

NOT DESIGNATED FOR PUBLICATION

**STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT**

NUMBER 2006 CU 2181

LEAH FRALEY

VERSUS

CHRISTOPHER FRALEY

Judgment Rendered: February 9, 2007

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**Appealed from the
Twenty-Third Judicial District Court
in and for the Parish of Ascension,
State of Louisiana**

Docket Number 77,022

Honorable Alvin Turner, Judge Presiding

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Christopher Fraley**

BEFORE: CARTER, C.J., WHIPPLE AND McDONALD, JJ.

WJW

*BAC by jmm
jmm*

WHIPPLE, J.

This child custody case is before us again on appeal.¹ In a previous opinion of this court we determined that the trial court erred in awarding sole custody of the minor child, M.F., to Christopher Fraley, her father, considering the trial court's stated factual findings and the mandatory provisions of the Post-Separation Family Violence Relief Act ("the PSFVRA"), which is embodied in LSA-R.S. 9:361-369.² Accordingly, the judgment of the trial court was vacated and this matter was remanded for the limited purpose of determining the suitability of Leah Fraley, M.F.'s mother, to serve as custodial parent of M.F.

On remand, the trial court was instructed to determine whether Mrs. Fraley was psychologically fit and otherwise able to care for M.F., and whether and under what circumstances visitation should be awarded to Mr. Fraley, considering the requirements of LSA-R.S. 9:364D. Pursuant to this court's instructions, if the trial court was unable to determine that either party was presently entitled to custody, the trial court was to determine whether some other family member or person should be granted custody, in accordance with the best interests of the child and as set forth in LSA-C.C. art. 133. See

¹The protracted factual and procedural history of this case is more fully set forth in this court's prior opinion. See Fraley v. Fraley, 2006-0391 (La. App. 1st Cir. 6/21/06) (unpublished opinion).

²In the trial court's reasons for judgment dated July 22, 2005, underlying its award of sole custody of M.F. to Mr. Fraley, it specifically found M.F.'s brother, Z.S., credible in recounting and describing in graphic detail events wherein he was forced to purchase drugs for Mr. Fraley, engage in smoking marijuana with Mr. Fraley, and of he and Mr. Fraley performing oral sex on each other. Moreover, the trial court noted that Mr. Fraley had used drugs in the past and acknowledged that Mr. Fraley needed to improve his parenting skills.

Thus, given these findings, in accordance with LSA-R.S. 9:364D the trial court should have "prohibit[ed] all visitation and contact between the abusive parent and the children, until such time, following a contradictory hearing, that the court finds, by a preponderance of the evidence, that the abusive parent has successfully completed a treatment program designed for such sexual abusers, and that supervised visitation is in the children's best interest."

Fraley v. Fraley, 2006-0391, p. 17-19 (La. App. 1st Cir. 6/21/06) (unpublished opinion).

In accordance with these instructions, the trial court conducted a hearing on July 19, 2006 for those limited purposes only. At the commencement of the hearing, the trial court offered the following explanation as to why it failed to apply the provisions of the PSFVRA given its factual findings rendered in support of the previous ruling:

Let the court state prior to beginning this particular hearing that in reading the First Circuit Court of Appeal's opinion, the court can see why the ruling was rendered by that court. But I want to state for the record that the judgment that was rendered by this court was not clear as it relates to any child molestation by Mr. Fraley.

In the Court's judgment it stated that the court felt that [Z. S.] was credible in his testimony. The intent of this court was to state that [Z.S.] was credible in his testimony as to the factual situation surrounding the drug transactions that Mr. Fraley had him engage in.

At no time did the court have the intent or mean to convey to anyone that Mr. Fraley committed any act whatsoever of child molestation, and let the record so reflect.

The trial court then heard the testimony of Robin Miley, a licensed professional counselor; Alicia Pellegrin, the court-appointed psychologist; Mr. Dale Skinner, M.F.'s maternal grandfather; and Mrs. Fraley.

Robin Miley testified that she had recently performed an initial assessment and intake interview with Mrs. Fraley and had reviewed the documentation involved in this case.³ She opined that if certain safeguards were put into place, Mrs. Fraley could be capable of providing a secure and stable home for M.F. Specifically, the safeguards she suggested were that Mrs. Fraley continue to live with her father, participate in random physical

³At the time of the hearing Ms. Miley had not interviewed M.F., Mr. Fraley, or Mrs. Fraley's other children and had not performed "forensic" testing on Mrs. Fraley.

examinations and drug screens (while acknowledging she never screened positive for drug use), that she and her children receive counseling, and that she take the medications deemed necessary to assist with her treatment. On cross-examination, however, Ms. Miley admitted that she was not aware of Mrs. Fraley having received any counseling over the course of the last year or whether Mrs. Fraley intended to live in the Lake Charles area with her father.

Alicia Pellegrin testified that in administering a sexual abuse evaluation to Mr. Fraley, he rated "low to no" risk for sexual abuse propensities. She further testified that until Mrs. Fraley demonstrates that she is complying with a specific program of counseling and other safeguards, M.F. should have limited, supervised visitation with Mrs. Fraley so that the child will not be at risk for additional unfounded claims of sexual abuse.

Mr. Skinner, M. F.'s grandfather, testified that he would be relocating from his home in Many, Louisiana to the Lake Charles area and had a FEMA trailer there. He further testified that if Mrs. Fraley were awarded custody of M.F., he would purchase a larger trailer or an additional trailer for the family to live in. Mr. Skinner again expressed to the court his willingness to provide financial and emotional support for his grandchildren as well as a home in which to live.

Mrs. Fraley testified that since the last hearing, she has been living in her father's home in Many, Louisiana, and taking care of her two sons. She stated that she continues to experience anxiety and depression concerning the situation with her daughter. Specifically, despite the inability of any state agency to document a case of abuse by Mr. Fraley, she persists in her belief that Z.S. and M.F. were sexually molested by Mr. Fraley. When

asked whether she would encourage a loving relationship between M.F. and Mr. Fraley if awarded sole custody of M.F., Mrs. Fraley responded “My answer is that any mother that would allow and support her child to go with someone who is sexually molesting them would be insane.” Moreover, although Mrs. Fraley contended that she and her sons had attended counseling sessions with Mary Tapely at Sinlaw Counseling Associates in Alexandria in November and December of 2005, she was unable to produce written verification or documentation evidencing these counseling sessions had occurred (or the nature of the treatment she was receiving) and admitted she had not told Ms. Miley about this counseling. Mrs. Fraley claimed that the sessions ended after the counselor “got sick and quit” some time in 2006.

After considering the testimony offered and evaluating Mrs. Fraley’s suitability as a custodian of M.F., the trial court rendered oral reasons for judgment finding that it was in M.F.’s best interest to remain in the custody of her father, Mr. Fraley, and that the visitation schedule previously established by the trial court should be maintained.⁴ In doing so, the trial court reasoned as follows:

As I stated initially at the beginning of this particular hearing, the court’s judgment, as it related to the credibility of [Z. S.], the wording was poorly done. I take responsibility for that.

The intent of this court was not to convey to the parties, the court of appeals or whoever may review this, that the court at no time [sic] had the intent to convey that Mr. Fraley was a child molester be it with [Z.S.], [M.F.] or any other child. At this point I’m making it clear that that was not the court’s intent.

To the contrary, the court found as the intent of the court that Mr. Fraley did not molest [Z.S.] and at no point during that hearing did the court believe that [Z.S.’s] testimony was credible as it relates to that issue.

⁴The visitation schedule previously established by the trial court awarded Mrs. Fraley supervised visitation of M.F. for three hours (11:00 a.m. to 2:00 p.m.) every other Saturday, to be supervised by Mr. Skinner.

Secondly, the Court of Appeal is correct in that it probably would have been better for me to withhold granting sole custody to Mr. Fraley until an evaluation, a sexual evaluation was done on Mr. Fraley.

However, on this – at this hearing, we’ve had testimony from that he’s submitted to the evaluation. Dr. Pellegrin testified that the findings were zero, low to zero or low to none. So the evaluation order was just as a precautionary measure. Not that the court believed that Mr. Fraley was a child molester.

In conformity with the First Circuit’s opinion, I will address the suitability of Ms. Fraley to have custody of the minor child, [M.F.]. I think the testimony is abundantly clear and has been substantiated more so that she’s not at the state that she should have custody of [M.F.].

The court is of the opinion that visitation should not be extended. It shall remain the same until Ms. Fraley can exhibit that she possesses the capabilities to handle custody, be it joint custody of [M.F.]. She has not shown that to this court as of yet. She has failed to get the counseling that she should have received. Until she exhibits that to this court that she is willing to take the steps necessary to have custody of [M.F.], the court’s previous judgment as to her visitation remains the same.

The court feels that it is in the best interest of this child, [M.F.], to be with her father, Chris Fraley. That’s the court’s ruling.

A written judgment in conformity with the trial court’s reasons was signed on August 22, 2006. In her sole assignment of error on appeal, Mrs. Fraley asserts that the trial court erred in awarding sole custody to Mr. Fraley and in imposing a very restricted visitation schedule upon Mrs. Fraley.⁵

At the outset, we acknowledge that in the instant case, as in most custody cases, the trial court's determination was based heavily on factual

⁵On August 15, 2006, Mrs. Fraley filed a writ application with this court seeking review of the trial court’s July 19, 2006 decision via supervisory writs. In response, on September 6, 2006, this court issued a stay order, noting that the trial court’s ruling of July 19, 2006 would be appealable once a written judgment was signed; that the judgment of the trial court was stayed pending further orders of this court; and that Mr. Skinner, the child’s maternal grandfather, was awarded provisional, domiciliary custody pending final resolution of this matter.

findings. We are further mindful that 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 (manifestly erroneous). Stobart v. State, Through Department of Transportation and Development, 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 even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Major v. Major, 2002-2131 (La. App. 1st Cir. 2/14/03), 849 So. 2d 547, 550.

When factual findings are based on the credibility of witnesses, the fact finder's decision to credit a witness's testimony must be given "great deference" by the appellate court. Rosell v. ESCO, 549 So. 2d 840, 844 (La. 1989). Thus, when there is a conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, although the appellate court may feel its own evaluations and inferences are as reasonable. Rosell, 549 So. 2d at 844.

On remand, the trial court clarified that at no time did it find Z.S. credible with reference to his recounting of events of alleged sexual molestation by Mr. Fraley. The trial court further stated that given the evidence before it, at no time did it feel that Mr. Fraley was a threat to M.F. or any other child on the issue of sexual abuse or molestation. However, the trial court maintained and reiterated its previous finding that Z.S. had been credible in his testimony as to the circumstances and situation surrounding the drug transactions and drug use that Mr. Fraley had initiated and forced Z.S. to engage in, which was corroborated in the evidence of record. However, the trial court apparently concluded that these prior improper (and illegal) acts

involving Z.S. did not render Mr. Fraley unsuitable for sole custody of their daughter, given Mrs. Fraley's mental problems.

It is well settled that in reaching its conclusions, the trier of fact need not accept all of the testimony of any witness as being true or false and may believe and accept any part or parts of a witness's testimony and refuse to accept any other part or parts thereof. Rao v. Rao, 2005-0059 (La. App. 1st Cir. 11/4/05), 927 So. 2d 356, 361, writ denied, 2005-2453 (La. 3/24/06), 925 So. 2d 1232. In the instant case, on remand, the trial court explained that it accepted Z.S.'s testimony with regards to Mr. Fraley's admitted drug use and activity but rejected Z.S.'s testimony as to the sexual abuse allegations made against Mr. Fraley.

Secondly, as per this court's instructions, the trial court addressed the suitability of Mrs. Fraley serving as custodial parent of M.F. The trial court stated that based on the evidence of record, it was "abundantly clear" that Mrs. Fraley remained incapable of serving as custodial parent of M.F. The court noted that Mrs. Fraley had failed to obtain the counseling that she needed to address her mental problems and to manage joint custody of M.F. Moreover, the court stated that until Mrs. Fraley exhibited to the trial court that she was willing to take the various steps deemed necessary by the trial court, the previous judgment as to her visitation would remain in place, and was so ordered.

After considering the testimony adduced at the hearing, the trial court determined that M.F.'s best interest required that she remain in the sole custody of her father, Mr. Fraley. Considering the credibility and factual determinations involved, including the testimony and the recommendations of the mental health care providers, we cannot say that the trial court

manifestly erred, given the shortcomings of each parent and the particular circumstances of this case.

Although we find the record (and the clarification by the trial court) now provides an adequate basis for the trial court's ruling, we remain troubled by the evidence, again accepted as true and credible by the trial court, concerning Mr. Fraley's past drug use and his prior improper recruitment and involvement of his step-son, Z.S., in those acts. Thus, we find that the trial court erred in failing to impose appropriate safeguards to protect M.F., given the court's findings concerning Mr. Fraley's past drug use and activity. Accordingly, we remand the matter to the trial court with instructions to include adequate provisions for Mr. Fraley to submit to random drug screens, at his expense, (to be administered by an entity specified by the trial court under conditions to be specified by the court) and to provide proof of same to the trial court.

Moreover, we find merit to Mrs. Fraley's contention that the trial court erred in maintaining the prior restrictive visitation schedule. As long as Mrs. Fraley provides the trial court with proof that she is attending the requisite counseling and receiving therapy as ordered by the trial court, and acts appropriately during the visitation sessions, given the geographical challenges presented herein, we see no reason that she should be forced to travel such a long distance to visit M.F. for supervised visits lasting only three hours, giving Mrs. Fraley a total of only six hours of visitation per month with her daughter. As such, the current visitation schedule is vacated and on remand, the trial court shall also revise the visitation schedule and impose any necessary conditions to foster meaningful and significant contact between Mrs. Fraley and M.F.

For these reasons, the August 22, 2006 judgment of the trial court is affirmed in part and vacated in part, and the matter is remanded. Costs of this appeal are assessed one-half each to the appellant, Leah Fraley, and the appellee, Chris Fraley.

**AMENDED IN PART, VACATED IN PART, AND REMANDED
WITH INSTRUCTIONS.**