint custody of the two minor children with an equal shared physical custody plan alternating on a seven (7) day basis. On January 9, 2006, the court signed an order rejecting both parties' recommendations for a child custody evaluator, and appointed its own expert, Dr. Raphael F. Salcedo, to prepare and complete a child

custody evaluation. The parents were officially divorced on April 3, 2006. On October 10, 2006, an order was signed ordering Dr. Salcedo to prepare a written supplement to his evaluation to update the “current status of the parties, together with his recommendation of the division of the days of physical custody of the two minor children, with each party.” Also on October 10, 2006, both parties entered into a consent judgment concerning discovery requests.

On October 19, 2006, Mr. Lester filed a motion to enforce judgment and rule for contempt, relative to the consent judgment, that was stipulated into the record on December 12, 2005. The basis for the rule for contempt and pursuant to the specific language in this consent judgement, both parties agreed that “no one of the opposite sex was allowed to stay overnight between the hours of 9:00 p.m. through 8:00 a.m. at either party’s home unless related by blood and/or marriage” while either party has physical custody of the minor children.

On February 2, 2007, March 13, 2007, and May 8, 2007, the court conducted a trial regarding custody and Mr. Lester’s motion to enforce judgment and rule for contempt. On June 14, 2007, the trial court rendered judgment awarding the sole custody of the minor children to Joy Lester with reasonable visitation being granted to David Lester.

The appellant filed a motion for new trial on June 25, 2007, which the trial court denied on September 5, 2007. The trial court noted the absence of a decision regarding the appellant’s motion to enforce judgment and rule for contempt. On

November 9, 2007, the trial court rendered a second judgment denying the motion to enforce the consent judgment and rule for contempt.

On December 3, 2007, the appellant, David Lester, filed this appeal contending that the trial court committed legal error and abused its discretion in failing to properly consider all relevant factors in awarding sole custody with reasonable visitation to the appellant as the judgment was contrary to the evidence and testimony at trial. The appellant argues that this judgment is not in the best interest of the children and departs from the recommendation of the court's own expert. The appellant also asserts that the trial court erred in failing to find that the appellee was in contempt of court for violation of the consent judgment stipulated into the record on December 12, 2005, and subsequently signed by the court on October 1, 2007.

## **LAW AND DISCUSSION**

Louisiana Revised Statutes 9:335, which guides courts in determining joint custody arrangements, provides the following:

### **§ 335. Joint custody decree and implementation order**

A. (1) In a proceeding in which joint custody is decreed, the court shall render a joint custody implementation order except for good cause shown.

(2)(a) The implementation order shall allocate the time periods during which each parent shall have physical custody of the child so that the child is assured of frequent and continuing contact with both parents.

(b) To the extent it is feasible and in the best interest of the child, physical custody of the children should be shared equally.

(3) The implementation order shall allocate the legal authority and responsibility of the parents.

B. (1) In a decree of joint custody the court shall designate a domiciliary parent except when there is an implementation order to the contrary or for other good cause shown.

(2) The domiciliary parent is the parent with whom the child shall primarily reside, but the other parent shall have physical custody during time periods that assure that the child has frequent and continuing contact with both parents.

(3) The domiciliary parent shall have authority to make all decisions affecting the child unless an implementation order provides otherwise. All major decisions made by the domiciliary parent concerning the child shall be subject to review by the court upon motion of the other parent. It shall be presumed that all major decisions made by the domiciliary parent are in the best interest of the child.

C. If a domiciliary parent is not designated in the joint custody decree and an implementation order does not provide otherwise, joint custody confers upon the parents the same rights and responsibilities as are conferred on them by the provisions of Title VII of Book I of the Civil Code.

## **STANDARD OF REVIEW**

In child custody cases, appellate courts will not disturb an award of custody absent a manifest abuse of discretion in the trial court. See Revision Comments--1993 to La. Civil Code art. 134, Comment (b). In Bergeron v. Bergeron, 492 So.2d 1193 (La.1986), the Louisiana Supreme Court described the appellate review standard by stating that "upon appellate review, the determination of the trial judge in child custody matters is entitled to great weight, and his discretion will not be disturbed on review in the absence of a clear showing of abuse." Id. at 1196. Where there has been an error of law, a *de novo* review is required in a child custody case. In Evans v. Lungrin, 97-0541 (La.2/6/98), 708 So.2d 731, the Supreme Court discussed the appellate review standard where the trial court has committed legal error. The Supreme Court stated:

[W]here one or more trial court legal errors 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 and determine a preponderance of the evidence. 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. When such a prejudicial error of law skews the trial court's finding of a material issue of fact and causes it to pretermitt other issues, the appellate court is required, if it can, to render judgment on the record by applying the correct law and determining the essential material facts de novo.

97-0541, 97-0577, pp. 6-7, 708 So.2d at 735 (citations omitted).

In the instant matter a *de novo* review standard is not applicable.

## **ANALYSIS**

The paramount consideration in any determination of child custody is the best interest of the child. La. C.C. art. 131; Evans v. Lungrin, Id., Rutledge v. Rutledge, 41,792 (La.App.2d Cir.12/13/06), 945 So.2d 307. The best interest of the child test under Articles 131 and 134 is a fact-intensive inquiry requiring the weighing and balancing of factors favoring or opposing custody in the competing parties on the basis of the evidence presented in each case. Rutledge, supra; Cook v. Cook, 40,572 (La.App.2d Cir.1/25/06), 920 So.2d 981. Each custody case must be viewed within its own peculiar set of facts. Cook, supra.

La. C.C. art. 134 provides that the court shall consider all relevant factors in determining the best interest of the child and such factors which may include the following:

- (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.

(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 the statutory factors listed in Article 134, but should decide each case on its own facts in light of those factors. The 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. Rutledge, *supra*.

Moreover, the factors are not exclusive but are provided as a guide to the court and the relative weight given to each factor is left to the discretion of the trial court.

Rutledge, *supra*, citing McIntosh v. McIntosh, 33,908 (La.App.2d Cir.8/31/00), 768 So.2d 219.

### **Burden of Proof for Modification of Custody Judgment**

In Evans v. Lungrin, *supra* the Louisiana Supreme Court discussed the burden of proof that a party seeking a change in child custody must meet. The

general rule is that "the paramount consideration in any determination of child custody is the best interest of the child." Evans v. Lungrin, Id. An additional jurisprudential burden is imposed when a change in a considered custody decree is requested. In Evans the Supreme Court described the burden of proof in that situation. The Supreme Court stated:

When a trial court has made a considered decree of permanent custody, the party seeking the change bears a heavy burden of proving that the continuation of the present custody is "so deleterious to the child as to justify a modification of the custody decree," or of proving by "clear and convincing evidence that the harm likely to be caused by the change of environment is substantially outweighed by its advantages to the child."

97-0541, p. 13, 708 So.2d at 738.

Mr. Lester maintains that the court appointed expert, Dr. Raphael Salcedo, recommended shared physical custody; and that the trial court committed legal error by not adopting that recommendation. The great discretion and deference granted to the fact-finder on appellate review extends to its assessment of expert testimony. Sistler v. Liberty Mutual Ins. Co., 558 So.2d 1106 (La.1990). After weighing and evaluating expert and lay testimony, the trial court may accept or reject the opinion expressed by any expert. It is within the trial court's discretion to substitute common sense and judgment when such a substitution appears warranted upon the record as a whole. Verret v. Verret, 34,982 (La.App. 2 Cir. 5/9/01), 786 So.2d 944. A trial judge may substitute his/her own common sense and judgment for that of an expert witness when such a substitution appears warranted on the record as a whole. Raney v. Wren, 98-0869, 722 So.2d 54 (La.App. 1 Cir. 11/6/98); Goodwin v. Goodwin, 618 So.2d 579, 586 (La.App. 2 Cir.1993).



In the present case, the trial court exercised its great discretion in evaluating the expert's information along with the other evidence and deciding to award sole custody and domiciliary parent status to the mother.

In the trial court's reasons for judgment it noted that:

The court reviewed all of the evidence including video tapes, photos, lawsuits, and two reports from Dr. Raphael Salcedo, done for the court as an evaluation. The reports are what forms the major crux of this case. Dr. Salcedo, in his first report, agrees for the custody to be joint, with the mother being the domiciliary parent. His subsequent report declares that he has had a change of opinion and states that the domiciliary parent should be the father.

We find no evidence of any legal error on the part of the trial court in failing to implement Dr. Salcedo's custody plan.

In the trial court's reasons for judgment, it clearly enunciates the rational behind awarding sole custody to the mother was, in the statutory sense, in the best interest of the children.

This court never heard any evidence of the effects of these facts on the issue of who should be the domiciliary parent in a joint custody arrangement. This court believes that the opposite is in fact true. It would not be beneficial to these children to be subjected to this kind of joint custody arrangement. Since the parties are not communicating, at this time, it would be better served for the children to be administered to a sole custody arrangement. The purpose of the joint custody is for the parents to make decisions together on what is best for their children. This court does not believe that the parties can do this...

After considering all of the factors listed in the Civil Code, this court believes it is in the best interest of the children that the mother be granted the sole custody of the children.

We can find no error in the trial court rational and determination that the mother should have the designation of being the domiciliary parent with sole custody of the minor children.

Finally the appellant argues that the trial court erred in failing to find the appellee in contempt of court for violation of the consent judgment stipulated into the record on December 12, 2005, and subsequently signed by the court on October 1, 2007.

The trial court on November 9, 2007, signed the judgment finding that David Brent Lester, "failed to prove the defendant, Joy Leona Provance Lester to be in contumacious contempt of court. There was no showing or proof to the court that the children were present at the home when the boyfriend of the mother was shown to be in the family home. The mother declared, and this court finds that the children may well have been at another member of the family's home."

Contempt of court proceedings in civil cases are governed by La. C.C.P. art. 221, *et seq.*, which define contempt as "any act or omission tending to obstruct or interfere with the orderly administration of justice, or to impair the dignity of the court or respect for its authority." The Code of Civil Procedure provides for two kinds of contempt, direct and constructive. Direct contempt of court is defined in La. C.C.P. art. 222 as "one committed in the immediate view and presence of the court and of which it has personal knowledge, or a contumacious failure to comply with a subpoena or summons, proof of service of which appears of record." Constructive contempt of court is any contempt other than a direct one, including the willful disobedience of any lawful judgment, order, mandate, writ, or process of the court. La. C.C.P. art. 224(2).

A trial court is vested with great discretion to determine whether circumstances warrant holding a party in constructive contempt of court pursuant to La. C.C.P. art. 224 for willful disobedience of a court order. Lang v. Asten, Inc., 04-1665, p. 12 (La.App. 4 Cir. 3/30/05), 900 So.2d 1031, 1039. Moreover, a trial court must find that the party's violation was willful in order to hold that party in contempt, meaning that the party must have " 'intentionally, knowingly and purposely acted or failed to act.' " Id. A court may not hold a party in contempt unless it finds that the party's reasons for violating the order were without justifiable excuse. Id.

The trial court reviewed all of the evidence and documentation at the hearing and determined that David Lester did not provide sufficient evidence to sustain his motion to enforce consent judgment and rule for contempt. Accordingly, we find no abuse of discretion in the trial court's ruling.

For the above and foregoing reasons, we affirm the judgment of the trial court.

**AFFIRMED**