

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

VESPER V. FRANCIS

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BRUCE VESPER, APPELLANT,
V.
DAWN FRANCIS, APPELLEE.

Filed October 8, 2013. No. A-12-1168.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge.
Affirmed.

Shane J. Placek, of Sidner, Svoboda, Schilke, Thomsen, Holtorf, Boggy, Nick & Placek,
for appellant.

Patrick T. Carraher and Christine A. Stolarskyj, of Legal Aid of Nebraska, and Adam R.
Tripp for appellee.

MOORE, PIRTLE, and BISHOP, Judges.

PIRTLE, Judge.

INTRODUCTION

Bruce Vesper appeals the order of the district court for Saunders County finding it was in the minor child's best interests to place his care, custody, and control with the child's mother, Dawn Francis, subject to Vesper's right of reasonable visitation. For the reasons that follow, we affirm.

BACKGROUND

Vesper and Francis are the biological parents of Alexander Francis. Vesper and Francis met in July 2010, moved in together 4 months later, and lived together for approximately 6 months. After they separated, Francis notified Vesper that she was pregnant, and their last correspondence prior to the birth of the child was in February 2011. In June 2011, Vesper filed a petition to establish paternity and custody.

During the pregnancy, Francis met Keylee Bonney, a woman who had obtained a harassment protection order against Vesper. Francis contacted Bonney to find out information about the protection order. Bonney did not know Vesper personally, but at the time of the protection order, Bonney's current husband was going through a divorce from Vesper's second cousin. Unbeknownst to Bonney, Vesper was videotaping Bonney's 6- and 8-year-old children. The police were called, and Vesper was found on the Bonney property with a camcorder. The videotapes included footage of the children engaging in activities such as going to school, playing with friends, and jumping on a trampoline over the course of about 3 months. Vesper was charged with disturbing the peace and trespassing, and Bonney successfully obtained a 1-year protection order. A few days after the issuance of the order, Bonney saw Vesper approximately one block away from her home, again recording video. The police were called, and Vesper was removed from the property. Bonney shared this information with Francis, because she was concerned Vesper would do the same thing to her.

Francis did not want Vesper to be present at the hospital during the delivery of their child because their relationship was not very good and she felt it would not be good for her or the child for Vesper to be present. Alexander was born in September 2011. Francis did not notify Vesper that Alexander was born or that he was in neonatal intensive care at the hospital for 2 weeks after his birth. She believed Vesper would start a confrontation during labor and delivery.

In October 2011, Vesper filed a motion for genetic testing, and the test confirmed that Vesper was Alexander's biological father. After the results of the test, Vesper sought temporary custody of Alexander, and his request was denied. Vesper was granted temporary visitation with Alexander on Saturdays from 10 a.m. to 5 p.m. and on Wednesdays from 6 to 8 p.m. Vesper filed his amended petition to establish paternity and custody on November 17. In January 2012, he sought an increase in parenting time. Vesper provided notice, in compliance with Neb. Rev. Stat § 42-364 (Cum. Supp. 2012) on September 7 that in the event he was not granted full physical and legal custody of the child, he requested joint legal and physical custody.

The parties appeared for trial on November 13, 2012, to determine paternity, child support, child custody, and parenting time.

At the time of trial, Vesper resided in Fremont, Nebraska, in a duplex he had rented for over a year. He was single and employed full time as a "locating technician," locating "underground . . . OPPD wires." His work schedule was roughly 8 a.m. to 5 p.m. Monday through Friday, and his hours decreased during the winter due to reduced demand. Vesper also testified that he is paid cash to plow snow for a friend as needed and that he has done this for the past four winters.

Vesper testified that he completed a 16-week parenting program and a nutrition education program. A family life educator testified that Vesper was an active participant in a parenting support group.

Vesper's second cousin testified that Vesper is like a brother and that he has helped her to parent her children, especially during times when she was in training or stationed abroad with the U.S. Army National Guard. She said Vesper is a stable, positive role model for her children.

At the time of trial, Francis resided in Cedar Bluffs, Nebraska. She was the primary caregiver for Alexander, who was approximately 14 months old at that time. She was divorced from Eddie Guerrero prior to her involvement with Vesper. Francis and Guerrero had three

children together, and after the divorce, Guerrero consented to Francis' moving from Texas to Nebraska with their children. The children are older half siblings to Alexander, and at the time of the trial, their ages were 11, 9, and 5. Francis was unemployed and relied on food stamps, "WIC," Medicaid, and child support to care for the children. Francis participated in a court-ordered parenting course, as well as "parenting classes through WIC," and a parenting class for divorcing couples, at the time of her divorce from Guerrero.

Guerrero testified that he had no concerns about his children or their safety with Francis and that he was happy and satisfied with how she was raising their children. Guerrero and Francis consistently communicate via text, "Skype," and telephone calls regarding "medical, school, other important events, and developments" concerning their children. He said that his children were very excited to have a little brother and that "they love him very much, they play with each other and it's very cohesive."

Bonney testified that Francis is a loving, kind, and funny person who "interacts with [her children] all the time" and meets their educational and medical needs. She said she had no concerns with Francis' parenting skills or with the cleanliness, safety, or space available in the home.

Both parties testified regarding Vesper's relationship with Francis' children when they resided together. Vesper testified that he provided supervision for the children when she was not available and that he fed them, assisted them with homework, and put them to bed without issue. Vesper testified that he and Francis separated because she had a problem with him providing structure for her children, making them do chores, and disciplining them.

Francis testified she had concerns with the care Vesper provided for the children. She said he would tell the children what was expected of them and that when they met that expectation, he would change it. She said this was confusing for the children. She also testified that there was conflict between them regarding discipline and where his role ended and hers began. She believed that it should be her role, as the mother, to discipline her own children and that she felt he was too hard on the children.

Francis testified that she is concerned Vesper expects Alexander to act older than he is and that "he expects too much too soon" from the child. Francis also testified that she was concerned with Alexander's safety and the level of supervision Vesper provided. Specifically, Alexander came home after a visit with Vesper with a "goose egg on his head" before he was able to walk or crawl, and on another occasion, he had a scratch on his leg. She was also concerned that Alexander becomes clingy after visits.

The clinical director of a behavioral health care company testified that she performed a parenting assessment for Vesper in 2012. She testified that Vesper had great knowledge about parenting a small child, and she felt he demonstrated the qualities that would make an excellent parent. However, her written analysis states that Vesper does not have a good grasp on the abilities of a child at this age. It also states Vesper is capable of providing direction to his child, but can easily become distracted when he is seeking to take care of his own needs. The clinical director testified that she did not observe Francis' interactions with the child or with Vesper and that her opinion about the communication between the parties was based on very limited information.

When Vesper's visitation with Alexander began, the exchanges were to take place in Fremont at the parking lot across from the police station. At some point, the exchange was moved inside of the police station in front of the dispatcher window. Francis' brother testified that he, or another family member, accompanies Francis when she exchanges Alexander with Vesper because he is concerned for her safety. Francis' brother testified that he believed his presence was necessary, because at times, Vesper was aggressive toward Francis and yelled at her. Francis' brother testified he has encouraged Francis to obtain a protection order. He testified that Francis has demonstrated her ability to properly care for children and that she has taken the proper steps to ensure their safety in the home.

Vesper and Francis disagree about how to address Alexander's nutritional needs. Francis testified that Alexander has food sensitivities or allergies and that his doctor told her what types of food to give him. The doctor tested Alexander for a milk allergy, and the test did not confirm the allergy. The doctor said Alexander was probably lactose intolerant, and Francis provided that information to Vesper. Francis said that she provided Vesper with a prescription for soy milk but that Vesper continued to give Alexander milk. Francis testified that Alexander often returns from visits with diarrhea.

Vesper confirmed that Francis provided him with the doctor's instructions for what to feed Alexander and the reasons behind that decision. Vesper testified he follows the instructions from a nutrition class instead of the doctor Alexander sees on a regular basis. Vesper said:

I do what's best for what my child needs, and so I take the information that I've learned and then I take the information from the doctor. The doctor is not with my son, the doctor doesn't know my son. The doctor goes off the information provided to her, so if the information she receives is wrong, she's giving wrong information back.

Vesper and Francis also disagree about how to meet Alexander's developmental and educational needs. Francis testified that Alexander is enrolled in "Head Start" and that a teacher comes to the home to work with him one on one. Vesper testified that he believes Alexander is a little too young to be in "Head Start" and asked whether the skills are ones that his mother should be teaching.

Francis testified that she tries to communicate with Vesper but that he is often argumentative and threatens her with contempt or "with the Court." Francis said that she does not talk to Vesper about all of her concerns, because she is afraid it might cause problems, and that she does not consider the communication between them to be effective. The parties attempted to mediate their issues but were unable to come to an agreement regarding custody or visitation.

The trial court determined that Vesper was the father of Alexander and found that it was in the best interests of Alexander that his care, custody, and control be placed with Francis. The court found the parties did not cooperate well enough to support a joint custody arrangement. The court ordered Vesper to pay child support and established a visitation schedule set forth in the parenting plan. The plan allowed Vesper parenting time every other weekend from Friday at 6 p.m. to Sunday at 5 p.m., and every Wednesday from 5 to 8 p.m. The plan also set forth the schedule for customary holidays and summer break. The court also determined the parties should continue to exchange Alexander at the police station in Fremont. Vesper timely appealed.

ASSIGNMENTS OF ERROR

Vesper asserts the district court abused its discretion in finding it was in Alexander's best interests that his care, custody, and control be placed with Francis. Vesper also asserts the district court abused its discretion by not giving appropriate consideration to whether Francis interfered persistently with Vesper's relationship with Alexander.

STANDARD OF REVIEW

Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Hill v. Hill*, 20 Neb. App. 528, 827 N.W.2d 304 (2013).

A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system. *Id.*

Where the credible evidence is in conflict on a material issue of fact, an appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Pohlmann v. Pohlmann*, 20 Neb. App. 290, 824 N.W.2d 63 (2012).

ANALYSIS

Award of Custody.

Vesper alleges the trial court abused its discretion in finding it was in the child's best interests to place the care, custody, and control of the child with Francis.

The decision to award custody of a minor child must be based upon the best interests of the child. § 42-364(1)(b). In determining the best interests of a minor child, a judge should consider the following factors:

- (a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;
- (b) The desires and wishes of the minor child, if of an age of comprehension but regardless of chronological age, when such desires and wishes are based on sound reasoning;
- (c) The general health, welfare, and social behavior of the minor child;
- (d) Credible evidence of abuse inflicted on any family or household member. . . .
- (e) Credible evidence of child abuse or neglect or domestic intimate partner abuse.

Neb. Rev. Stat. § 43-2923(6) (Cum. Supp. 2012).

Vesper sought primary custody of Alexander, and in the event primary custody was not granted, he sought joint custody. The trial court heard evidence related to the factors listed in § 43-2923(6). The trial court found the parties did not cooperate well enough to support a joint custody arrangement. The court was ultimately persuaded that granting custody to Francis was in Alexander's best interests.

Both parties presented evidence as to why he or she should be granted custody of Alexander, and several witnesses testified on behalf of both parties. Vesper alleges the trial court did not give sufficient weight to the witnesses who testified regarding his parenting ability.

Vesper asserts the trial court should have given greater weight to the testimony of the clinical director who performed the parenting assessment for him. She stated that he had great knowledge about parenting a small child and that he demonstrated the qualities of an excellent parent. However, the evidence also shows the clinical director's written report was less complimentary, and actually contradicted some of her testimony. The report stated, in part, that Vesper does not have a good grasp on the abilities of a child at this age and that he is capable of providing direction to his child, but can easily become distracted when he is seeking to take care of his own needs.

This court has held where credible evidence is in conflict on a material issue of fact, an appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Pohlmann v. Pohlmann*, 20 Neb. App. 290, 824 N.W.2d 63 (2012).

We find, upon our de novo review of the evidence and the testimony of the witnesses, that the trial court did not abuse its discretion and that it was in Alexander's best interests to grant Francis custody of Alexander, subject to Vesper's parenting time.

Section 42-364(3)(b) provides that in dissolution cases, if the parties do not agree to joint custody in a parenting plan, the trial court can award joint custody if it specifically finds, after a hearing in open court, that it is in the best interests of the child. *Hill v. Hill*, 20 Neb. App. 528, 827 N.W.2d 304 (2013). See *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007). The Nebraska Supreme Court in *Zahl* noted that joint physical custody must be reserved for those cases where, in the judgment of the trial court, the parents are of such maturity that the arrangement will not operate to allow the child to manipulate the parents or confuse the child's sense of direction, and will provide a stable atmosphere for the child to adjust, rather than perpetuating turmoil or custodial wars.

Although Vesper requested joint legal and physical custody in the event that he was not granted full physical and legal custody of Alexander, the parties did not agree to joint custody in mediation or at trial. The evidence shows that the parties do not have a strong relationship with one another and have a history of strained communication. The evidence shows that they disagree with regard to the proper approach to nutrition, education, discipline, and parenting in general. They do not communicate often, or effectively. We find it was not an abuse of discretion for the trial court to determine that a joint custody arrangement would not be in Alexander's best interests.

Vesper also alleges the trial court abused its discretion in setting forth a "restrictive *Wilson* visitation schedule" for Vesper. Brief for appellant at 12.

The trial court ordered the parties to engage in a standard parenting plan allowing Vesper reasonable parenting time every other weekend, every Wednesday, and for an extended period during the summer. The court also set up a schedule for holidays and other special days.

The evidence shows that changes to visitation schedules and communication have been sources of significant stress for the parties. The visitation schedule set out in *Wilson v. Wilson*, 224 Neb. 589, 399 N.W.2d 802 (1987), is often used, and one benefit is that the parties'

parenting time is clearly defined and set forth well in advance to avoid potential miscommunications and disagreements. We find it was not an abuse of discretion to apply such a schedule under the circumstances.

Interference.

Neb. Rev. Stat. § 43-2932 (Reissue 2008) provides:

(1) When the court is required to develop a parenting plan:

(a) If a preponderance of the evidence demonstrates, the court shall determine whether a parent who would otherwise be allocated custody, parenting time, visitation, or other access to the child under the parenting plan:

. . . .

(iv) Has interfered persistently with the other parent's access to the child, except in the case of actions taken for the purpose of protecting the safety of the child or the interfering parent or another family member, pending adjudication of the facts underlying that belief[.]

If such interference is demonstrated, the trial court will impose limitations such as an adjustment of custody, the supervision of parenting time, the exchanges of the child to be conducted in a protected setting, or the imposition of restraints on the parent from communication with or proximity to the other parent or the child. § 43-2932(1)(b).

In this case, the trial court did not impose such limitations. Vesper asserts that he proved by a preponderance of the evidence that Francis was in violation of § 43-2932(1)(a)(iv) and that the trial court failed to adjust the order accordingly.

Upon our review of the evidence, we find that although Francis initially limited Vesper's exposure to the child and information about the child, there is little evidence that the same limitations have persisted since the temporary order was established in this case on November 14, 2011.

Francis has complied with the visitation schedule ordered by the court. The record shows there were a few days where visitation was not possible due to complications with the weather. On one occasion, Francis canceled a visit because it was very cold outside and the road between Cedar Bluffs and Fremont was in poor condition during bad weather. Francis offered to move visitation to another day, and Vesper refused, saying he would "go to the judge" about this issue.

Vesper asserts Francis interferes with his relationship with Alexander and does not notify him of medical procedures or doctor's visits. Vesper testified that Alexander was to have surgery in the weeks following trial but that Francis did not advise him of where or when the procedure would take place. Francis testified that Alexander was scheduled "to get tubes in his ears because [of] recurring ear infections." She testified that she tried to give Vesper the information but that Vesper became upset with her. She said if the doctor provides a visit summary, she asks for two copies and gives the second copy to Vesper.

As stated above, where credible evidence is in conflict on a material issue of fact, an appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Pohlmann v. Pohlmann*, 20 Neb. App. 290, 824 N.W.2d 63 (2012). Upon our review of the record, although there was evidence of strained communication between the parties, such evidence would not

mandate the application of § 43-2932(1)(b). Accordingly, the trial court's adoption of a parenting plan without the limitations available under § 43-2932(1)(b) was not an abuse of discretion.

CONCLUSION

We find the trial court did not abuse its discretion in granting custody to Francis. Additionally, the court did not abuse its discretion by developing a parenting plan without the limitations available pursuant to § 43-2932, because the record did not support by a preponderance of the evidence that Francis persistently interfered with Vesper's relationship with the child.

AFFIRMED.