

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

JEW

NUMBER 2007 CU 0656

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IN RE:

JEREMY JUSTIN VARNER
HEATHER BARNEY VARNER AND
SHERE WATSON WEBB

Judgment Rendered: September 14, 2007

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Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Livingston, Louisiana
Trial Court Number 87,981

Honorable Ernest G. Drake, Jr., Judge

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BEFORE: CARTER, C.J., PETTIGREW, AND WELCH, JJ.

Carter J. Carter

WELCH, J.

In this child custody dispute, the parents of a minor child appeal a judgment of the trial court that maintained custody of the child with the child's grandmother. Finding no abuse of the trial court's broad discretion with regard to such matters, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

Jeremy Justin Varner and Heather Barney Varner are married and together, they have two children: O.V., born July 8, 1998 (the minor child at issue in this case), and J.V., who is approximately two and a half years old. Heather has two children from a previous marriage, H.L. and C.L., both of whom reside with her and Jeremy. Jeremy also has a child from a previous marriage, K.V; however, in 2004, Jeremy voluntarily "surrender[ed] his parental rights" to K.V. in exchange for extinguishing the child support arrearages owed by him to his ex-wife.

Shere Watson Webb is Jeremy's mother, and the paternal grandmother of K.V., O.V., and J.V. O.V. has resided exclusively with Shere and her husband, Louis Webb, since she was ten months old.

On February 9, 2000, Jeremy, Heather, and Shere filed a verified Joint Petition for Change of Custody alleging that Jeremy and Heather were the parents of O.V., that Shere was the paternal grandmother of O.V., that O.V. had been residing with Shere for the past four months, and that it was in the best interest of O.V. that Shere be granted custody of O.V. Accordingly, on February 18, 2000, the trial court signed a consent judgment granting Shere custody of O.V.

On November 14, 2001, Heather and Jeremy filed a rule to show cause alleging that when the February 18, 2000 consent judgment was rendered, it was in the best interest of O.V. to be in Shere's custody because of a number of personal problems they were experiencing, but since that time, "they ha[d] gotten their life in order," they were "drug and alcohol free," and therefore, it was in the best

interest of O.V. to be returned to their custody.

At the hearing on the rule to show cause, the trial court ordered Jeremy, Heather, and Shere to undergo an immediate hair follicle drug test, the results of which were to be furnished to the trial court and counsel for all parties. After Jeremy tested positive for both “amphetamine group” (amphetamines, methamphetamines, and/or MDMA (ecstasy)) and “cocaine/metabolites” (cocaine, cocathylene, benzoylecgonine) and Heather tested positive for “amphetamine group,” they voluntarily dismissed their request for a change in custody.

On July 21, 2006, Jeremy and Heather filed another rule for change of custody, again alleging that when they entered into the February 18, 2000 consent judgment, they were using and selling drugs, but had since “turned their lives around” and were “drug free.” They further alleged that they were currently paying child support to Shere for O.V., that they had had another child (J.V.), and that it would be in O.V.’s best interest for her to be raised with her parents and siblings.

A hearing on the rule to show cause was held on September 11 and October 10, 2006. After the introduction of evidence, including hair follicle drug tests taken by Jeremy and Heather, the trial court denied Heather and Jeremy’s request for a change in custody and maintained custody of O.V. with Shere. A written judgment in conformity with the trial court’s ruling was signed on November 11, 2006, and it is from this judgment that Jeremy and Heather have appealed.

II. ASSIGNMENT OF ERRORS

On appeal, Jeremy and Heather contend that: (1) the trial court abused its discretion in maintaining the custody award of O.V. to Shere because she failed to prove that an award of custody to the parents would result in substantial harm to the child; and (2) the trial court erred in using their financial status as a primary factor in its decision to maintain custody of the child with Shere.

III. STANDARD OF REVIEW

Every child custody case must be viewed in light of its own particular facts and circumstances. **Major v. Major**, 2002-2131, p. 4 (La. App. 1st Cir. 2/14/03), 849 So.2d 547, 550. The paramount consideration in any determination of child custody is the best interest of the child. **Evans v. Lungrin**, 97-0541, 97-0577, p. 12 (La. 2/6/98), 708 So.2d 731, 738; La. C.C. art. 131. Thus, given each unique set of circumstances, the trial court is in the best position to ascertain the best interest of the child. In performing its function of deciding custody cases, the trial court is vested with vast discretion in matters of child custody because of its superior opportunity to observe the parties and witnesses who testified at trial. **Smith v. Tierney**, 2004-2482, p. 7 (La. App. 1st Cir. 2/16/05), 906 So.2d 586, 590-591. Accordingly, on appellate review, the trial court's determination of custody is entitled to great weight and will not be reversed unless an abuse of discretion is clearly shown. **Smith**, 2004-2482 at pp. 7-8, 906 So.2d at 591; **Major**, 2002-2131 at p. 4, 849 So.2d at 550.

In this case, and as in most child custody cases, the trial court's determination was based heavily on factual findings. As an appellate court, we cannot set aside the trial court's factual findings unless we determine that there is no reasonable factual basis for the findings and the findings are clearly wrong. **Stobart v. State, DOTD**, 617 So.2d 880, 882 (La. 1993). If the findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse those findings even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989).

IV. LAW AND DISCUSSION

A. Burden of Proof in Custody Disputes Between a Parent and a Non-Parent (Assignment of Error Number 1)

In Heather and Jeremy's first assignment of error, they argue that in any

custody contest between a parent and non-parent, it is always the non-parent's burden to prove that parental custody would result in substantial harm to the child in accordance with La. C.C. art. 133. They further contend that Shere failed to present any evidence demonstrating that an award of custody to them would result in substantial harm to O.V., and therefore, the trial court abused its discretion in maintaining the award custody of O.V. with Shere. We disagree.

Louisiana Civil Code article 133 provides:

If an award of joint custody or of sole custody to either parent would result in substantial harm to the child, the court shall award custody to another person with whom the child has been living in a wholesome and stable environment, or otherwise to any other person able to provide an adequate and stable environment.

This article demonstrates that parents have a paramount right of custody. See La. C.C. art. 133, comment (b). Parents may be divested of that right only for compelling reasons shown by clear and convincing evidence. **Robert v. Gaudet**, 96-2506, p. 5 (La. App. 1st Cir. 3/27/97), 691 So.2d 780, 783; **Smith**, 2004-2482 at pp. 6-7, 906 So.2d at 590. Thus, in an initial custody contest between a parent and a non-parent, the burden of proof is on the non-parent to show that granting custody to the parent would result in substantial harm to the child, thus necessitating an award of custody to a non-parent. **Smith**, 2004-2482 at p. 7, 906 So.2d at 590.

However, after custody is initially awarded to a non-parent over a parent, parental primacy may no longer carry the same weight due to the accrual of factors in the custodial environment that develop with the non-parents. **McCoy v. Brock**, 41,948, p. 7 (La. App. 2nd Cir. 2/28/07), 953 So.2d 885, 889; see also **Hill v. Hill**, 602 So.2d 287, 289 (La. App. 2nd Cir. 1992). Therefore, at a subsequent hearing to change custody awarded to a non-parent, the burden of proof should be on the parent (the party seeking the change) and should be the same standard applicable to custody disputes between parents. **Hill**, 602 So.2d at 289.

Between parents, if a prior award of custody has been made by a non-considered decree,¹ the proponent of the change must show that a material change in circumstances affecting the child's welfare has occurred since the rendition of the last custody decree and that the change in custody would be in the best interest of the child. **Major**, 2002-2131 at p. 7, 849 So.2d at 552.² Accordingly, in order to change custody awarded to a non-parent by a non-considered decree, the burden of proof is on the parent, as the proponent of the change in custody, to show that a material change in circumstances affecting the child's welfare has occurred since the rendition of the last custody judgment and that the proposed change in custody is in the best interest of the child. **Robert**, 96-2506 at p. 6, 691 So.2d at 783; **Millet v. Andrasko**, 93-0520, pp. 5-6 (La. App. 1st Cir. 3/11/94), 640 So.2d 368, 370-71; **Pierre v. Pierre**, 2004-1496, p. 9 (La. App. 1st Cir. 12/30/04), 898 So.2d 419, 426, writ denied, 2005-0253 (La. 2/16/05), 896 So.2d 11; and **Hill**, 602 So.2d at 289.³

Although the custody dispute in this case is between parents and a non-parent, there is a prior custody award to the non-parent, Shere, by a non-considered decree (the February 18, 2000 consent judgment). Hence, Shere did not have the burden of proving an award of custody would result in "substantial harm to the child" as suggested by Jeremy and Heather. Rather, the burden of proof herein

¹ A non-considered decree is one in which no evidence is presented as to the fitness of the parents, such as one that is entered by default, by stipulation or consent of the parties, or is otherwise not contested. **Major**, 2002-2131 at p. 7, 849 So.2d at 552.

² By contrast, when a considered decree (one in which the trial court receives evidence of parental fitness to exercise care, custody, and control of children) of permanent custody has been rendered by a court, the proponent of the change bears the heavy burden of proving that a change of circumstances has occurred such that the continuation of the present custody arrangement is so deleterious to the child as to justify a modification of the custody decree, or that the harm likely caused by a change of environment is substantially outweighed by its advantages to the child. **Bergeron v. Bergeron**, 492 So.2d 1193, 1200 (La. 1986); see also **Major**, 2002-2131 at p. 7, 849 So.2d at 551.

³ Cf., **Cutts v. Cutts**, 2006-0033, p. 5 (La. App. 3rd Cir. 5/24/06), 931 So.2d 467, 470 (holding that in an action to modify custody previously awarded to a non-parent by a non-considered decree, the non-parent bears the burden of proving that an award of custody to the parent would result in substantial harm to the child).

was on Jeremy and Heather to show that a material change in circumstances affecting the child's welfare had occurred since the rendition of the February 18, 2000 custody judgment and that the proposed change in custody was in the best interest of the child.

**B. Material Change in Circumstances and Best Interest of the Child
(Assignment of Error Number 2)**

In Heather and Jeremy's second assignment of error, they argue that the trial court erred in using their financial status as a factor in its determination that custody of O.V. should remain with Shere. They contend that the overwhelming evidence demonstrates that there has been a change in circumstances since the rendition of the February 18, 2000 consent judgment because they have changed their lives, they are no longer using illegal drugs, and they are able to provide a stable and safe living environment. Heather and Jeremy also contend that the change in custody is also in the best interest of the child because it is always in the best interest of the child to be raised by her parents.

According to the testimony of Jeremy, Heather, and Shere, when Jeremy and Heather agreed to transfer custody of O.V. to Shere, they were abusing and selling illegal drugs, and the State of Louisiana, Department of Social Services, Office of Community Services ("OCS") was investigating them for neglecting their children. Jeremy and Heather further testified that their drug use and the pending OCS investigation were the motivating factors behind their decision to transfer physical and legal custody of O.V. to Shere in February 2000. However, Jeremy and Heather testified that in July 2004, they stopped using drugs, they have since changed their lifestyle, they attend church regularly, they are dedicated to raising their children, and they can provide O.V. with a loving and stable environment.

Vivian and Roy Crum (Heather's grandparents), Vicki Riffe (Heather's aunt), Rebecca Varner (Jeremy's step-mother), and Nicole Varner (Jeremy's sister-in-law), all testified that they knew Jeremy and Heather when they were using

illegal drugs, but since that time, they have since changed their lives, they no longer use drugs, and they are good parents to their children.

While we agree with Jeremy and Heather that there is overwhelming evidence in the record demonstrating that they no longer use drugs, that they have changed their lives, and that they are more stable than they were in February 2000, thereby satisfying their burden of proving a material change in circumstance affecting the welfare of O.V. since the rendition of the February 18, 2000 consent judgment, they also had the burden of proving that the proposed change in custody was in O.V.'s best interest.

Louisiana Civil Code article 134 enumerates twelve non-exclusive factors that may be relevant to a determination of the best interest of the child, including:

- (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 best interest of the child test under La. C.C. art. 134 is a fact intensive inquiry requiring the weighing and balancing of any relevant factors favoring or opposing custody in the competing parties on the basis of the evidence presented in each case. **Romanowski v. Romanowski**, 2003-0124, p. 4 (La. App. 1st Cir. 2/23/04), 873 So.2d 656, 659. While child custody should not be determined solely on the basis of comparing the financial ability of the potential custodians, see Millet, 93-0520 at p. 7, 640 So.2d at 371, it may be considered by a court when weighing factors (2), (3), and (4), set forth above.

After considering all of the evidence, in oral reasons for judgment, the trial court found that while Heather and Jeremy were no longer using drugs, they were still in a “volatile situation” and were not as financially secure as Shere. The trial court also found that O.V. “ha[d] known no other parent than [Shere] for the vast majority of [her] life . . . and had more stability [with Shere] than she would have at [Jeremy and Heather’s] house.” Thereafter, the trial court determined that O.V. should remain in the custody of Shere. Thus, while the trial court did consider the financial status of Heather and Jeremy in its determination of custody, it was only one of several factors considered by the trial court in its determination of custody.

The testimony of all witnesses demonstrated that O.V. loves Shere, Jeremy, and Heather and that they love her. However, O.V., who was approximately eight years old at the time of the trial of this matter, has lived exclusively with Shere since she was ten-months old. During this time period, O.V. was cared for and reared by Shere, and until Heather and Jeremy filed this action to change custody, their contact with O.V. had been sporadic and minimal.

According to the testimony of Shere and Jeanie Windon, the principal of O.V.’s elementary school, Shere has taken an active role in O.V.’s education, has

met with O.V.'s teachers and attended field trips and open houses at school. Additionally, O.V. is doing well academically in school and is enrolled in several extracurricular activities, including dancing, Brownies, modeling, and beauty pageants. On the other hand, Jeremy and Heather admitted that they have never been to O.V.'s school or met any of her teachers, and had never requested any of her report cards. Heather's two children from her previous marriage have both had numerous unexcused absences from school, and one child has been suspended from school on several occasions for disciplinary problems.

Additionally, in proceedings brought by the State of Louisiana, Department of Social Services, Support Enforcement Services, Jeremy and Heather have been ordered to pay child support to Shere for the support of O.V. Jeremy has been incarcerated on several occasions for his failure to pay the child support as ordered, and Heather and Jeremy are currently required to attend a hearing once a month to ensure their compliance with the child support order.

According to Jeremy's testimony, since 2004, he has had five different jobs, and he has not filed an income tax return for the past three years. Heather is currently unemployed so that she can stay at home with the children, although she has previously been employed as a "stripper" and as a waitress. In 2005, Heather applied for and received food stamps, and her children were placed on Medicaid.

Although Jeremy and Heather have admitted and taken responsibility for their prior drug use and have significantly changed their lifestyle since the February 18, 2000 consent judgment, they entered into a consent judgment that resulted in O.V. residing with and being cared for exclusively by Shere for most of O.V.'s life. O.V. has bonded with Shere, and Shere has provided stability, financial support, and a secure home for O.V. The trial court carefully evaluated the testimony, and its factual findings in this regard are reasonably supported by the record. In light of such evidence and considering the trial court's broad

discretion in making custody determinations, we cannot say that the trial court abused its discretion in maintaining custody of O.V. with Shere.

V. CONCLUSION

For the above and foregoing reasons, the November 11, 2006 judgment of the trial court denying Jeremy and Heather Varner's rule for a change in custody and maintaining an award of custody of O.V. in favor of Shere Watson Webb is hereby affirmed.

All costs of this appeal are assessed to the appellants, Jeremy and Heather Varner.

AFFIRMED.