NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CU 1917

KELLY MARIE FLETCHER HOOVER

VERSUS

DANIEL BUFORD HOOVER

JKW

Judgment Rendered: February 13, 2012

* * * * * * *

Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Livingston, Louisiana
Trial Court Number 113,492

Honorable Bob H. Hester, Judge Ad Hoc

* * * * * * *

Sherman Q. Mack
Albany, LA

Attorney for
Plaintiff – Appellee
Kelly Wolfe

Glenn Hoover, Curator for
Daniel Buford Hoover
Springfield, LA

In Proper Person
Defendant – Appellant

* * * * * *

BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

JM Pettigrew, J. Concurs
PMc McClendon, J. concurs and assigns reasons.

WELCH, J.

Glenn Hoover, in his capacity as the curator for his son, Daniel Buford Hoover, appeals a trial court judgment awarding Daniel visitation with the minor child born of Daniel's marriage to Kelly Fletcher Hoover (now "Wolfe"), which was ordered to take place at the home of Lori Barient (Glenn's daughter and Daniel's sister), and dismissing several rules for contempt filed against Kelly. We affirm in compliance with Uniform Rules—Courts of Appeal, Rule 2-16.1(B).

The factual circumstances surrounding this case are very tragic. Kelly and Daniel were married on July 28, 1999, and had one child during their marriage, namely, R.D.H., born on May 24, 2001. Around June 14, 2004, Daniel suffered a severe brain aneurysm, which has rendered him mentally and physically handicapped (quadriplegic), unable to care for himself or for the child, and limited his ability to communicate.

Following Daniel's injury, numerous disagreements arose between Kelly and Daniel's parents, Glenn and Carolyn Hoover, allegedly concerning the appropriate care of Daniel. These disagreements eventually resulted in Kelly instituting proceedings for divorce on October 3, 2006. Daniel was subsequently interdicted, and his father, Glenn, presently serves as curator. The minor child has been in the physical care, custody, and control of Kelly since Daniel's injury.

The voluminous record in this matter contains numerous pleadings essentially pertaining to disputes between Kelly and Glenn, in his capacity as Daniel's curator, concerning the appropriate custody and visitation arrangements for Daniel and R.D.H., as well as contempt of court allegations relating to those arrangements. The nature of the dispute between Kelly and Glenn can be summarized as follows. Glenn and Carolyn apparently harbor a great deal of

hostility and animosity toward Kelly for her decision to divorce Daniel and for her subsequent actions relating to that decision. Glenn, Carolyn, some members of their family, and some of their friends have displayed inappropriate and hostile behavior toward Kelly and her current family with regard to their feelings about Kelly. Glenn and Carolyn would like for the visitation[1] between R.D.H and Daniel to occur at their home. Although it appears that Kelly wants R.D.H to have a relationship with Daniel and has made attempts at facilitating this relationship, she is fearful of Glenn and Carolyn because of their past behavior and level of anger towards her, and therefore, does not want R.D.H to visit with Daniel in the presence of Glenn and Carolyn or in their home. Instead, Kelly desires that Daniel have visitation with R.D.H at the home of his sister, Lori (and her children), with whom R.D.H. and Kelly have remained close, despite Kelly's decision to divorce Daniel. Visitation between Daniel and R.D.H. has occurred and has been previously awarded to Daniel at Lori's home. However, Lori is estranged from her parents, Glenn and Carolyn, because of her continued relationship with Kelly. Glenn refuses to bring Daniel to Lori's home for visitation.

Following a five-day trial held on March 4, March 5, May 28, June 30, and July 27, 2010, the trial court rendered judgment awarding Kelly sole custody of R.D.H., awarding Daniel specific visitation with R.D.H. at the home of Lori, and dismissing all rules for contempt against Kelly. A judgment reflecting the trial court's ruling was signed on September 3, 2010, and it is from this judgment that Glenn now appeals. On appeal, Glenn essentially challenges the trial court's decision that Daniel's visitation with R.D.H occur at the home of Lori instead of his own home and its decision that Kelly was not in contempt

[1] Given Daniel's physical and mental limitations and his legal status as an interdict, there is no dispute that Daniel's visitation with R.D.H. must be supervised. See La. C.C. arts. 132, 136, and 389.

of court relating to then-existing visitation arrangements.[2]

Louisiana Civil Code article 136(A) 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.

Our jurisprudence emphasizes that the best interest of the child is the sole criterion for determining a noncustodial parent's right to visitation. **Anderson v. Brown**, 34,474 (La. App. 2nd Cir. 2/28/01), 781 So.2d 744, 747; **Duvalle v. Duvalle**, 27,271 (La. App. 2nd Cir. 8/23/95), 660 So.2d 152, 157; **Davis v. Davis**, 494 So.2d 1315, 1317 (La. App. 2nd Cir. 1986). In determining the best interest of the child, La. C.C. art. 134 provides:

> The court shall consider all relevant factors in determining the best interest of the child. Such factors 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.

---

[2] On appeal, Glenn did not specifically challenge the trial court's judgment insofar as it awarded Kelly sole custody of R.D.H. See generally, **Breaux v. Breaux**, 96-214 (La. App. 3rd Cir. 7/17/96), 677 So.2d 1106. However, Glenn also raised several other assignments of error (all of which were contained in assignment of error number 3) that were either not properly briefed or not raised in the trial court. Therefore, those assignments of error are not properly before us for consideration. See Uniform Rules—Courts of Appeal, Rules 1-3 and 2-12.4.

(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 list of factors set forth in this article is non-exclusive, and the determination as to the weight to be given each factor is left to the discretion of the trial court. La. C.C. art. 134, comment (b). Because each case depends on its own facts, determinations regarding visitation must be made on a case-by-case basis. **Davis**, 494 So.2d at 1317-1318. Great weight is given to the trial court's determination with regard to visitation, and the trial court's judgment will not be overturned unless a clear abuse of discretion is shown. **Anderson**, 781 So.2d at 747; **Davis**, 494 So.2d at 1317.

As previously noted, the main contested issue in this case concerned the location where Daniel's visitation with R.D.H. would occur. After hearing all of the evidence, the trial court first stated that its decision would be governed by the best interest of the child. The trial court then observed that during trial "[s]o many people were using the word 'I'" that they forgot it should have been about what was in R.D.H.'s best interest. The trial court then evaluated all of the evidence in light of the factors set forth in La. C.C. art. 134. The trial court also noted the testimony of Dr. David Adkins, a psychologist and R.D.H.'s counselor/therapist, that R.D.H. suffers from Aspberger's Syndrome and that his condition made it extremely difficult for him to accept strange surroundings and unfamiliar people. The trial court then gave great weight to the following observations made by Dr. Alicia Pellegrin, the court-appointed child custody

and visitation evaluator, which were contained in her psychological evaluation and testimony:

> While understandable given the circumstances, [Glenn and Carolyn] seem to be more focused on what they perceive to be best for Daniel and less so about the difficulty that their grandson has faced in coming to terms with the "loss" of his father as he knew him. Given the extent of [Daniel's] impairment, characterizing his deficits as a loss is certainly appropriate, especially from the standpoint of a child who does not understand why his father is no longer able to function as he did in the past. When one does not fully understand something, the common response is negative emotion such as anger, anxiety, and sadness. This is especially true in the case of a child. Structure and routine are important in coping with negative emotions, again, particularly in the case of a young child. Presently, [R.D.H.] has developed a routine for visiting his father and he indicates that he is enjoying his time with his father as it now stands.
>
> . . . .
>
> There is evidence to support [Kelly's] claims of irrational anger, particularly on the part of [Glenn], towards her. There is also evidence that [Glenn and Carolyn] have demonstrated a lack of understanding of and sensitivity to the adjustment problems that [R.D.H.] has had over the loss of his father, as he knew him. . . .
>
> . . . .
>
> . . . If [R.D.H.] expresses reluctance to attend a visit, [Kelly] should certainly encourage him, but the child should never be forced into a visit. Given the comfortable and familiar setting of [Lori's] home, it is in both [R.D.H.'s] and [Daniel's] best interest for the visits to continue there.

The trial court then determined that it was in R.D.H.'s best interest that Kelly be awarded sole custody and that Daniel be awarded specific visitation with R.D.H. at Lori's home. After a thorough review of the record, we find that the trial court's conclusions with regard to what was in the best interest of R.D.H. with regard to the location of his visitation with Daniel was overwhelmingly supported by the evidence at trial—particularly, the testimony of Dr. Pellegrin and Dr. Adkins. We also note that Glenn and Carolyn specifically admitted at trial that the visitation with R.D.H. that they sought on Daniel's behalf was what they believed was best for Daniel. As tragic as

Daniel's circumstances may be and while we are cognizant that the evidence established that visitation between Daniel and R.D.H. is more convenient and comfortable for Daniel, Carolyn, and Glenn at their own home than at Lori's home (particularly with regard to the level of preparation that must be made for Daniel's personal care when he leaves his home), the visitation in this case *must* be dictated by what is in R.D.H's best interest. The trial court concluded that R.D.H.'s best interest would be served by having visitation with his father at the home of Lori, with whom the child has a significant level of comfort. Because this factual determination is reasonably supported by the record, we cannot conclude that the trial court abused its discretion with regard to the location of Daniel's visitation with R.D.H.

With regard to the trial court's decision to dismiss all previously filed rules for contempt, we recognize that willful disobedience of any lawful judgment constitutes constructive contempt of court. La. C.C.P. art. 224(2). To find a person guilty of constructive contempt, the trial court must find the person violated the court's order intentionally, purposely, and without justifiable excuse. **Barry v. McDaniel**, 2005-2455 (La. App. 1st Cir. 3/24/06), 934 So.2d 69, 73. The trial court is vested with great discretion in determining whether a party should be held in contempt for disobeying a court order, and the court's decision should be reversed only when the appellate court discerns an abuse of that discretion. **Boudreaux v. Vankerkhove**, 2007-2555 (La. App. 1st Cir. 8/11/08), 993 So.2d 725, 733.

The trial court did not give specific reasons for its ruling that "all prior motions for contempt are denied," even though it recognized at the beginning of its oral reasons for judgment that Glenn would not prepare Daniel for visits with R.D.H if it the visitation were going to occur at Lori's home. Implicit in the trial court's decision to dismiss all prior rules for contempt was that neither Kelly nor

Glenn had violated any orders of the court intentionally, knowingly, and without justifiable excuse. Considering all of the evidence in the record, we do not find that the trial court abused its discretion in finding that Kelly was not in contempt of court.

For all of the above and foregoing reasons, the September 3, 2010 judgment of the trial court is affirmed. All costs of these proceedings are assessed against Glenn Hoover.

AFFIRMED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CU 1917

KELLY MARIE FLETCHER HOOVER

VERSUS

DANIEL BUFORD HOOVER

****

McCLENDON, J., concurs and assigns reasons.

Based on the deference owed to the trier of fact, I am constrained to concur with the result reached by the majority.