NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CU 1212

SCOTT EDWARD CULLEN

VERSUS

KRISTIANN MARIE CULLEN

Judgment Rendered: NOV - 9 2011

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On Appeal from the Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket No. 2005-13011

Honorable Dawn Amacker, Judge Presiding

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BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

Welch J. concurs with reasons.
Pettigrew J. Concurs with Reasons

McCLENDON, J.

A mother appeals a trial court's judgment that designated the father domiciliary parent of their minor children. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

Kristiann Cullen and Scott Cullen were married on April 4, 1998, and the couple had three children: J.C. (born 7/15/93), N.C. (Born 11/6/00), and G.C. (born 6/30/03). On June 28, 2005, Mr. Cullen filed a petition for divorce and therein sought joint legal custody and co-domiciliary status over the children. Ms. Cullen answered the petition and filed a reconventional demand seeking sole custody of the children.

On March 15, 2006, the trial court signed both a Judgment of Divorce and a stipulated judgment wherein the parties agreed to share joint custody of the children and which designated Ms. Cullen as domiciliary parent. Moreover, the stipulated judgment provided that the neither parent could move the children out of state without giving the other parent 60 days written notice and obtaining written permission of the other parent or a court order authorizing the move.

In the fall of 2009, Ms. Cullen decided to allow J.C. to live with his father because she believed she could no longer handle J.C. On May 19, 2010, after J.C. was expelled from school as a result of drug-related issues, Ms. Cullen filed a motion for contempt, asserting that Mr. Cullen "has refused to have his son returned to his mother's home as required by the judgment." She requested that Mr. Cullen be held in contempt, be required to attend a parental education course and counseling, and be forced to submit to random drug tests.

On July 7, 2010, by consent of the parties, Dr. Alicia Pellegrin, a psychologist, was appointed to conduct a "Custody Evaluation."" On July 8, 2010, the parties stipulated that pending determination of Ms. Cullen's motion, J.C. would remain at the Odyssey House Academy, a facility where J.C. was being treated for his drug-related issues. [1]

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[1] We note that J.C. is now 18 years of age, rendering the custody issue as to him moot.

On September 15, 2010, Mr. Cullen filed a rule to modify custody and for contempt, asserting that Ms. Cullen had moved to Alabama and enrolled the children, N.C. and G.C., in school there.[2] Mr. Cullen sought temporary custody of the minor children so that they could return to school in St. Tammany Parish and be within the jurisdiction of the court. The trial court set the matter for hearing on January 19, 2011, and ordered Ms. Cullen "to immediately return the children to the jurisdiction of the court."[3]

The trial on the custody and contempt issues was held on January 19 and 29, 2011. After hearing testimony from the parties and Dr. Pellegrin, among others, the trial court maintained a joint custody arrangement, but designated Mr. Cullen as domiciliary parent, reasoning, in part, as follows:

> The Court does find, based on the evidence, the exhibits that have been filed, the testimony of the parties, the entire record of this case, that indeed there has been a material change in circumstances that has occurred since the original award by consent of custody of the parties back in 2006.
>
> ***
>
> [T]he father is now in a stable, committed relationship with his fianc[ée] who, for the record, the Court finds to be a very credible party, Ms. Johnson, a very caring and kind individual, a very nurturing mother to her family and her children, in addition to being a great asset to the father and to his children.
>
> I find that the father is now financially stable, and the fact that this has been brought to the table by his fianc[ée] doesn't make any difference to me. The fact is that the household is stable.
>
> ***
>
> [T]o [Mr. Cullen's] credit, he did step up to the table for his children. He did what the Court asked him to do. He had drug testing, and we have negative drug tests since then, and we have absolutely no evidence whatsoever but that he's been anything but drug free in the past year.
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> ***

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[2] Mr. Cullen had previously received a certified letter from Ms. Cullen stating that she intended to move to Alabama within 30 days. On October 19, 2010, in a status conference with the trial court in which she participated by telephone, Ms. Cullen acknowledged that she, along with N.C. and G.C., had moved to Alabama.

[3] On October 26, 2010, Mr. Cullen filed another rule for contempt and to modify custody based on Ms. Cullen's defiance of the prior court order that she return to Louisiana. In connection therewith, the trial court signed an *ex parte* order granting Mr. Cullen temporary custody.

[Mr. Cullen,] I believe you have done everything this Court's asked you to do and been rehabilitated in that regard.

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[Ms. Cullen]...decided to violate the State's relocation statute and moved off to the State of Alabama, moved back only because the Court had to order her to do so. We have a long history, and I am convinced, that the mother has attempted to alienate these children and has not allowed visitation on many, many occasions with the father....

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It's very concerning to me that the mother exhibits histrionic behavior. She's always injecting drama into the situation when it doesn't need to be. She has, in my opinion, and by the father's testimony, made his life pretty miserable the last, at least [for a] couple of years, in accusing him and his family, the maternal grandmother, other people of various things, concerning particularly the child [N.C.], blaming him for anything that occurs with the children.

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It's quite obvious to me that Mr. Cullen has really, for some time, been the person that the children really see as truly their primary domiciliary parent.

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But for this period of time, at least for right now, the Court believes it is in these children's best interest, all of them...that the father be the primary domiciliary parent.

A written judgment was signed by the court on March 3, 2011.[4]

Ms. Cullen has appealed, presenting the following issues for review:

A. Did the trial court properly consider the [LSA-] C.C. art. 134 best interest factors in changing the domiciliary parent from Ms. Cullen to Mr. Cullen?

B. Did the trial court improperly consider polygraph evidence to disregard the child's reports of abuse by his grandmother?

C. Did the trial court give undue weight to Dr. Alicia Pellegrin's opinions?

[4] The trial court also held Ms. Cullen in contempt, but she does not seek review of that ruling.

DISCUSSION

STANDARD OF REVIEW

A trial court's determination of child custody is entitled to great weight and will not be reversed on appeal unless an abuse of discretion is clearly shown. **R.J. v. M.J.**, 03-2676, p. 4 (La.App. 1 Cir.5/14/04), 880 So.2d 20, 23. In the instant case, as in most custody cases, the trial court's determination was based heavily on factual findings. See **R.J.**, 03-2676 at p. 5, 880 So.2d at 23. As an appellate court, we cannot set aside a trial court's factual findings unless we determine that there is no reasonable factual basis for the findings and that the findings are clearly wrong or manifestly erroneous. 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. **Id.**

ASSIGNMENTS OF ERROR NUMBERS 1 AND 3

Because the parties entered into a non-considered custody decree, the party moving for modification must prove: (1) a material change of circumstances has occurred since the original custody decree was entered, and (2) the proposed modification is in the best interest of the child. See **Elliott v. Elliott**, 05-0181, p. 9 (La.App. 1 Cir. 5/11/05), 916 So.2d 221, 227, writ denied, 05-1547 (La. 7/12/05), 905 So.2d 293.[5] The Louisiana Civil Code provides a framework in LSA-C.C. art. 134 for making "the best interest of the child" determination.[6]

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[5] Ms. Cullen does not challenge the trial court's finding that a material change of circumstances has occurred since the March 15, 2006 stipulated judgment.

[6] Louisiana Civil Code 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.

Ms. Cullen contends, however, that the trial court, in changing domiciliary parent status from her to Mr. Cullen, erred in failing to properly consider the factors set forth in Article 134. Specifically, Ms. Cullen contends that in reading the trial court's reasons for judgment, it is clear that the trial court changed the domiciliary parent based on its belief that Ms. Cullen was consistently "injecting drama when it didn't need to be" and was making Mr. Cullen's "life pretty miserable the last, at least couple of years...blaming him for anything that occurs with the children." Ms. Cullen asserts that the law dictates that she, in attempting to protect her children, was correct and appropriate in her maternal apprehensions. Although the trial court did not reference the factors, Ms. Cullen does not allege that the trial court did not consider any of the factors in making its ruling. Nevertheless, she asserts that the trial court's analysis, in failing to give weight to all of the factors in Article 134, erred as a matter of law and abused its discretion.

The trial court, however, "is not bound to make a mechanical evaluation of all of the statutory factors listed in LSA-C.C. art. 134, but should decide each case on its own facts in light of those factors." **Harang v. Ponder**, 09-2182, p. 11 (La.App. 1 Cir. 3/26/10), 36 So.3d 954, 963, writ denied, 10-0926 (La. 5/19/10), 36 So.3d 219. Moreover, the trial court is not bound to give more

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(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.

weight to one factor over another, and when determining the best interest of the child, the factors must be weighed and balanced in view of the evidence presented. **Harang**, 09-2182 at p. 11, 36 So.3d at 963. The factors are not exclusive, but are provided as a guide to the court, and the relative weight given to each factor is left to the discretion of the trial court. **Id.**

In reaching its decision, the trial court relied heavily upon the recommendations of Dr. Pellegrin, who opined that Mr. Cullen should be designated domiciliary parent.[7] Ms. Cullen contends, however, that the trial court abused its discretion in placing great weight on Dr. Pellegrin's testimony because it was patently illogical, inconsistent with legal principles, and speculative. However, we note that both parties stipulated that Dr. Pellegrin was to perform a custody evaluation to be introduced into evidence at trial. Moreover, neither Dr. Pellegrin's expertise nor the methodology she used in performing the evaluation, were ever contested at trial. Additionally, Beverly Connor, who Ms. Cullen hired and consulted with to address several concerns with regard to the children and who the trial court accepted as an expert in the area of clinical social work, agreed with Dr. Pellegrin's recommendations in connection with designating Mr. Cullen domiciliary parent.[8]

It is the role of the trial court to make credibility determinations, and it may accept in whole or in part the expert's opinion. **Bellard v. American**

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[7] Dr. Pellegrin testified that although she has concerns about Mr. Cullen's passive nature, she likewise has "concerns about [Ms. Cullen's] overreacting at times and her taking unilateral control of the situation such that Mr. Cullen's role as a father is totally marginalized" and "that he should have no role as a father." Dr. Pellegrin opined that if Ms. Cullen "had her way," Mr. Cullen's "parental rights would be terminated." Dr. Pellegrin also indicated that the fact Ms. Cullen moved to Alabama was not "the big issue" in this situation, but it reflected poor judgment on Ms. Cullen's part. Specifically, despite her attorney advising her not to make a unilateral move and that "there will be dire consequence if you do this," Ms. Cullen "convinced herself of the rightness of her position...[and] it doesn't really matter what the objective data [indicates]."

On the other hand, Dr. Pellegrin testified that Mr. Cullen "seems to be more stable than he has [been] in the past" and that Mr. Cullen is more amendable to correcting his shortcomings as a parent than Ms. Cullen. Moreover, Dr. Pellegrin opined that N.C. and G.C., given their ages, "need a strong dad" and Mr. Cullen should be afforded "that opportunity." Dr. Pellegrin testified that she is "concerned that if Ms. Cullen kept domiciliary custody, Mr. Cullen wouldn't have that chance." As such, she concluded that Mr. Cullen should be designated domiciliary parent.

[8] We note that "[c]ustody should not be changed when to do so would punish a parent for past behavior when there is no proof of a detrimental effect on the child or children." See **Everett v. Everett**, 433 So.2d 705, 708 (La. 1983). Although Ms. Cullen posits that the trial court used the finding of contempt as a basis to change domiciliary status, there is no indication in the record that the trial court placed any "undue weight" on the contempt finding. Cf. **Everett**, 433 So.2d at 708.

Cent. Ins. Co., 07-1335, p. 28 (La. 4/18/08), 980 So.2d 654, 673. The admission of evidence, expert or otherwise, is subject to the trial court's discretion. **Franklin v. Franklin**, 05-1814, p.5 (La.App. 1 Cir. 12/22/05), 928 So.2d 90, 93, writ denied, 06-0206 (La. 2/17/06), 924 So.2d 1021.

In light of the foregoing, we cannot conclude that the trial court abused its discretion in accepting Dr. Pellegrin's testimony or in changing the domiciliary parent to Mr. Cullen. Accordingly, assignments of error numbers 1 and 3 are without merit.

ASSIGNMENT OF ERROR NUMBER 2

In her second assignment of error, Ms. Cullen contends that the trial court erred as a matter of law in relying on polygraph evidence to disregard alleged abuse of C.M. by the paternal grandmother. Ms. Cullen asserts that the trial court's reliance on the results was misplaced insofar as it has no connection to her suitability as a custodial parent or any connection to the best interest of the child analysis.

While we are concerned with the trial court's reference to the polygraph tests, see **Franklin**, 05-1814 at pp. 3-8, 928 So.2d at 91-94, we note that the trial court's reference to the tests dealt directly with the paternal grandmother's restriction on visitation. The trial court had made its ruling awarding joint custody and designating the domiciliary parent prior to any reference to the polygraph tests. This evidence was not used or referenced by the trial court in determining the suitability of Ms. Cullen as a domiciliary parent.[9] Moreover, Ms. Cullen does not specifically assign as error the trial court's decision to remove the paternal grandmother's visitation restriction. See Rule 1-3 of the Uniform Rules of Louisiana Courts of Appeal. Given that the visitation restriction has not been assigned as error, we pretermit discussion of the specifics of assignment of error number two.

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[9] We note that the trial court's ruling from the bench consisted of over 22 transcribed pages. The reference to the polygraph test does not appear until the last few pages of that ruling.

CONCLUSION

For the foregoing reasons, the March 3, 2001 judgment of the trial court is affirmed. Costs of this appeal are assessed to the appellant, Kristiann Marie Cullen.

AFFIRMED.

SCOTT EDWARD CULLEN

VERSUS

KRISTIANN MARIE CULLEN

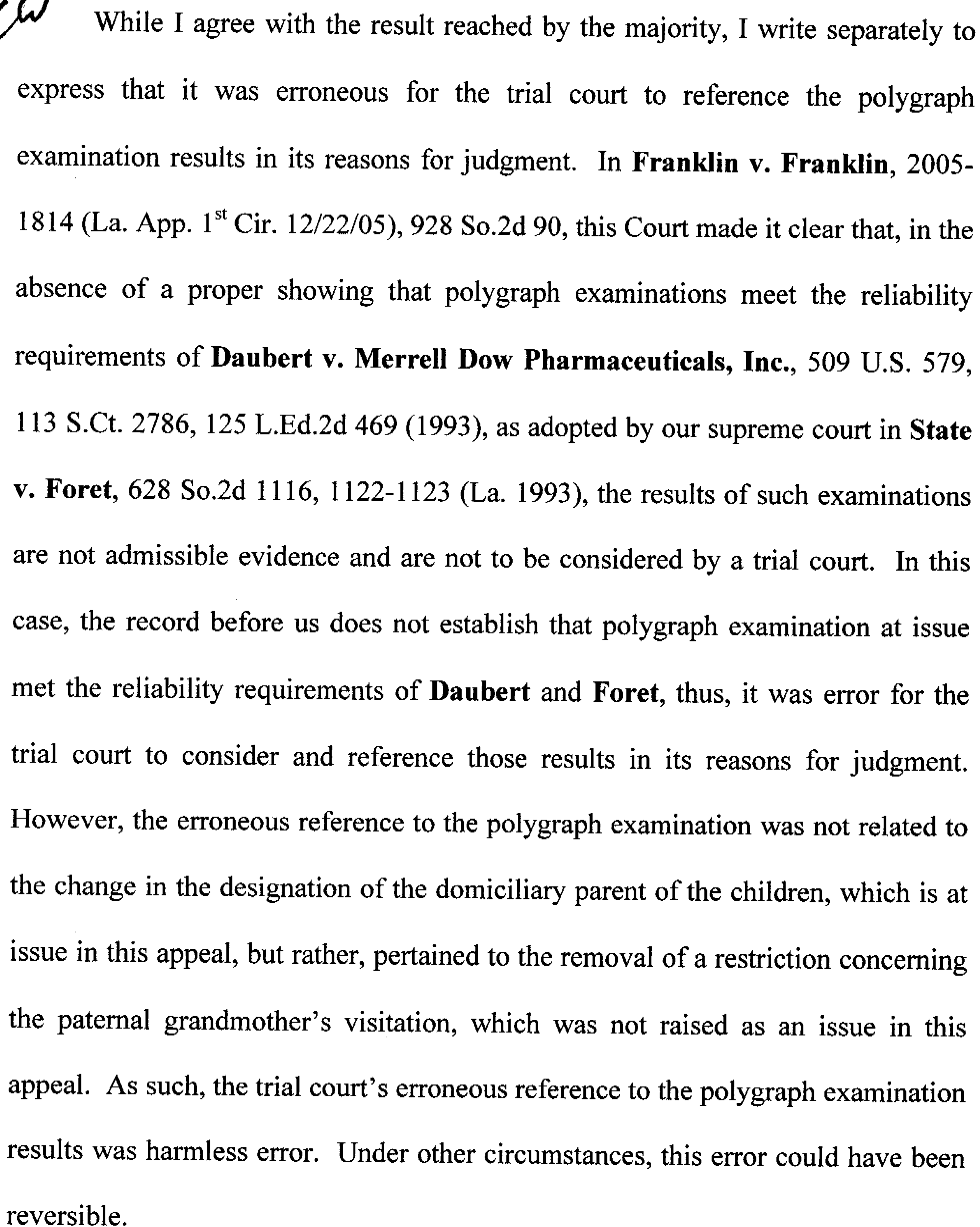
NUMBER 2011 CU 1212

FIRST CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

WELCH, J. concurring



While I agree with the result reached by the majority, I write separately to express that it was erroneous for the trial court to reference the polygraph examination results in its reasons for judgment. In **Franklin v. Franklin**, 2005-1814 (La. App. 1st Cir. 12/22/05), 928 So.2d 90, this Court made it clear that, in the absence of a proper showing that polygraph examinations meet the reliability requirements of **Daubert v. Merrell Dow Pharmaceuticals, Inc.**, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), as adopted by our supreme court in **State v. Foret**, 628 So.2d 1116, 1122-1123 (La. 1993), the results of such examinations are not admissible evidence and are not to be considered by a trial court. In this case, the record before us does not establish that polygraph examination at issue met the reliability requirements of **Daubert** and **Foret**, thus, it was error for the trial court to consider and reference those results in its reasons for judgment. However, the erroneous reference to the polygraph examination was not related to the change in the designation of the domiciliary parent of the children, which is at issue in this appeal, but rather, pertained to the removal of a restriction concerning the paternal grandmother's visitation, which was not raised as an issue in this appeal. As such, the trial court's erroneous reference to the polygraph examination results was harmless error. Under other circumstances, this error could have been reversible.

Thus, I respectfully concur.

SCOTT EDWARD CULLEN

VERSUS

KRISTIANN MARIE CULLEN

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BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

PETTIGREW, J., CONCURS, AND ASSIGNS REASONS.

I respectfully concur with the results reached by the majority, but I must express concerns that I have of the overreliance and overuse by trial courts of hearing officers and "experts" in child custody cases.