NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CU 1485

DAVE JOHN CORTEZ

VERSUS

HEATHER LOTT CORTEZ

Judgment Rendered: MAR 2 9 2012

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On Appeal from the 17th Judicial District Court
In and for the Parish of Lafourche
Docket No. 116,476

The Honorable Ashly Bruce Simpson, Judge Presiding

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Leslie J. Clement, Jr. Thibodaux, Louisiana	Counsel for Plaintiff/Appellee Dave John Cortez
H. Craig Cabral Metairie, Louisiana	Counsel for Defendant/Appellant Heather Lott Cortez

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

Hughes, Jr., dissents and will assign reasons.

GAIDRY, J.

In this custody case, a mother appeals a judgment which awarded the parents joint custody and named the father as the domiciliary parent. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

Dave John Cortez and Heather Lott Cortez were married on September 4, 2009. Their only child, Caroline Celeste Cortez, was born on March 19, 2010. After the marriage, Heather and Dave[1] lived in Lafourche Parish, near Thibodaux, next door to Dave's brother, Aaron "Chip" Cortez, and Chip's wife, Janet Cortez. Heather worked as a registered nurse at Thibodaux Regional Medical Center after the marriage, and Dave worked as a financial consultant with a local bank and also a part-time National Guardsman. In May 2010, Dave was called into active duty due to the British Petroleum oil spill, and was stationed at the National Guard Armory in Napoleonville, where he remained deployed until October 15, 2010.[2]

During the time Dave was deployed, Heather relied heavily on Dave's family to care for Caroline. Around the end of May 2010, Heather claimed that she had been diagnosed with cancer and required medical treatment. As a result, Heather began to rely on Dave's sister-in-law, Janet, for assistance in caring for Caroline. On June 2, 2010, Heather and Dave appeared before a notary public and executed a document giving temporary provisional custody of Caroline to Janet and Chip.[3] Then, on or about July 19, 2010, Heather also suffered an injury to her elbow, which required surgery, and

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[1] As it is necessary to refer to several members of the Cortez family herein, we will refer to each Cortez family member by his or her first name, for ease of discussion.

[2] Dave testified that he went home on October 15, 2010, but that he got two weeks of paid leave from that date, so he was officially still active until November 1, 2010.

[3] The purpose of the document was to provide Janet and Chip with authority to get medical care for Caroline should it become necessary to do so while she was in their care.

increased her reliance on Janet for child care while Dave was away. On the days Dave was home during his deployment, he took care of Caroline.

Dave and Heather's relationship eventually deteriorated amid accusations of lies, alcohol abuse, infidelity, and vandalism, and Dave filed suit for a La. C.C. art. 102[4] divorce on November 22, 2010. After Heather was served with the suit for divorce at the matrimonial domicile on or about December 3, 2010, she moved with Caroline to her mother's home in Picayune, Mississippi. She and Dave agreed to an informal temporary custody arrangement, pending a hearing by the trial court on the issue of custody, in which Caroline primarily resided with Heather, and Dave had alternating weekend visitation. Heather agreed to primarily provide transportation between their homes, with some exchanges of the child being made in New Orleans.

Heather responded to the suit with an answer and reconventional demand on December 10, 2010. Both parties sought the exclusive use of the matrimonial domicile, custody of Caroline, and child support. Heather also asserted that Dave was at fault in the breakup of the marriage, alleging cruel treatment, lying, infidelity, threats of physical abuse, and constructive abandonment. In support of her request for custody of Caroline, Heather further alleged that Dave exercised "minimal visitation" with Caroline, and

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[4] Louisiana Civil Code Article 102 provides:

> Except in the case of a covenant marriage, a divorce shall be granted upon motion of a spouse when either spouse has filed a petition for divorce and upon proof that the requisite period of time, in accordance with Article 103.1, has elapsed from the service of the petition, or from the execution of written waiver of the service, and that the spouses have lived separate and apart continuously for at least the requisite period of time, in accordance with Article 103.1, prior to the filing of the rule to show cause.
>
> The motion shall be a rule to show cause filed after all such delays have elapsed.

The parties herein alleged that they had not engaged in a covenant marriage.

alleged that Dave had anger management issues, abused alcohol, worked full-time at the bank as well as part-time with the National Guard, and that he also hunted, fished, and engaged in other "extracurricular" activities, all of which limited the amount of time he had to spend with their child. Heather also sought to be allowed to relocate, with Caroline, to her hometown of Picayune, Mississippi, where she would have available support from her mother and other family members.

The parties agreed to submit to psychological evaluations by Alan James Klein, Ph.D., on issues related to parental fitness as it affected custody of Caroline. On joint motion of the parties, the court ordered Dr. Klein to conduct an independent psychological evaluation of Dave to address Heather's alcohol abuse allegations and to conduct an independent psychological evaluation of Heather to address Dave's Munchausen Syndrome allegations, and, thereafter, to submit a written report to the court.

Following trial of the issues, held February 9, 2011, February 18, 2011, April 26, 2011, and May 13, 2011, the trial court signed a judgment on June 1, 2011, awarding the parties joint custody of Caroline and naming Dave as the domiciliary parent. Heather's requests for support, injunctive relief, and use of the matrimonial domicile were denied. Heather was ordered to pay child support to Dave in the amount of $640.50 per month and to pay all court costs. The trial court also signed a Joint Custody Implementation Order, awarding the physical custody of Caroline to Heather: "every other weekend, commencing at 6:00 P.M. Friday through 6:00 P.M. on Sunday commencing on June 10, 2011," along with alternating holidays (New Year's, Easter Sunday, Memorial Day, July 4th, Labor Day, Thanksgiving, and Christmas), four weeks during the school summer

vacation (to be exercised in two week intervals), Mother's Day, Heather's birthday, and on Caroline's birthday (from 2:00 P.M. until 6:00 P.M.).

Heather has appealed the trial court judgment, asserting that the trial court erred in naming Dave as the domiciliary parent and in denying her petition for relocation. On appeal, Dave has filed an original and supplemental motion to strike statements contained in Heather's appellate brief, which he contends pertains to "events that allegedly transpired after the [j]udgment from which the appeal has been taken which are not part of the record of this appeal" and to a "[p]rotective [o]rder that [Heather] sought after the completion of the trial of this matter."

LAW AND ANALYSIS

Motion to Strike

We first address Dave's motion and supplemental motion to strike allegations contained in Heather's appellate brief, which concern events that transpired after rendition of the judgment herein appealed. Heather's appellate brief asserted that in the month following the trial court's ruling, Dave engaged in certain acts of criminal behavior, was arrested for those acts, and that as a result she filed for a protective order in this case, which she later voluntarily dismissed. We note that Heather's application for the protective order and certain orders relating to the scheduling of a hearing on that application for protective order do appear in the appellate record of this case, apparently having been filed prior to completion of the compilation of the appellate record.

In general, proceedings that occur after an appealed judgment has been rendered and not appearing in the appellate record cannot be considered by this court; appellate review is limited strictly to the record as it existed at the time the underlying judgment was rendered. See *Collins v.*

Mike's Trucking Company, Inc., 2005-0238, p. 15 (La. App. 1 Cir. 5/5/06), 934 So.2d 827, 836, writ denied, 2006-1914 (La. 12/8/06), 943 So.2d 1094. See also Uniform Rules - Courts of Appeal, Rule 1-3. But see *In re Interdiction of DeMarco*, 2009-1791, p. 17 (La. App. 1 Cir. 4/7/10), 38 So.3d 417, 429. Nonetheless, we note that this court has the power, under La. C.C.P. article 2164, to "render any judgment which is just, legal, and proper upon the record on appeal."

However, because of the fact that Heather has an adequate remedy in the trial court with respect to the matters that allegedly arose after the judgment appealed from was rendered, we find it unnecessary to consider the post-judgment actions of the parties. Accordingly, we will address only those arguments urged by Heather that pertain to matters submitted to the trial court prior to rendition of the June 1, 2011 judgment. We hereby grant the Dave's motion to strike.

Designation of Domiciliary Parent and Request for Relocation

Louisiana Civil Code Article 131 provides: "In a proceeding for divorce or thereafter, the court shall award custody of a child in accordance with the best interest of the child." Louisiana Civil Code Article 134 directs the court to consider "all relevant factors" in determining the best interest of the child, and states that 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.

(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.

In the absence of an agreement as to custody, the court shall award custody to the parents *jointly*; however, if custody in one parent is shown by clear and convincing evidence to serve the best interest of the child, the court shall award custody to that parent. See La. C.C. art. 132. The legal effects of joint custody, once it is awarded, are addressed in La. R.S. 9:335. La. C.C. art. 132, 1993 Revision Comment (c). Louisiana Revised Statutes 9:335 provides:

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.

The best-interest-of-the-child test under La. C.C. 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. Every child custody case is to be viewed on its own particular set of facts and the relationships involved, with the paramount goal of reaching a decision which is in the best interest of the child. The trial court is vested with broad discretion in deciding child custody cases. Because of the trial court's better opportunity to evaluate witnesses, and taking into account the proper allocation of trial and appellate court functions, great deference is accorded to the decision of the trial court. A trial court's determination regarding child custody will not be disturbed absent a clear abuse of discretion. *Martello v. Martello*, 2006-0594, p. 5 (La. App. 1 Cir. 3/23/07), 960 So.2d 186, 191-92.

The trial judge in this case issued written reasons for judgment, which stated, in pertinent part:

> The trial court will first assess the credibility of witnesses.
>
> The trial court determines that Heather Lott Cortez is not a credible witness for the following reasons:

1. The evidence proved that Heather Lott Cortez was diagnosed with dysplasia of the epithelium of the uterine cervix.

2. Heather Lott Cortez informed her treating psychiatrist, Dr. Maria Braud, that she was diagnosed with cancer of the cervix and she received radiation therapy to treat the cancer of her cervix.

3. Heather Lott Cortez told her mother, Maria Lott, that she was diagnosed with cancer of the cervix.

4. Heather Lott Cortez testified that she was paying rent of $1,000.00 each month to her mother, as well as paying a portion of the utility and food expenses of the household. Maria Lott did not testify that her daughter paid rent. Maria Lott testified that her daughter paid a portion of the utility and food expenses of their household.

5. Heather Lott Cortez testified that she attended a consultation with Dr. Lisa Matherson during her trip to Los Angeles. Mrs. Cortez did not introduce into evidence any medical records concerning any consultation with Dr. Lisa Matherson. Furthermore, Angela Cook, the friend with whom she stayed while in Los Angeles, testified she was unaware Mrs. Cortez had any medical appointments while in Los Angeles.

6. Heather Lott Cortez testified she visited M.D. Anderson during her return flight from Los Angeles to New Orleans. Exhibit P-7 shows that she had a direct flight from Los Angeles to New Orleans.

7. Heather Lott Cortez informed Dr. Maria Braud that she obtained a second opinion regarding cancer of the cervix from M.D. Anderson Hospital.

The foregoing evidence, together with her demeanor while testifying, cause[s] the trial court to give little weight to the testimony of Heather Lott Cortez.

The trial court determines that Janet Cortez is a credible witness. Although she is the [sister-in-law] of Dave Cortez, she gave the following testimony which was adverse to her [brother-in-law]:

1. Janet Cortez testified that she observed Dave Cortez intoxicated during Christmas of the year 2009 and "a few times at night."

2. Janet Cortez testified that the petitioner's family believed he was drinking too much alcohol.

3. Janet Cortez testified that one evening the child remained with her overnight because her [brother-in-law] was drinking alcohol.

4. Janet Cortez testified that Heather Lott Cortez was concerned with the drinking habits of Dave Cortez.

5. Janet Cortez testified that she never observed Heather Lott Cortez impaired.

6. Janet Cortez was consistent throughout her testimony.

Based upon the foregoing testimony, the trial court concludes that Janet Cortez testified truthfully, even when her testimony was detrimental to her [brother-in-law]. For these reasons, the trial court will give great weight to the testimony of Janet Cortez.

Based upon the evidence, and giving great weight to the testimony of Janet Cortez, the trial court makes the following findings of fact:

1. From the child's birth on March 19, 2010 until May 2, 2010, Heather Lott Cortez primarily exercised responsibility for child rearing.

2. During the period of time from May 2, 2010, the date Dave Cortez began active duty with the Louisiana National Guard, until late November 2010, when Heather Lott Cortez permanently moved to her mother's home in Mississippi, Janet Cortez primarily exercised responsibility for child rearing when Dave Cortez was on active duty and away from the family home.

3. During the period of time from May 2, 2010 through late November 2010, Dave Cortez primarily exercised responsibility for child rearing when he was on leave from active duty and present at the family home.

4. Heather Lott Cortez did not meet with Dr. Lisa Matherson during her trip to Los Angeles.

5. Heather Lott Cortez did not visit M.D. Anderson Hospital during her return trip from Los Angeles.

6. Janet Cortez primarily cared for Caroline Cortez during the period of approximately two months that Heather Lott Cortez feigned radiation treatment with Doctor Ellis.

7. Heather Lott Cortez used her claims of medical treatment for cancer of the cervix to avoid the responsibility of caring for Caroline Cortez.

8. [Dave] Cortez is employed by First American Bank as a financial adviser, and he works a forty hour work week.

9. Heather Lott is employed by Slidell Memorial Hospital as a registered nurse, and she works two days each week.

CONSIDERATION OF FACTORS OF LOUISIANA CIVIL CODE ARTICLE 134

Factor One:

Heather Lott Cortez's avoidance of her parental responsibility and Dave Cortez's care of Caroline while on his leave, prove that Dave Cortez possesses greater love, affection and emotional ties with Caroline.

Factor Two:

Heather Lott Cortez's avoidance of her parental responsibility, and Dave Cortez's care of Caroline while on his leave, prove that Dave Cortez possesses a greater capacity and

disposition to give Caroline love, affection and continue the rearing of the child. Insufficient evidence was presented on the issue of spiritual guidance. Due to the age of Caroline, the parties were unable to present evidence concerning continued education of Caroline.

Factor Three:

Both parents have an equal capacity and disposition to provide Caroline with food, clothing, medical care, and other material needs.

Factors Four, Five and Eight:

The evidence proved that Heather Lott Cortez was the primary caregiver from Caroline's birth on March 19, 2010 until May 2010; from May 2010 until November 2010 Janet Cortez and Dave Cortez were the primary caregivers for Caroline; and from November 2010 until commencement of the trial Heather Lott Cortez primarily exercised the responsibility of caring for Caroline. For these reasons, the parents are equal regarding Factors Four, Five and Eight. Louisiana Civil Code 134.

Factor Six:

There was no evidence that either parent lacks moral fitness insofar as it affects the welfare of Caroline.

Factor Seven:

The evidence proved that Heather Lott Cortez suffers from depression and post traumatic stress disorder. However, Alan James Klein, Ph.D. stated in his report that "[t]he psychological evaluation does not reveal any evidence of psychological and/or emotional problems that would compromise the ability of Mrs. Cortez to care for her infant daughter." The evidence proved that Dave Cortez consumes an excessive amount of alcohol in social settings. However, Doctor Klein concluded that Mr. Cortez did not have a diagnosable alcohol condition. The evidence proved that neither parent suffered from a physical health condition that would adversely impact the ability to rear Caroline. For these reasons, the parents are equal regarding Factor seven.

Factor Nine:

Due to the age of Caroline, she is unable to express a preference.

Factor Ten:

The evidence proved that both parents have facilitated and encouraged a continuing relationship between Caroline and the other parent.

Factor Eleven:

The distance between the residences of the parties is not determinative in this litigation.

Factor Twelve:

The evidence proved that Heather Lott Cortez avoided caring for Caroline for extensive periods of time from May 2010 through November 2010, and Dave Cortez primarily exercised responsibility for child rearing during the periods of his leave from active duty with the Louisiana National Guard. For these reasons, Factor Twelve favors Dave Cortez.

Considering the foregoing factors, the trial court determines that it is in the best interest of Caroline Cortez that Dave Cortez and Heather Lott Cortez are awarded joint custody of their child, and Dave Cortez is designated the domiciliary parent.

* * * *

There was ample evidentiary support in the record for the trial court's findings. Janet testified that she kept Caroline for Heather at night and sometimes during the day while Heather was supposedly being treated for cancer, and also kept Caroline on the two evenings per week that Heather worked at the hospital. Although Heather's shift ended at 10:00 p.m., she would leave Caroline with Janet and Chip overnight since Caroline would already be asleep by the time she would get home from work. On those nights, Heather was supposed to pick Caroline up at 6:30 a.m. so that Janet could go to work, although Janet testified that she often had to go wake Heather up to return Caroline to her. Melva Cortez, Dave's mother, testified that she would see Caroline at work with Janet three or four times a week. Melva also kept Caroline for three days when Heather claimed to have shingles and a couple of other times for Heather to supposedly go to medical appointments. Heather also left Caroline at home while she went on a trip to Los Angeles during this time, purportedly to seek cancer treatment, although it appears from the evidence that the trip was in fact just to visit friends. Overall, Janet and Chip estimated that they took care of Caroline about ninety percent of the nights that Dave was away.

Dr. Klein found that Heather and Dave each had a normal mental status. Dr. Klein concluded that neither Heather nor Dave had any psychological problem that would compromise their respective abilities to parent a young child.

Regarding Heather, Dr. Klein did not find that she had either Munchausen's Syndrome or Munchausen's Syndrome by Proxy, which he said would be characterized by other serious personality disorders that Heather did not have. He attributed the statements Heather made to her husband and his family about her medical condition and treatment as resulting from her anger toward her husband over their failing marriage or as a means of getting sympathy, but he could not state the reason with certainty.[5]

With respect to Dave, Dr. Klein reported that Dave had an alcohol "use" problem, though not an alcohol addiction. Dr. Klein stated that Dave's excessive drinking in social settings rose to the level of abuse, but was not a dependency. He cautioned in his report though, as to Dave, that "[c]onsumption of alcohol while in charge of an infant is problematic and this should be a consideration in a final determination of the parenting role and responsibilities that he is afforded with his infant daughter." Dr. Klein further stated that Dave did not have a problem with judgment and was not a particularly impulsive individual, so he opined that an admonishment by the court as to his conduct in this respect would be sufficient.

After a thorough review of the testimony and evidence presented in this case and considering the specific circumstances of this case, we cannot

[5] In discussing this point, Dr. Klein also referenced the fact that several years previously Heather had been in a very serious automobile accident in which her only child at that time, a six-year-old boy, had died in her presence while they were trapped in a vehicle. (Her twelve-year-old niece also died in the accident, and Heather suffered serious injuries.) Dr. Klein indicated that Heather suffered from Post-Traumatic Stress Disorder, as well as depression, as a result of that traumatic accident, from which she had been slowly recovering.

say that the trial court abused its discretion in awarding the parties joint custody of Caroline and designating Dave as the domiciliary parent.

Heather also argues that the court erred in denying her request to relocate with Caroline to Picayune, Mississippi. At the time of the trial, Heather was already living in Mississippi with Caroline and had been for some time.

Where the issue of relocation is presented at the initial hearing to determine custody of and visitation with a child, La. R.S. 9:355.15 instructs the court to apply the factors set forth in La. R.S. 9:355.12 in making its initial determination; however, the court is not required to give preferential consideration to any certain factor and need not list the specific factors as long as the record supports that the court considered the factors in light of the evidence presented. The factors provided by La. R.S. 9:355.12(A) are:

> (1) The nature, quality, extent of involvement, and duration of the child's relationship with the parent proposing to relocate and with the nonrelocating parent, siblings, and other significant persons in the child's life.
>
> (2) The age, developmental stage, needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child.
>
> (3) The feasibility of preserving a good relationship between the nonrelocating parent and the child through suitable visitation arrangements, considering the logistics and financial circumstances of the parties.
>
> (4) The child's preference, taking into consideration the age and maturity of the child.
>
> (5) Whether there is an established pattern of conduct of the parent seeking the relocation, either to promote or thwart the relationship of the child and the nonrelocating party.
>
> (6) Whether the relocation of the child will enhance the general quality of life for both the custodial parent seeking the relocation and the child, including but not limited to financial or emotional benefit or educational opportunity.

(7) The reasons of each parent for seeking or opposing the relocation.

(8) The current employment and economic circumstances of each parent and whether or not the proposed relocation is necessary to improve the circumstances of the parent seeking relocation of the child.

(9) The extent to which the objecting parent has fulfilled his or her financial obligations to the parent seeking relocation, including child support, spousal support, and community property obligations.

(10) The feasibility of a relocation by the objecting parent.

(11) Any history of substance abuse or violence by either parent, including a consideration of the severity of such conduct and the failure or success of any attempts at rehabilitation.

(12) Any other factors affecting the best interest of the child.

The relocating parent has the burden of proving that the proposed relocation is made in good faith and is in the best interest of the child. La. R.S. 9:355.13. A trial court's determination in a relocation matter involving children of parties to a divorce is entitled to great weight and will not be overturned on appeal absent a clear showing of abuse of discretion. *Curole v. Curole*, 02-1891, p. 3 (La. 10/15/02), 828 So.2d 1094, 1096. Although the court did not discuss each factor of the relocation statute in its reasons for judgment, there was evidence before the court addressing those factors and it is clear that the court considered the evidence and concluded that it was in Caroline's best interest to have her primary residence in Lafourche Parish with Dave. After reviewing all of the evidence presented, we cannot say that the court abused its discretion in denying Heather's request to have Caroline's principal residence in Mississippi.

CONCLUSION

For the reasons assigned herein, we grant Dave Cortez's motion to strike and affirm the trial court judgment. All costs of this appeal are to be borne by the appellant, Heather Lott Cortez.

MOTION TO STRIKE GRANTED; JUDGMENT AFFIRMED.

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CU 1485

DAVE JOHN CORTEZ

VERSUS

HEATHER LOTT CORTEZ

HUGHES, J., dissenting.

This is not a divorce case. This is a custody case. The credibility issue relied on by the trial court for its decision has no bearing on the best interests of the child.

The evidence presented by the parties in this case established, without a doubt, that Mr. and Ms. Cortez had ample reason to divorce, owing to Mr. Cortez's frequent drinking to excess and making dates with former girlfriends and Ms. Cortez's lying about her medical conditions, treatment, and reasons for needing assistance with childcare. However, the paramount consideration in a child custody ruling is the best interest of the child, and there was simply no testimony that Ms. Cortez was not a good caretaker for her child. In fact, the most revealing fact on the issue of the best interest of the child, with respect to custody, was that Ms. Cortez was the primary caretaker of the parties' minor child from the time of her March 19, 2010 birth through the date of the implementation of the trial court's June 1, 2011 ruling, appealed herein, except, perhaps, for a four-and-one-half-month period of time (between the end of May 2010 and October 15, 2010), while

Mr. Cortez was on active National Guard duty. It is also essential to note that it was not alleged that *Mr. Cortez* was the primary caregiver during that four-and-one-half-month period of time, as he was living elsewhere while on Guard duty. Rather, Mr. Cortez asserted that his brother and sister-in-law became his daughter's *de facto* primary caregivers, because of the amount of time Ms. Cortez left the child in their care, when she either worked, was out-of-town one weekend, and/or attended to her medical conditions including surgery.

While the trial court found that Ms. Cortez was untruthful about certain of these alleged medical conditions, there is no dispute that, during this time, she did in fact suffer an injury to her left elbow at the end of July 2010, for which she had to take time off from work and was paid workers' compensation benefits. It was further uncontroverted that Ms. Cortez had to undergo an August 26, 2010 surgery to repair her elbow and that, according to the medical evidence, she was impaired, with respect to her left elbow, from the end of July 2010 through, at least, the end of November 2010.

As between Mr. Cortez and Ms. Cortez, it was clear from the testimony that Ms. Cortez was the primary caregiver of their minor child during the child's entire life, at all pertinent times. Therefore, I would find that the evidence presented at trial provided no basis for the trial court's conclusion that placing the child in the domiciliary custody of Mr. Cortez was in the child's best interest. I would conclude that any untruthfulness or exaggeration regarding her medical condition by Ms. Cortez, during the four-and-one-half-month marital period that Mr. Cortez was away from home on National Guard duty, to Mr. Cortez and his family, in order to gain childcare assistance, or even sympathy, was not sufficiently probative to

overcome the hard evidence of Ms. Cortez's status as primary caregiver throughout the other ten-and-one-half months of the child's life.

Moreover, in the seven months *immediately prior* to the trial court's custody ruling, Ms. Cortez had the *full care* of her daughter, except during Mr. Cortez's every other weekend visitation. Significantly, in those seven months, Mr. Cortez did not seek an *equal* share of the physical custody of the child and did not assist Ms. Cortez with the child's financial support.

The trial court provided extensive written reasons based primarily on his determination that Ms. Cortez was not a credible witness. All experienced trial judges know that a decision founded on witness credibility is a "safe" decision, i.e. difficult to overturn on appeal.

However, we must recognize that the credibility call needs to be relevant and probative to the issues being litigated.

With all due respect, we believe that the Reasons for Judgment of the trial court mischaracterize the evidence and are not supported by the record, for the following reasons:

These reasons, on a motion to determine custody, focus, not on that issue, but rather on the credibility of the witnesses.

The trial court lists seven reasons why Heather Cortez is not a credible witness. None of the seven concern the minor child.

The trial court determines Janet Cortez, the sister of Dave Cortez, is a credible witness, yet makes no determination of the credibility of Dave Cortez.

The findings of fact of the trial court are not supported by the record. The trial court does recognize in its findings of fact that Heather Cortez was the primary caretaker of the child from March 19, 2010 until May 2, 2010 but fails to mention that she was also the primary caretaker from November

2010 until June 2011. From May 2, 2010 through November 2010 the trial court found that Janet was the primary caretaker. Yet during this same period Dave Cortez is recognized as primarily exercising responsibility for child rearing *when he was on leave* from active National Guard duty while making no mention of Heather's day-to-day involvement with the child.

After a thorough review of the testimony and evidence presented in this case, we believe the trial court misconstrued crucial portions of the testimony presented, which led to an erroneous assumption that Heather had abdicated her parental responsibilities for Caroline during the period of May 2, 2010 through November 2010, in favor of Dave, when he was home, or to Janet Cortez, when Dave was not home.

Janet testified that she is married to Dave's brother, Chip, and that they live next door to Dave (and to Heather when she lived with Dave). Janet further testified that she is Caroline's godmother. Janet testified that after Dave went on active duty with the Guard, Heather claimed to have been diagnosed with cancer at the end of May or beginning of June 2010. Heather told Janet that she was receiving treatment for cancer. Janet also testified that when Heather had treatment, she would keep Caroline at night and sometimes during the day, when she did not have an appointment for her drapery business. She would also keep Caroline on the two evenings per week that Heather worked at the hospital. Janet testified that on the evenings that Heather worked, Heather could not pick Caroline up until approximately 10:30 or 11:00 p.m. (as her shift was from 5:00 p.m. until 10:00 p.m.), and since Janet and Caroline went to bed early, she and Heather agreed that Heather would pick Caroline up the next morning around 6:30 a.m.

Chip testified that both he and Janet worked full-time. Janet worked at her drapery shop in downtown Thibodaux. The shop was open to the public from 9:00 a.m. to 5:00 p.m. five days a week. Chip stated that he worked during the week from 6:30 a.m. until 5:00 p.m., four to five days a week, for an insulation company. Both he and Janet worked at the drapery store on Saturdays.[1]

Janet testified that "sometimes" she would keep Caroline at her drapery store and that "sometimes" her mother-in-law Melva Cortez would keep Caroline during the day. Melva testified that she kept Caroline "[o]ne time" when Heather said she had shingles and a "couple of different times" for Heather's "doctor visits or something."

When Janet and Chip kept Caroline overnight, they indicated that on the following morning Chip would leave for work at about 4:00 a.m. and Janet would leave to go to work around 6:30 a.m. Heather was supposed to come get Caroline by 6:30 a.m., but that sometimes Janet had to go knock on Heather's door when she did not arrive on time.

The testimony indicated that Janet and Chip's care of Caroline did not take place when Dave was at home, which was approximately three days per week. They testified that they took care of Caroline about ninety percent of the nights that Dave was away. Janet and Chip could not state exactly how many nights they kept Caroline, and they admitted that on some nights when

[1] Despite his heavy work schedule, Chip maintained that he knew "for a fact" that Dave did the majority of feeding, bathing and caring for Caroline when he was home. Chip also testified that Dave did everything for Caroline and "[e]very now and then" he would see Heather holding the baby. He said, "I was there." Later in his testimony, Chip admitted he could not actually say exactly how much Dave cared for Caroline as compared to how much Heather cared for her. Chip and Janet admitted they were not at Dave and Heather's house all the time and that they saw Dave and Heather mostly at their own (Chip and Janet's) house.

Caroline spent the night Heather did as well. Further, Chip indicated that on nights Heather did not work, she usually ate dinner with them, and that she would go back to her house around 8:00 p.m.

Dave's active Guard duty lasted from May 2, 2010 through October 15, 2010, which was about five and one-half months. Janet indicated that she began caring for Caroline at the end of May or beginning of June 2010, continuing until Dave returned, about four and one-half months later. During that four and one-half month period, Janet continued to work full-time from 9:00 to 5:00 daily, as well as on Saturdays, though Janet also kept Caroline "sometimes" during the day. Janet testified that when she kept Caroline at night, Heather would bring her over at about 5:30 p.m. Caroline would be put to bed at Janet and Chip's house between 8:00 and 9:00 p.m. Caroline would then be returned to Heather's care by 6:30 a.m. the following morning. There was no testimony that Caroline woke up during the night.

It seems obvious, and there was no contrary testimony, that Heather was taking care of Caroline during the daytime, except for "sometimes" when she was cared for either by Janet, at her drapery shop, or by Dave's mother, Melva. When Dave returned from Guard duty, Janet and Chip were not needed to help care for Caroline, except occasionally. So, at the most, the testimony presented at trial would support a finding that while Dave was on Guard duty, his family stepped in to cover what, under normal circumstances (if he had not been activated for Guard duty), would have been Dave's share of the responsibility of caring for his child.[2]

[2] Since Dave expressed an intent to split, as equally as possible, parenting responsibilities with Heather, and considering Heather's primary care of Caroline during the approximate eight hours Dave would have spent away from the family home during the day, while he was at his full-time bank job, then when Dave returned during the evenings he would presumably have cared for his child for the three to four hours before her bedtime.

Whether or not Heather actually underwent "cancer" treatment,[3] she nevertheless had an incontrovertible injury to left elbow, which she suffered with from approximately July 19, 2010 through November 2010. A July 21, 2010 report from Dr. Lance S. Estrada, Heather's treating orthopedist, filed into the record, indicated that two days previously Heather had fallen at work and injured her left elbow, which he diagnosed as a left elbow and ulnar nerve contusion; Heather was placed on a "modified" work status. In his August 4, 2010 report, Dr. Estrada indicated Heater's condition was worse and he diagnosed "acute cubital tunnel syndrome," opining that "nothing short of an ulnar nerve transposition [would] give her any significant relief." On August 26, 2010, Dr. Estrada performed surgery on Heather's elbow. In his September 8, 2010 report, Dr. Estrada stated that Heather's incision had healed but that there was "decreased sensation in the ulnar nerve distribution," and that she should "rest this for another four weeks;" work restrictions were continued as including "not activity [sic]." Dr. Estrada's October 6, 2010 report indicated that Heather was not "100% yet but she [was] making slow but sure progress;" she was continued on modified work duty. On November 24, 2010, Dr. Estrada found clear

[3] Heather maintained throughout the trial that, at the end of May 2010, she had been diagnosed with dysplasia of the cervix, which she thought was "cancer." She testified that she had been treated with a "LEEP procedure," which she indicated included a radiation component. She also sought alternative treatment modalities for her condition. While she acknowledged that she misrepresented to Dave, his family, and even her counselors, the extent of her condition and the treatment she underwent, she explained that she did so because she was angry with Dave and wanted to keep her medical treatment private and that Dave's family "gossip[ed] about everybody's business." She nevertheless failed to satisfy the trial court with convincing evidence to support her claims regarding the alleged diagnosis or that she did in fact receive the alternative treatments she described. Heather introduced into evidence medical records obtained from Dr Robert A. DeSantis of The Women's Clinic of Laurel [Mississippi]. These records consisted of handwritten notes of Dr. DeSantis, along with diagnostic tissue sample reports, contained in Dr. DeSantis's file, from the Diagnostic Tissue/Cytology Group in Meridian, Mississippi. One of the diagnostic tissue reports stated that the endocervical cell specimen examined contained a "epithelial cell abnormality" and the diagnosis contained in the report was: "Atypical Squamous Cells of Undetermined Significance[;] Cannot R/O Dysplasia (rare cells)[;] Continued Follow[-]up Warranted." Dr. DeSantis's handwritten notes for his July 6, 2010 examination of Heather, noted an enlarged uterus, indicated that a "LEEP procedure" had been performed, noted a prescription for Methotrexate, noted that Heather was to consult with Dr. Lisa Matthews, and recommended continued conservative treatment with Dr. J. Bliss. Literature filed into evidence on the drug Methotrexate referred to Methotrexate as, among other things, a chemotherapy drug.

inflammation in Heather's elbow with "point" tenderness (for which anti-inflammatory medications were prescribed), though he noted a good range of motion and working nerve function. Thus, Heather was impaired, with respect to her left elbow, from the end of July 2010 through, at least, the end of November 2010.

We do not condone Heather's misrepresentations to Dave and his family regarding the severity of her medical condition and the nature and extent of the treatment she underwent for that condition. Although these misrepresentations certainly cast doubt on Heather's moral fitness in general, LSA-C.C. art. 131 was revised in 1993 to provide that the moral fitness of the parents is now a factor to be considered only insofar as it affects the welfare of the child. This reflects the jurisprudential rule that moral misconduct should be considered only if it has a detrimental effect on the child, not to regulate the moral behavior of the parents. See **Griffith v. Latiolais**, 2010-0754, p. 19 (La. 10/19/10), 48 So.3d 1058, 1071.

We cannot agree with the trial court that Heather's misrepresentations, perhaps designed, at least in part, to gain child care assistance from Dave's family while he was away on Guard duty, should be equated to neglect of her child. Under other circumstances (if Dave had not been activated by the National Guard), Dave would have been home to share in the care of their child. Dave's family's assumption of Dave's proportional share of the care of his child, while he was away, should not be used to characterize Heather as shirking her parental responsibilities. Many mothers work at full-time jobs, after maternity leave, and leave their babies in the care of babysitters forty hours per week or more. At most, Caroline was in Janet's care twelve hours per day for four days per week or forty-eight hours per week, at least thirty-six hours of which were during the time the child was sleeping. Under

the particular facts and circumstances of this case, we cannot conclude this constituted an "avoidance of [Heather's] parental responsibility."

Furthermore, there was no evidence that Heather did not otherwise care for her child all day, almost every day (with the exceptions mentioned), or that the child was not well cared for. Even after Dave returned from Guard duty, he worked a full-time job at the bank. There was no evidence presented that Heather did not care for Caroline during the entire time Dave was at work at the bank.

More significantly, after Heather left the matrimonial domicile at the end of November or beginning of December, in 2010, through the time the trial judge rendered the June 1, 2011 judgment that named Dave domiciliary parent, a period of some six months, Heather cared for Caroline without any assistance from Dave or his family, except when Dave exercised visitation every other weekend.[4] Regardless of any past excessive reliance by Heather on Dave's family to assist in the care of her child, Heather was indisputably the primary caregiver of Caroline during the six months preceding the trial court's ruling. We deem the current behavior of the parents to be more relevant than past behavior. See **Monsour v. Monsour**, 347 So.2d 203, 204-5 (La. 1977).

Nor do we consider Heather's approximate four-day trip to California, at the end of September 2010, indicative of an intent to avoid her parental responsibilities. Even if Dave's contention is entirely correct (i.e., that she went to California exclusively to enjoy the company of friends), it cannot be

[4] We note that no evidence was presented that Dave asked for more visitation time and was refused. In fact, the testimony showed that sometime in early 2011, he asked for visitation through Monday of his alternating weekend visitation, and Heather agreed. Apparently, Dave did not seek equal physical custody of Caroline during that time period. Dave's family confirmed that he has not been denied visitation since Heather has had primary custody of Caroline.

concluded that such a trip constituted an avoidance of parental duties, when the child was left in the care of her father.

For these reasons I respectfully dissent.