No. 04-FM-1230

DISTRICT OF COLUMBIA COURT OF APPEALS

INDIA FIELDS,

Appellant,

v.

GREGORY CONWAY,

Appellee.

Appeal from the Superior Court of the District of Columbia,
Family Division (No. DR-403-02)

REPLY BRIEF OF APPELLANT

Barbara McDowell (No. 414570)
Legal Aid Society of the District of Columbia
666 11th Street, N.W., Suite 800
Washington, D.C. 20001
PH: (202) 628-1161
FX: (202) 727-2132

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTE AND RULE

INTRODUCTION

Mr. Conway does not dispute the legal standard applicable to his motion to modify Ms. Fields's parental rights under the Consent Custody Order. As the movant, Mr. Conway bore "the heavy burden of persuasion," Rice v. Rice, 415 A.2d 1378, 1383 (D.C. 1980), that a modification of visitation was warranted by "a substantial and material change in circumstances" and "the best interest of the child," D.C. Code 16-914(f)(1). See Appellee's Br. 1 (conceding that Mr. Conway bore the burden of persuasion).

For the reasons explained in our principal brief, the trial court erred in holding that Mr. Conway had met that burden. See Appellant's Br. 11-19. The record contains no reliable non-hearsay evidence that Ms. Fields was responsible for the injuries that the child, Tyshe, exhibited on the day after his two-day Christmas visit with Ms. Fields and her elder son, Tyquan. By contrast, the record contains ample evidence from Ms. Fields and three witnesses who were present during the visit that neither she nor Tyquan injured Tyshe. The reasons offered by the court for declining to credit Ms. Fields's and her witnesses' testimony do not withstand scrutiny. In sum, there was no adequate evidentiary basis for the court to confine Ms. Fields's contact with her young son to the institutionalized setting of the Supervised Visitation Center.

Although Mr. Conway attempts to defend the trial court's order as adequately supported by the record, those attempts are unavailing for the reasons discussed below.

ARGUMENT

I. THE TRIAL COURT'S ORDER CANNOT BE SUSTAINED ON THE BASIS OF THE THREE-YEAR-OLD CHILD'S OUT-OF-COURT STATEMENTS

Mr. Conway does not, and cannot, dispute that Tyshe's out-of-court statements constituted the sole evidence that his bruise and loose teeth were caused by Ms. Fields and Tyquan. The court erred in considering those statements for their truth. The statements are hearsay, and

no exception to the rule against hearsay applied. Mr. Conway does not suggest the applicability of any hearsay exception.[1]

Even aside from whether the rule against hearsay barred consideration of Tyshe's out-of-court statements at all, the court erred in according the statements any significant weight. As this Court has recognized, a trial court's finding that a child has been abused by a parent may well be "less informed and reliable" when the court bases that finding on the child's out-of-court statements, without having "seen and heard the child[] itself." In re Jam. J., 825 A.2d 902, 911 (D.C. 2003); see In re Ty. B., No. 01-FS-1307, slip op. at 9 n.12 (D.C. July 21, 2005) (observing, in a case in which the trial court relied on the out-of-court statements of the children's allegedly abused mother, that "[o]bviously, the judge could not assess the credibility of the mother, who had disappeared and was unavailable to testify").[2]

Here, without any opportunity personally to see and hear Tyshe, the trial court had no basis to assess whether the three-year-old was capable of "understand[ing] the difference between truth and falsehood and appreciat[ing] the duty to tell the truth." Barnes v. United States, 600

---

[1] As noted in our principal brief, because the trial court gave no indication of its intent to rely on Tyshe's out-of-court statements for their truth, Ms. Fields's trial counsel would have had no reason to object to such reliance. The statements were not themselves offered into evidence. Rather, the statements were contained in the CFSA report, a public record that was admissible for the separate purpose of establishing CFSA's decision not to pursue Mr. Conway's allegations of child abuse. See generally Harris v. United States, 612 A.2d 198, 202 (D.C. 1992) (noting the hearsay exception for official records such as probation violation reports); Fed. R. Evid. 803(8).

In any event, the trial court's reliance on Tyshe's out-of-court statements would warrant reversal of the order at issue under the plain error standard. The court's consideration of those statements for their truth, without any adequate basis to evaluate their credibility through personal observation and cross-examination of the declarant, was "so clearly prejudicial to [Ms. Fields's] substantial rights as to jeopardize the very fairness and integrity of the trial." In re D.S., 747 A.2d 1182, 1187 (D.C. 2000) (citation omitted).

[2] Mr. Conway has not suggested any impediment to Tyshe's testifying in this case. See Appellee's Br. 7 n.2 (stating merely that Mr. Conway "did not even consider" Tyshe's testifying).

A.2d 821, 823 (D.C. 1991).[3] The court likewise had no basis to assess whether Tyshe was telling the truth with respect to the particular matter at issue here. Moreover, the out-of-court statements on which the court relied -- "that his mother hit him in the head with her fist, and that his older brother hit him in the mouth" (CSFA Report 1) -- are entirely conclusory, containing none of the contextual detail that could inform an assessment of their truthfulness and accuracy.

Whether or not Mr. Conway is correct in his assertion that he "testified that his son told the doctor that his mother and brother had hit him" (Appellee's Br. 6), any such reference to Tyshe's statements would be hearsay (just as were the statements in the CFSA report), and thus should not have been considered for their truth. In any event, the sum total of Mr. Conway's testimony on the matter consisted of the following (essentially non-responsive) answers on cross-examination:

> Q So you can't stand here and tell me that he [i.e., Tyshe] was punched by Ms. Fields, can you?
>
> A Yes, I can, because he said --
>
> Q Did you --
>
> A The child told the doctor, and he told me.
>
> * * * * *
>
> Q So you can't tell me with certainty that either of them [i.e., Ms. Fields and Tyquan] was involved in loosening those teeth, can you?
>
> A Because he said that, I would.

3/22/04 Tr. 24. Mr. Conway thus offered no testimony about the words that Tyshe used, the

[3] Contrary to Mr. Conway's suggestion (Appellee's Br. 2), whether a young child has been described as "well-spoken for his age," as Tyshe was described in the CFSA report, has no particular bearing on that inquiry. In some instances, if a child is unusually "well spoken" about matters in dispute between his estranged parents, there may be reason to suspect coaching by the parent who has access to the child.

questions or comments that elicited Tyshe's statements, or any other information about the context in which Tyshe made the statements that would permit an assessment of their credibility and accuracy. Mr. Conway's cursory references to the child's having said something about the matter to the doctor and to Mr. Conway are insufficient to carry the burden of proof here.

None of this is intended to suggest that a young child's allegations of abuse by a parent should not be taken seriously by the judicial system. Rather, courts need to take particular care in ascertaining the truth or falsity of such allegations in order to assure, among other things, that the child is not erroneously subjected to further injuries (e.g., because the court has failed to identify the actual cause of the child's injuries), that the child and parent are not erroneously denied the opportunity to maintain a meaningful relationship (e.g., because the court has misidentified the parent as the source of the injuries), and that the parent is not erroneously labeled as an abuser. The underlying defect in this case is not that the trial court took the allegations of abuse too seriously, but that the court did not take them seriously enough -- by resting its decision on out-of-court statements of uncertain reliability, by not insisting that the moving party substantiate its allegations, and by not engaging in the rigorous analysis of the record to which the child and the parents were entitled.

II. THE TRIAL COURT'S ORDER CANNOT BE SUSTAINED ON THE BASIS OF CREDIBILITY FINDINGS RELATING TO PERCEIVED TESTIMONIAL INCONSISTENCIES THAT ARE LIMITED TO COLLATERAL MATTERS AND ARE LARGELY NONEXISTENT

Mr. Conway relies on the trial court's refusal to credit Ms. Fields and her witnesses based on what the court characterized as "inconsisten[cies]" and "contradict[ions]" in their testimony. See Appellee's Br. 3-4. That reliance is misplaced.

As our principal brief explains, to the extent that the trial court pointed to specific testimony of Ms. Fields and her witnesses as support for its credibility assessment, the testimony re-

lated to peripheral matters. Appellant's Br. 14-15; see e.g., Mem. & Order 2. n.1 (suggesting inconsistencies about whether Ms. Fields's landlady was ill during the visit); id. at 3 n.2 (suggesting inconsistencies about whether Tyshe had one bath or two during the visit). Mr. Conway nowhere disputes either our general point that witnesses' credibility is not undermined by "inconsistencies and contradictions" about mere "collateral details," In re A.H.B., 491 A.2d 490, 496 (D.C. 1985), or our specific point that the alleged inconsistencies here were confined to such matters.

As our principal brief also explains, there was nothing at all inconsistent or implausible about most of the testimony that the trial court sought to characterize as such. Appellant's Br. 15-16. For example, the court perceived an inconsistency between, on the one hand, Ms. Fields's statement to the CFSA investigator that "if her son had any bruises, they were the result of him playing with his cousin and his brother," and, on the other hand, Ms. Fields's testimony that Tyshe and Tyquan were the only children present during the Christmas visit. Mem. & Order 4 n.5; CFSA Report 1. There is no inconsistency. Ms. Fields did not state to CFSA that the "cousin" was present during the Christmas visit. Presumably, Ms. Fields was referring to the young cousin with whom Tyshe lives in Mr. Conway's house. It was entirely reasonable, and consistent with her trial testimony, for Ms. Fields to suggest that Tyshe's injuries might have resulted from play with the cousin, which might have occurred before or after the two-day Christmas visit. See Appellant's Br. 16 n.6 (discussing why Ms. Fields's statement about the cousin does not cast doubt on her credibility). Although Mr. Conway seizes on the trial court's credibility findings based on the cousin reference (see Appellee's Br. 3), Mr. Conway makes no attempt to counter our explanation of why Ms. Fields's statement about the cousin was consistent with her testimony before the court.

Similarly, Mr. Conway relies on the trial court's credibility findings based on Ms. Fields's supposed testimony that Tyshe and Tyquan "were at all times under her observation." Appellee's Br. 4 (quoting Mem. & Order 3 n.2). What Ms. Fields actually testified, however, was that she never left the children "unattended" (3/22/04 Tr. 57) or "alone" (id. at 64), not that she never let them out of her sight, as the court seemed to suggest. As we previously explained, Ms. Fields's testimony in this regard is plausible and is consistent with the remainder of her testimony and with the testimony of her witnesses. See Appellant's Br. 15-16. Mr. Conway makes no attempt to counter that explanation.

As a general matter, when a decisionmaker's proffered reasons for arriving at a particular result are pretextual, there may be cause to question whether the decisionmaker's real reasons are impermissible ones. See generally McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973); RAP, Inc. v. District of Columbia Comm'n on Human Rights, 485 A.2d 173, 176-177 (D.C. 1984). Here, in view of the insubstantiality of the trial court's stated reasons for finding that Ms. Fields and her witnesses were not credible, one cannot entirely discount the possibility that the court may have been influenced (even without recognizing it) by Ms. Fields's cognitive disability, her limited education, or her poverty. Such factors had no proper role in the court's inquiry into whether Mr. Conway met his burden of establishing that Ms. Fields abused the child so as to warrant a severe restriction of her parental rights. As Mr. Conway's own authorities make clear, a trial court's discretion "does not mean the arbitrary will or merely individual or personal view of the judge," Potomac Small Loan Co. v. Myles, 34 A.2d 609, 612-613 (D.C. 1943) (internal quotation marks omitted), much less a view that is colored by biases or stereotypes. See Appellant's Br. 14.

III. THE TRIAL COURT'S ORDER CANNOT BE SUSTAINED ON THE BASIS OF EVIDENCE OF THE CHILD'S ILLNESS UNRELATED TO ANY ALLEGED STRIKING BY HIS MOTHER OR HIS BROTHER

Mr. Conway also calls this Court's attention to evidence that Tyquan developed a fever and an ear infection some hours after his return from the Christmas visit. See Appellee's Br. 3, 6, 7. But that evidence is irrelevant to whether Ms. Fields "is physically abusive toward the minor child, and has allowed the minor child to be physically injured by a sibling," which were the sole grounds for the trial court's decision that "modification of the Consent Custody Order is necessary to protect the best interest of the minor child." Mem. & Order 5. The court did not find any causal connection between the alleged striking of Tyshe and his fever and ear infection. Nor does the record suggest such a connection.

Although Mr. Conway may have offered the evidence in an attempt to establish that the Consent Custody Order should be modified on the separate ground that Ms. Fields was inattentive to the child's illness, the court did not make any finding of such inattentiveness. No support exists in the record for such a finding. Ms. Fields and her witnesses consistently testified that Tyshe did not appear to be ill during the visit. See 5/22/04 Tr. 35, 44, 51, 60. Moreover, Mr. Conway acknowledged that he had not recognized Tyshe to be ill until "three or four hours" after they returned to his home after the visit. Id. at 20. Any discussion of Tyshe's illness is thus beside the point here.

IV. THE TRIAL COURT'S ORDER CANNOT BE SUSTAINED ON THE BASIS OF UNSPECIFIED "HISTORY" THAT PREDATES THE ENTRY OF THE CONSENT CUSTODY ORDER

Finally, Mr. Conway contends that the trial court's order may be affirmed based not on the evidence presented at the May 22, 2004, hearing alone, but also on "the court's entire history with the parties in this matter, and the totality of facts known to the court about the parties." Appellee's Br. 8. That contention is incorrect.

Because the decision whether to modify the Consent Custody Order required an inquiry into whether "a substantial and material change in circumstances" had occurred since its entry, D.C. Code 16-914(f)(1), the trial court could not properly have relied on matters that were known to the court and the parties before its entry. See, e.g., Rice, 415 A.2d at 1383 ("Although it is indisputable that the courts have continuing jurisdiction to modify custody arrangements in the best interests of the children, it is equally beyond dispute that the modification must be based upon changed circumstances which occurred after the * * * decree was entered and were not contemplated by the parties at the time.") (internal citation omitted). Nor did the court purport to rely on such matters. In any event, because Mr. Conway does not specify what in the court's prior experience with the case might support its findings that Ms. Fields struck Tyshe during the Christmas visit and allowed Tyquan to do so, this Court would be in no position to affirm the order based on that experience.

CONCLUSION

For the reasons stated above and in Ms. Fields's principal brief, the trial court's order modifying the Consent Custody Order should be reversed.

Respectfully submitted.

Barbara McDowell (No. 414570)
Legal Aid Society of the District of Columbia
666 Eleventh Street, N.W., Suite 800
Washington, D.C. 20001
PH: (202) 628-1161
FX: (202) 727-2132

Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July 2005, I caused a true and correct copy of the foregoing Reply Brief of Appellant to be deposited in the first-class mail, postage prepaid, addressed to:

Robert L. Chaves
1025 Connecticut Avenue, N.W.
Suite 1012
Washington, D.C. 20036

Counsel for Appellee

_____
Barbara McDowell