NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 CU 1008

JOEL P. McALISTER, JR.

VERSUS

BECKI E. McALISTER

Judgment Rendered: SEP 19 2008

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On Appeal from the Twenty-First Judicial District Court
In and For the Parish of Livingston
State of Louisiana
Docket No. 113445

Honorable Robert H. Morrison, III, Judge Presiding

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BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

McCLENDON, J.

In this custody matter, the mother appeals from a trial court judgment awarding joint custody and designating the father as primary domiciliary parent. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

Joel P. McAlister, Jr. (Joel) and Becki E. McAlister (Becki) were married on June 29, 2000. Their child, Ayden, was born on March 1, 2005. Joel filed for divorce on September 28, 2006. In his petition for divorce, Joel requested that the trial court award joint custody to the parties and designate Joel as Ayden's domiciliary parent. In her answer, Becki also sought joint custody and designation as the domiciliary parent. Pursuant to an interim order agreed to by the parties and signed by the trial court on November 7, 2006, Joel and Becki alternated physical custody on a week-to-week basis. The trial court also ordered that both parties submit to a mental health evaluation to be conducted by Dr. Donald G. Hoppe, a clinical psychologist. In accordance with the interim order, Dr. Hoppe conducted multiple interviews with the parties, including a session with each parent in which he watched their interaction with Ayden. Becki's father, Bobby Ellender, was also interviewed by Dr. Hoppe. A judgment of divorce between Joel and Becki was signed on June 25, 2007.

After a three-day hearing regarding custody, the trial court took the matter under advisement. On November 19, 2007, the trial court signed a judgment naming Joel as the primary domiciliary parent and awarding Becki liberal visitation. Becki appealed, assigning the following as error:

1. A reasonable factual basis for the finding of the trial court does not exist.

2. The finding of the trial court is manifestly erroneous.

3. The trial court committed legal error.

STANDARD OF REVIEW

Every child custody case must be viewed in light of its own particular set of facts and circumstances. **Elliott v. Elliott**, 05-0181, p. 7 (La.App. 1 Cir. 5/11/05), 916 So.2d 221, 226, writ denied, 05-1547 (La. 7/12/05), 905 So.2d 293. The paramount consideration in any determination of child custody is the best interest of the child. See LSA-C.C. art. 131; **Evans v. Lungrin**, 97-0541, 97-0577, p. 12 (La. 2/6/98), 708 So.2d 731, 738. Thus, the trial court is in the best position to ascertain the best interest of the child given each unique set of circumstances. Accordingly, a trial court's determination of custody is entitled to great weight and will not be reversed on appeal unless an abuse of discretion is clearly shown. **Elliott**, 05-0181 at p. 7, 916 So.2d at 226.

Further, in this case, as in most child custody cases, the trial court's determination was based heavily on factual findings. It is well settled that an appellate court cannot set aside a trial court's findings of fact in the absence of manifest error or unless those findings are clearly wrong. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). 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. **Id.** In order to reverse a fact finder's determination of fact, an appellate court must review the record in its entirety and (1) find that a reasonable factual basis does not exist for the finding, and (2) further determine that the record establishes that the fact finder is clearly wrong or manifestly erroneous. **Stobart v. State, DOTD**, 617 So.2d 880, 882 (La. 1993).

DISCUSSION

Louisiana Civil Code article 134 enumerates the following twelve factors that are relevant in determining the best interest of the child:

> (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; and

(12) The responsibility for the care and rearing of the child previously exercised by each party.

The list of factors provided in Article 134 is nonexclusive, and the determination as to the weight to be given each factor is left to the discretion of the trial court. LSA-C.C. art. 134, Revision Comments – 1993, comment (b).

The best-interest-of-the-child test under LSA-C.C. arts. 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 peculiar set of facts and the relationships involved, with the paramount goal of reaching a decision which is in the best interest of the child. **Martello v. Martello**, 06-0594, p. 5 (La.App. 1 Cir. 3/23/07), 960 So.2d 186, 191. See also LSA-C.C. art. 134, Revision Comments – 1993, comments (a) and (c).

In this matter, Becki asserts that the trial court failed to follow the dictates of LSA-C.C. art. 134 and engaged in only a perfunctory review of the factors

listed in Article 134. Specifically, she asserts that the trial court committed error when it stated in its written reasons that the "biggest issue presented is whether the child's mother was overly dependent upon her father, and whether that issue, coupled with chronic anxiety, mitigated in favor of the father's being named domiciliary parent." Becki asserts that this statement, contrary to Article 131 and the best interest of the child, together with the trial court's reliance almost exclusively on the findings and recommendations of Dr. Hoppe, resulted in legal error. We disagree.

A review of the record and the trial court's extensive reasons for judgment reveal a thorough analysis of the factors contained in LSA-C.C. art. 134 in determining what was in Ayden's best interest. In reaching its conclusion, the court initially expressed that Becki and Joel compared favorably in most of the factors under Article 134. The court determined that both parents had a great deal of love and affection for Ayden, had the capacity to give Ayden love and guidance in contributing to his upbringing, and had the capacity to provide his necessary material needs. The trial court further determined that both parties had the requisite degree of moral fitness and physical health to provide for the proper welfare of Ayden. However, the court believed that under the current week-to-week arrangement, Ayden was not being exposed to a stable environment, that there was no permanence to his home situation, and that there was no solid home, school or community history. The court found the distance between the present residences of the parents "regrettable," but apparently unavoidable, and observed that Ayden was not old enough to express a preference as to where he lives. The court noted that Becki had provided most of Ayden's care prior to the parties' separation, but also recognized that since their separation and Joel's change of employment, this responsibility had been shared for many months due to the week-to-week sharing of physical custody. Thus, the remaining factors to be considered, and those which gave the court concern, were:

(7) The mental . . . health of each party; and

> (10) The willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party.

With regard to Becki's mental health, the trial court was concerned with her chronic anxiety and her overdependence on her father. The court acknowledged that Dr. Dennis M. Spiers, Becki's treating psychiatrist, was of the opinion that Becki's anxiety was controlled by medication and did not affect her parenting ability. However, what troubled the court and what was a major factor in the trial court's decision, was Becki's overdependence on her father and the effect that overdependence would have on Ayden. The court stated:

> While Dr. Spiers opined that Ms. McAlister's long standing anxiety disorder would not affect her ability to care for her child, Dr. Hoppe expressed concerns that the combination of the anxiety disorder coupled with her dependence on her father would complicate her ability to provide better care for the child. Dr. Hoppe, unlike Dr. Spiers, had the benefit of interview with both parents and Mr. Ellender, and to observe their interactions with the child. While the Court does not believe that Ms. McAlister's condition would prevent her from providing adequate care for Ayden, and the Court has discounted the tests administered by Dr. Hoppe, there remains some concern as to the impact of the combination of factors described by Dr. Hoppe as to whether Ms. McAlister could provide *better* care for Ayden.

The court then discussed this concern in light of the relationships of the parties and Ayden. The court continued:

> Another factor provided in Article 134 is the willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party. This Court has previously expressed its distaste for the manner in which Mr. McAlister initially handled the separation by keeping Ayden from his mother. However, since that time, it appears that he has attempted to cooperate, and for the most part, he expressed little malice towards Ms. McAlister during the trial, except when defending some of the accusations she leveled.
>
> On the other hand, Ms. McAlister seemed to waste no opportunity to discredit Mr. McAlister in any way possible. She frequently tagged on unresponsive berating in her responses to questions presented during the trial. Further, it was apparent to the Court that Mr. Ellender loathed Mr. McAlister, and certainly as long as Ms. McAlister continues to live in her father[']s house, it is likely that this feeling will be communicated to Ayden.

After reviewing the evidence and discussing the Article 134 factors, the trial court concluded:

> The bottom line with respect to custody is that this Court concludes that the contention as to Ms. McAlister's overdependence upon her father is accurate. While the close ties of the Ellender family are to be admired in many respects, it seems apparent that this closeness as it relates to Ms. McAlister may border upon suffocation as to her ability to independently rear her son. The primary concern the Court has is that Ayden would develop the same dependency in this environment.
>
> Realizing that this decision will have wrenching repercussions for his mother, the Court must nonetheless conclude that Ayden's best interest would be served by having his father designated as primary domiciliary parent.

We find Becki's argument that the trial court committed legal error in failing to follow the dictates of LSA-C.C. arts. 131 and 134 to be without merit.

Further, we find no abuse of discretion in the trial court's reliance on the testimony of Dr. Hoppe. Initially, we note that had this court been sitting as the trier of fact, we might have weighed Dr. Hoppe's testimony differently. However, a trial court may accept or reject in whole or in part the opinion expressed by an expert. The effect and weight to be given expert testimony is within the broad discretion of the trial court. **Suazo v. Suazo**, 07-0795, p. 11 (La.App. 1 Cir. 9/14/07), 970 So.2d 642, 650, writ denied, 07-2291 (La. 12/14/07), 970 So.2d 539.[1]

Based on a thorough review of the record in this matter, we cannot conclude that the trial court was manifestly erroneous or unsound in making its factual findings, which have a reasonable basis in the record. Further, based on the specifics of this case, we cannot find that the trial court abused its discretion in deciding that it would be in the best interests of Ayden to designate Joel as the domiciliary parent, with liberal visitation by Becki.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed. Costs of this appeal are assessed to Becki McAlister.

AFFIRMED.

[1] We also note that the trial court had the benefit of both Mr. Ellender's and Becki's testimony in court.