IN THE

District of Columbia Court of Appeals

Nos. 06-FM-165 & 06-FM-1609

PEGGY FAIRCHILD,

Appellant,

v.

NICHOLAS CARSON,

Appellee.

On Appeal from the
Superior Court for the District of Columbia,
Family Division

REPLY BRIEF FOR APPELLANT
PEGGY FAIRCHILD

BARBARA MCDOWELL
THE LEGAL AID SOCIETY OF THE
DISTRICT OF COLUMBIA
1331 H Street, N.W., Suite 350
Washington, D.C. 20005
(202) 628-1161

September 4, 2007

LORANE F. HEBERT
JESSICA L. ELLSWORTH
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600

Counsel for Appellant
Peggy Fairchild

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. MR. CARSON DOES NOT – AND CANNOT – DEMONSTRATE THAT THE TRIAL COURT ENGAGED IN THE ANALYSIS THAT THE CUSTODY STATUTE REQUIRES WHEN A PARENT HAS COMMITTED AN INTRAFAMILY OFFENSE 2

A. Mr. Carson Does Not Dispute The Statutory Prerequisites To Any Award Of Custody Or Visitation To A Parent Who Has Committed An Intrafamily Offense 2

B. Mr. Carson Points To Nothing In The Trial Court's Decision That Reflects Compliance With Its Duty Under The Custody Statute To Weigh A Parent's Intrafamily Offenses Against Him 5

II. MR. CARSON DOES NOT – AND CANNOT – DEMONSTRATE THAT THE TRIAL COURT CONSIDERED OTHER FACTORS THAT THE CUSTODY STATUTE REQUIRED IT TO CONSIDER 8

III. MR. CARSON DOES NOT DEMONSTRATE THAT THE TRIAL COURT'S RULING THAT MS. FAIRCHILD ACTED CONTRARY TO THE CHILDREN'S BEST INTERESTS WAS THE PRODUCT OF SUBSTANTIAL REASONING BASED ON A FIRM FACTUAL FOUNDATION 10

A. Mr. Carson Fails To Justify The Trial Court's Ruling With Respect To Ms. Fairchild's Flight To Wisconsin 11

B. Mr. Carson Fails To Justify The Trial Court's Ruling With Respect To Home Schooling 13

IV. THE TRIAL EVIDENCE ESTABLISHES THAT GRANTING CUSTODY TO MS. FAIRCHILD WOULD HAVE SERVED THE CHILDREN'S BEST INTERESTS 14

V. MR. CARSON OFFERS NO PERSUASIVE DEFENSE OF THE TRIAL COURT'S DENIAL OF APPEAL TRANSCRIPTS 16

CONCLUSION 18

TABLE OF AUTHORITIES

CASES:

Dumas v. Woods, 914 A.2d 676, 679 (D.C. 2007) 7, 16

Fitzgerald v. Fitzgerald, 464 A.2d 110 (D.C. 1983) 7

Nixon v. United States, 728 A.2d 582 (D.C. 1999) 12

Prost v. Greene, 652 A.2d 621 (D.C. 1995) 1, 10

T.L., In re, 859 A.2d 1087 (D.C. 2004) 1

Wilkins v. Ferguson, Nos. 05-FM-1555 et al., 2007 D.C. App. LEXIS 462 (D.C. July 19, 2007) 1, 4, 7

Ysla v. Lopez, 684 A.2d 775 (D.C. 1996) 7, 16

STATUTES AND RULE:

D.C. Code 16-914 .... passim

D.C. Code 16-916.01 (2005) 10

D.C. Code 16-1001 3-4

Evidence of Intrafamily Offenses in Child Custody Act of 1994, D.C. Law 10-154 3

Rule 10, Rules of the D.C. Court of Appeals ....

OTHER AUTHORITIES:

Report of the Committee on the Judiciary, Bill 10-7, the "Evidence of Intrafamily Offenses in Child Custody Act of 1994" (April 27, 2994) 4

INTRODUCTION

Although a child custody award is, as Mr. Carson emphasizes, subject to review under an abuse of discretion standard, that does not mean that a trial court may neglect to apply the governing law, disregard relevant facts, or rely on purported facts that are not supported by the record. "[T]he exercise of judicial discretion must be grounded 'upon correct legal principles and must rest on a firm factual foundation.'" Wilkins v. Ferguson, Nos. 05-FM-1555 et al., 2007 D.C. App. LEXIS 462, at *30 (D.C. July 19, 2007) (quoting In re T.L., 859 A.2d 1087, 1090 (D.C. 2004)); see Prost v. Greene, 652 A.2d 621, 626 (D.C. 1995) (explaining that review of custody decisions for abuse of discretion "looks to whether the trial judge has considered all relevant factors and no improper ones, and to whether her decision is then supported by substantial reasoning drawn from a firm factual foundation in the record").

The Custody Order in this case cannot be sustained under that standard. It was an abuse of discretion for the trial court to fail to perform its duty under D.C. Code 16-914(a)(3) to consider three statutory factors bearing on the children's best interests – namely, Mr. Carson's two intrafamily offenses, the children's preference to live with Ms. Fairchild, and her more extensive prior involvement in their lives. It was an abuse of discretion for the court to fail to engage in the additional inquiry required by D.C. Code 16-914(a-1) when a parent seeking custody or visitation has committed an intrafamily offense. It was an abuse of discretion for the court to find that Ms. Fairchild had acted contrary to her children's interests by fleeing with them from the District, when the court gave no serious attention to Ms. Fairchild's safety concerns as a result of Mr. Carson's history of domestic abuse, to the inability of any civil protection order to assure her safety, or to her lack of a job or other financial resources to provide for the children on her own. It was an abuse of discretion for the court to accord significant weight to Ms.

Fairchild's choice of home schooling, when the court had no firm factual foundation to support its assumption that the choice was detrimental to the children, ignored Mr. Carson's acquiescence in that choice, and gave Ms. Fairchild no credit for obtaining speech therapy for one of the children. It was an abuse of discretion for the court to rely on findings adverse to Ms. Fairchild that were not supported by the evidence at trial.

ARGUMENT

I. MR. CARSON DOES NOT – AND CANNOT – DEMONSTRATE THAT THE TRIAL COURT ENGAGED IN THE ANALYSIS THAT THE CUSTODY STATUTE REQUIRES WHEN A PARENT HAS COMMITTED AN INTRAFAMILY OFFENSE

A. Mr. Carson Does Not Dispute The Statutory Prerequisites To Any Award Of Custody Or Visitation To A Parent Who Has Committed An Intrafamily Offense

In our opening brief, we explained that the custody statute requires trial courts to engage in a rigorous inquiry before granting custody or even visitation to a parent who has committed an intrafamily offense. See D.C. Code 16-914(a)(3)(F) and (a-1); Fairchild Br. 12-18. Mr. Carson does not take issue with our analysis of the scope and applicability of those statutory requirements.

Mr. Carson does not dispute, therefore, that the trial court was obligated to consider "evidence of [his] intrafamily offense[s]" in determining the children's best interests with respect to custody or visitation, D.C. Code 16-914(a)(3)(F). He likewise does not dispute that he, as a parent who had been found to have committed intrafamily offenses, bore the burden of proving that granting him visitation, much less custody, would "not endanger the child[ren] or significantly impair the child[ren]'s emotional development," D.C. Code 16-914(a-1). Nor does he dispute that the court was required to justify any award of custody or visitation to him, as the perpetrator of intrafamily offenses, with "a written statement * * * specifying factors and

findings which support that determination," id. Finally, he does not dispute that the court could not award him custody or even visitation without specifically finding that the children and Ms. Fairchild "can be adequately protected from harm," id.

Instead, Mr. Carson seems to misunderstand our statutory argument. We do not contend that a trial court, in a case in which an intrafamily offense has been proved, is obligated to take into account "social and psychological studies and theories." Carson Br. 10; see id. at 20-22. We simply contend that a trial court is obligated in such a case to adhere to the express requirements of the custody statute: to consider the intrafamily offense in determining the children's best interests, to require the offender to prove that awarding him custody or visitation will not harm the children physically or emotionally, to assure that such an award will not impair the safety of the other parent, and to set forth its analysis in writing. To be sure, the D.C. Council's choice to impose those requirements is amply supported by empirical studies on the adverse impact of domestic violence on children, some of which are referenced in the legislative record of the Evidence of Intrafamily Offenses in Child Custody Act of 1994 [hereinafter, 1994 Act], D.C. Law 10-154, which contained the provisions now codified as Section 16-914(a)(3)(F) and Section 16-914(a-1). But the trial court's error lies in its disregard of the statute (see Section I-B, infra), not its disregard of the learning on which it was based.

Contrary to Mr. Carson's intimations (see, e.g., Carson Br. 9-10, 13), a trial court is required to engage in the analysis mandated by Section 16-914(a)(3) and Section 16-914(a-1) not only when the parent committed an intrafamily offense against the child, but also when the parent committed an intrafamily offense against the other parent or another person protected by the Intrafamily Offenses Act (i.e., a person "[t]o whom the offender is related by blood, legal custody, marriage, domestic partnership, having a child in common, or with whom the offender

shares or has shared a mutual residence," D.C. Code 16-1001(5)). The Council chose to use the all-encompassing term "intrafamily offense," a term with a defined meaning under District law; it did not use a more limited term that would reach only a parent's abuse of a child, as the Council has done elsewhere in the custody statute. See, e.g., D.C. Code 16-914(a)(2) (referring separately to "child abuse" and "an intrafamily offense").

The Council's choice was deliberate. During its consideration of the 1994 Act, the Council was made aware that children are adversely affected by violence between their parents, even when the children are not themselves targets of or witnesses to the violence. See Report of the Committee on the Judiciary, Bill 10-7, the "Evidence of Intrafamily Offenses in Child Custody Act of 1994," at 3 (April 27, 1994) (noting that "[r]esearch reveals that children exposed to spouse abuse often suffer emotional and physical harm," and that children may experience a variety of harms "even where [they] do not directly witness the abuse") (quoted at Fairchild Br. 14). In addition, the Judiciary Report explained that the 1994 Act would prevent a judge from "determin[ing] that an intrafamily offense has occurred, but find that there is insufficient proof that said domestic violence is detrimental to the children involved." Id. at 8. After the 1994 Act, therefore, a parent's commission of any intrafamily offense automatically raises a red flag as to any award of custody or visitation to that parent. See Wilkins, 2007 D.C. App. LEXIS 462, at *42 ("Simply put, the Council has decreed that a history of domestic abuse will always be relevant at every custody or visitation proceeding in which the abuser is involved."). A court is not, to be sure, absolutely barred from making such an award. But the court may do so only if, after engaging in the careful analysis required by Section 16-914(a)(3) and Section 16-914(a-1), it concludes that the award nonetheless would be in the child's best

interest, would not pose a risk of physical or emotional harm to the child, and would not endanger the other parent.[1]

B. Mr. Carson Points To Nothing In The Trial Court's Decision That Reflects Compliance With Its Duty Under The Custody Statute To Weigh A Parent's Intrafamily Offenses Against Him

As explained in our opening brief, the trial court did not engage in the inquiry that the custody statute requires when a parent seeking custody or visitation has been found to have committed an intrafamily offense. Although Section 16-914(a)(3)(F) required the court to "consider" Mr. Carson's intrafamily offenses as a "relevant factor" in determining the children's best interests, the court's decision does not comply with that requirement. And, although Section 16-914(a-1) required the court (i) to place the burden on Mr. Carson to prove that the children would not suffer physical or emotional harm by awarding him custody, (ii) to justify any award of custody to Mr. Carson in the face of his intrafamily offenses with "a written statement * * * specifying factors and findings which support that determination," and (iii) to satisfy itself that the award would not put the children or Ms. Fairchild at risk, the court's decision does not comply with those additional requirements. See Fairchild Br. 18-20.

Mr. Carson does not identify any discussion in the trial court's decision of the implications of his intrafamily offenses for the children's best interests, for Ms. Fairchild's

---

[1] Mr. Carson errs in asserting that, in this particular case, "there was no evidence that the children were witness to or traumatized by familial violence." Carson Br. 21. To the contrary, Ms. Fairchild testified that, after the June 2004 incident in which Mr. Carson punched her in the face with his closed fist, the children "both opened the bedroom doors and came out with scared looks on their faces and tears in their eyes." A 85. Ms. Fairchild further testified that, during the August 2004 incident in which Mr. Carson slapped her in the face and yelled at her for more than an hour, Nicolas, the older child, twice came out of his bedroom to urge his father to go back to sleep. A 86-87. In addition, Ms. Fairchild testified that Nicolas "has witnessed some of the abuse, and he's very, he's fully aware of it," and connected that exposure to his "problems with tantrums and being in very grumpy moods." A 365; see A 623 (Guardian ad Litem testifies that Nicolas was aware of the incidents that provided the basis for the Civil Protection Order).

safety, or for why he should nonetheless be preferred over Ms. Fairchild as the permanent custodian of the children. Nor could he. The court addressed the intrafamily offenses only in the context of Section 16-914(a)(2), which eliminates the presumption of joint custody when a parent has committed an intrafamily offense, but not in the context the other applicable provisions of the custody statute. See A 10-14.

In attempting to excuse the trial court's failure to engage in the statutorily required analysis in awarding permanent custody, Mr. Carson relies on the court's reference to the intrafamily offenses in its oral ruling granting him pendente lite custody. See Carson Br. 12-13; see also A 199-200 (oral ruling); A 21 (describing that ruling). The pendente lite ruling does not satisfy the statutory requirements with respect to permanent custody. Nor does it appear to have been intended by the trial court to do so. The pendente lite ruling was entered at the end of the hearing on Ms. Fairchild's petition for a Civil Protection Order. The court limited that hearing to the intrafamily offense issues, as distinguished from the permanent custody and visitation issues. Early in that hearing, for example, the court observed that "we'll be here three days" if "I get too much in this custody o[r] visitation," and expressed its intent "to leave the status quo on this" and to "set this for a hearing on custody and visitation at some other date." A 115. The court proposed, and the parties agreed, to proceed toward a prompt trial on permanent custody, rather than to litigate the children's best interests on an interim basis at the CPO hearing. A 116.

At most, then, the pendente lite ruling reflects the trial court's predictive judgment that, if the children were left in Mr. Carson's custody pending the imminent custody trial, they would be adequately cared for and not "abused." A 199. The ruling does not reflect the comprehensive analysis that Section 16-914(a)(3) requires of the multiple factors bearing on the children's long-term best interests. The ruling does not reflect any placement of the burden of proof on Mr.

Carson, as Section 16-914(a-1) requires, to show that awarding permanent custody to him would not "significantly impair the child[ren]'s emotional development." The ruling does not even meet the requirement of Section 16-914(a-1) of being "a written statement * * * specifying factors and findings which support [the] determination."

Aside from the pendente lite ruling, Mr. Carson is left to argue that, since the trial court had itself previously found that he had committed intrafamily offices and then relied on them to eliminate the joint custody presumption under Section 16-914(a)(2), the court also must have engaged, sub silentio, in the analysis of those offenses required by Section 16-914(a)(3)(F) and Section 16-914(a-1). That argument is untenable. This Court insists that trial judges show their work in order to assure that they engaged in the analysis that the custody statute mandates. As the Court recently made clear, "[a] failure by the trial court to make findings as to each of the relevant factors [in Section 16-914(a)(3)] requires remand." Dumas v. Woods, 914 A.2d 676, 679 (D.C. 2007) (emphasis added); accord, e.g., Wilkins, 2007 D.C. App. LEXIS 462, at *47 (faulting the trial court for "not explicitly consider[ing] the factors relevant to the best interest of the child determination, especially those appearing in § 16-914(a)(3)(E) ('the mental and physical health of all individuals involved') and (F) ('evidence of an intrafamily offense as defined in section 16-1001(5)')"); Ysla v. Lopez, 684 A.2d 775, 781 (D.C. 1996); Fitzgerald v. Fitzgerald, 464 A.2d 110, 112-113 (D.C. 1983). The Council has likewise specified that an award of custody or visitation to a parent who committed an intrafamily offense must be justified by "a written statement * * * specifying factors and findings." D.C. Code 16-914(a-1); see Wilkins, 2007 D.C. App. LEXIS 462, at *42-*43) (faulting the trial court for not "making the required finding under § 16-914(a-1)"). Mr. Carson does not explain how the trial court's decision can be reconciled with this controlling authority.

II. MR. CARSON DOES NOT – AND CANNOT – DEMONSTRATE THAT THE TRIAL COURT CONSIDERED OTHER FACTORS THAT THE CUSTODY STATUTE REQUIRED IT TO CONSIDER

We previously explained that the trial court committed reversible error not only in failing to consider Mr. Carson's intrafamily offenses (as discussed in Section I), but also in failing to consider two other factors that the Council has required to be considered in custody cases: "the wishes of the child as to his or her custodian" and "the prior involvement of each parent in the child's life," D.C. Code 16-914(a)(3)(A) and (I). See Fairchild Br. 21-24. Although Mr. Carson asserts that "this contention is simply not true" (Carson Br. 14), he points to no discussion of either factor in the trial court's decision. Nor can any such discussion be found.

Mr. Carson does not dispute that the children expressed a preference to live with Ms. Fairchild. Nor does he dispute that the children, who were 10 and 7 at the time of trial, were capable of formulating an opinion on their preferred custodian. See Fairchild Br. 21-22 (discussing cases in which courts honored the preferences of even younger children). He likewise does not dispute that Ms. Fairchild was the children's principal caregiver from their birth until January 2005. To the contrary, he acknowledged as much at trial. See, e.g., A 264, 290-291. The evidence establishing both statutory factors was before the trial court. It was error for the court not to have addressed it.

Mr. Carson argues that, because the Guardian Ad Litem (GAL) addressed those two factors in recommending that custody be granted to Ms. Fairchild, and the trial court rejected the GAL's recommendation, the court can be assumed to have considered those factors as well. See Carson Br. 15. Mr. Carson is incorrect. The court did not express either agreement or disagreement with the GAL's findings that the children preferred to live with Ms. Fairchild and that she had been the children's primary caregiver for most of their lives. See A 9, 13-14. It

does not follow that, simply because the GAL expressly considered all of the relevant statutory factors, the trial court implicitly did so (even if, contrary to this Court's teaching in cases such as Wilkins and Dumas, implicit consideration were sufficient).

There is an additional reason why the trial court's disposition of the GAL's report is not entitled to any weight, whether for Mr. Carson's proposed purpose of excusing the court's failure to address relevant statutory factors or for any other purpose. As we have explained, the court offered no reasoned basis for disregarding the GAL's recommendation and the findings on which it was based. See Fairchild Br. 37-41. The court faulted the GAL for using a methodology that the GAL expressly disavowed using; the court offered no reason to conclude that its perception of the GAL's approach was more accurate that the GAL's own. See id. at 38. The court then summarily rejected as "incredulous [sic]" the GAL's findings on six statutory factors – not the two factors at issue here – even though each finding was reasonable and, in some cases, any finding different from the GAL's would have been untenable.

To take one example addressed by Mr. Carson (see Carson Br. 16-17), the GAL correctly concluded that the twelfth statutory factor, "the demands of parental employment," D.C. Code 16-914(a)(3)(L), favored neither parent because both maintained flexible work schedules. A 15. In an attempt to defend the trial court's rejection of the GAL's finding, Mr. Carson draws inferences about Ms. Fairchild's work schedule that are contrary to the record (and that the trial court did not itself purport to draw). Specifically, Mr. Carson implies that Ms. Fairchild's occasional house-sitting work would "require[] her to spend nights in a stranger's home" and thus take her away from the children. Carson Br. 16-17. Ms. Fairchild testified, however, that she confined her work to "the times when I don't have the boys with me," and that, if she was granted custody, "I would only do it [i.e., house-sitting] when they were with their father." A.

407-408, 483. Mr. Carson offered no testimony or other evidence to refute Ms. Fairchild's testimony on those points.[2]

Mr. Carson does not even attempt to defend the trial court's rejection of the GAL's findings on certain other factors. For example, Mr. Carson does not explain how the trial court could rationally disagree with GAL's finding on the second statutory factor, "the wishes of the child's parent or parents as to the child's custody," D.C. Code 16-914(a)(3)(B), in a case in which both parents were vigorously contesting for sole custody. Nor does Mr. Carson attempt to explain why the court might have found "incredulous [sic]" the GAL's finding in his favor on the fourth statutory factor. In sum, the court's inadequately reasoned rejection of the GAL's recommendation is a wholly inadequate basis from which to conclude that the court complied with its statutory obligation to consider the children's preference to live with Ms. Fairchild and her extensive prior involvement in their lives.

III. MR. CARSON DOES NOT DEMONSTRATE THAT THE TRIAL COURT'S RULING THAT MS. FAIRCHILD ACTED CONTRARY TO THE CHILDREN'S BEST INTERESTS WAS THE PRODUCT OF SUBSTANTIAL REASONING BASED ON A FIRM FACTUAL FOUNDATION

We previously demonstrated that the trial court's determination that Ms. Fairchild did not act in her children's best interests – first, in fleeing with them to her family's home in Wisconsin and, second, in choosing home schooling for them over public school – was not "supported by substantial reasoning drawn from a firm factual foundation in the record." Prost, 652 A.2d at 626; see Fairchild Br. 25-37.[3] Mr. Carson's response involves little more than paraphrasing the

[2] Of course, if Ms. Fairchild had been granted custody, she would likely have received substantial child support (presumptively, more than $1,500 a month) from Mr. Carson. See D.C. Code 16-916.01 (2005). That would have permitted Ms. Fairchild to maintain a flexible work schedule even with the additional costs associated with custody.

[3] Mr. Carson also asserts that the trial court found that Ms. Fairchild did not act in her children's best interest with respect to matters of toilet training and breast feeding (see Carson Br. 14), but the court did not actually make any such findings.

decision below and his trial testimony. He offers no cogent grounds for disregarding the numerous deficiencies that we have identified in the trial court's reasoning.

A. Mr. Carson Fails To Justify The Trial Court's Ruling With Respect To Ms. Fairchild's Flight To Wisconsin

With respect to Ms. Fairchild's flight with the children to Wisconsin, we explained that the trial court's reasoning was deficient because it disregarded Ms. Fairchild's personal safety concerns and limited financial resources (see Fairchild Br. 26-29), faulted her for not presenting evidence of additional domestic abuse that the court itself excluded (id. at 30-31), and relied on factual findings that were not supported by the record (id. at 31-34). Mr. Carson does not respond to many of our points, focusing principally on the domestic abuse issues.

Contrary to Mr. Carson's suggestion, however, the question for purposes of this custody case is not whether Ms. Fairchild or the children were in "imminent physical harm" at the time of their flight in August 2004 (Carson Br. 19).[4] The question is whether Ms. Fairchild's choice to relocate with the children to Wisconsin, without informing Mr. Carson of their whereabouts, was contrary to the children's best interests, given the information available to her at the time and the entirety of her situation.

Although Mr. Carson emphasizes that, after his August 2004 assault, he did not resume his physical abuse of Ms. Fairchild (see Carson Br. 19), that does not mean that her fears were insubstantial or unreasonable at the time, especially as she contemplated an alternative scenario in which she remained in the District in close proximity to Mr. Carson. Nor does Ms. Fairchild's failure to leave Mr. Carson when she had earlier opportunities to do so cast any doubt on the

[4] The question whether Ms. Fairchild or the children were in "imminent physical harm" would have been relevant as a statutory defense to a criminal charge of parental kidnapping. As noted in our opening brief, although Ms. Fairchild was charged with that offense, the charge was dismissed, and the trial court did not consider its viability. See Fairchild Br. 3; A 30-31.

validity of her fears in August 2004 (see id.). Those opportunities preceded Mr. Carson's final intrafamily offense and, as a general matter, women who experience domestic violence, especially mothers, often do not leave their abusers until many such incidents have occurred. See, e.g., Nixon v. United States, 728 A.2d 582, 586 (D.C. 1999) (affirming admission of expert testimony in that regard). Ms. Fairchild testified that she returned to Mr. Carson on other occasions because, although she feared him, she was also "confused," "didn't know whatever else to do," and "hoped that things would cease." A 142. To the extent that the trial court had any doubt about the reasonableness of Ms. Fairchild's safety concerns, the court should have allowed her to present evidence of additional incidents of abuse by Mr. Carson, rather than excluding it on the ground that the incidents had not been specifically disclosed during discovery. Mr. Carson does not dispute that his counsel had received Ms. Fairchild's specification of those incidents on or before October 6, 2005 (see A 423-424), so that Mr. Carson and his counsel would have had ample opportunity to prepare to respond to them by the last day of trial on November 17, 2005. See Fairchild Br. 31.

Moreover, Mr. Carson does not dispute that Ms. Fairchild had not worked outside the home for six years as of August 2004 and had been entirely dependent on him financially during that time. She would thus have had considerable difficulty providing food, housing, and other necessities for herself and the children had she stayed in the District after leaving Mr. Carson's home, rather than moving in with her family in Wisconsin. Surely, Ms. Fairchild was not required, in order to act in her children's best interests, to leave them behind with a father who had not been their principal caretaker (A 428), who had sometimes denied her money to buy them food (A 407, 499, 506-508), and who had abused her within earshot of them (A 85-87, 365). Indeed, if she had chosen that course in order to protect herself from further abuse, she

would have risked being accused of having acted against the children's best interests by abandoning them to their father.

In view of all of the circumstances confronting Ms. Fairchild in August 2004 – many of which the trial court did not appear to consider – her choice to take the children to Wisconsin cannot reasonably be said to have been contrary to their best interests. There is no indication that they were inadequately cared for at their new home. The GAL found that the children, aside from missing their father, "didn't express any particular difficulty with living in Wisconsin." A 587.[5] Even with respect to contact between the children and their father, although Ms. Fairchild chose not to disclose their precise whereabouts to Mr. Carson, she did arrange for the children to communicate with him by telephone and e-mail. Mr. Carson does not dispute our demonstration that many of the trial court's negative findings about the Wisconsin stay were unsupported by the record. See Fairchild Br. 31-34.

B. Mr. Carson Fails To Justify The Trial Court's Ruling With Respect To Home Schooling

With respect to the trial court's holding that Ms. Fairchild did not act in the children's best interest in her preference for home schooling, we previously explained that the court's reasoning was deficient for several reasons: The court assumed, without any supporting testimony from any educator, that Ms. Fairchild's home schooling was the sole cause of the children's being behind their peers academically (see Fairchild Br. 35-36); even if the court were justified in imposing blame for the choice of home schooling, the blame should not have been placed on Ms. Fairchild alone, when Mr. Carson consented to the choice initially and took no action to change it during the time the couple remained together (see id. 34); and the court did

[5] Ms. Fairchild testified that, because the children were unhappy in the Wisconsin school in which she had enrolled them, she took them out of after two weeks and resumed home schooling. A 475-476. Mr. Carson confuses that testimony. See Carson Br. 20.

not give Ms. Fairchild any credit for identifying River's speech deficiency and enrolling him in speech therapy at a public school (id. at 35). Mr. Carson does not address any of these points in his cursory treatment of the home schooling issue. See Carson Br. 18.

IV. THE TRIAL EVIDENCE ESTABLISHES THAT GRANTING CUSTODY TO MS. FAIRCHILD WOULD HAVE SERVED THE CHILDREN'S BEST INTERESTS

The evidence at trial demonstrated that Ms. Fairchild, in contrast to the picture painted by the trial court and Mr. Carson, was a responsible, devoted, and loving mother who would be an appropriate sole custodian of the children. Ms. Fairchild was the children's primary caregiver from the time that they were born until January 2005; she "changed their diapers," "took care of them when they were sick," "cooked most of their meals," "took them to the doctors' appointments and dental appointments," "arranged their play dates," conducted their home schooling, and took them to and from a number of activities, including gymnastics, swimming, soccer, and baseball. A 312-313, 371-372, 398, 428. She has since been diligent in maintaining her scheduled visitation with the children. A 439. She participates with the children in a variety of activities, including baking, gardening, and arts and crafts. A 363-364, 369. She takes them on vacations, on picnics, to museums, and to the park. A 369, 494, 575. She attends their school functions and their sporting events. A 355, 441, 570. According to those who have observed her with the children, she is an "extremely patient" and "extremely careful" parent (A 493), deals appropriately with the children's behavioral issues (A 337), and, in the words of one of Mr. Carson's witnesses, is "a very, very good mother" (A 341). The children not only love her, as they do Mr. Carson, but also want to live with her. A 498, 573-574.

As discussed in our opening brief, the trial court made a number of purported factual findings, all adverse to Ms. Fairchild, that were not supported by the evidence in the record or were so incomplete in light of the evidence as to be misleading. See Fairchild Br. 24 n.14, 31-

34. Mr. Carson does not take issue with our characterization of those problematic findings. He does, however, pepper his brief with negative assertions about Ms. Fairchild that are without record support. For example, Mr. Carson claims that Ms. Fairchild "had to admit that her son's mood was probably the result of something that she had done, and as a result she had to apologize to her son for her conduct" (Carson Br. 21 (citing A 463)), when she made no such admission. Rather, in response to a question whether Ms. Fairchild recalled a specific incident when she had counseled Nicolas about appropriate behavior, she testified: "Well, just this last weekend he was in a very grumpy mood, and so we talked about it. We talked about what each of us are going to try to work on, and you know, I had him apologize and we've talked about it." A 463. It was, therefore, Nicolas who apologized to Ms. Fairchild, not the other way around, and for conduct that was not connected to Ms. Fairchild's own conduct. The incident, as actually described in the record, reflects positively on how Ms. Fairchild deals with the children on disciplinary issues.[6]

The foregoing is not necessarily to suggest that a trial court, applying the correct legal standard, would be compelled to award custody to Ms. Fairchild over Mr. Carson. At this stage of the proceedings, however, this Court need only conclude that the trial court abused its discretion in granting custody to Mr. Carson, because the court failed to apply the correct legal standard, ignored relevant facts, relied on findings that were unsupported by the record, and engaged in faulty reasoning. For each of those reasons, the Custody Order should be reversed.

---

[6] Mr. Carson later returns to that mischaracterization, albeit without any record citation (see Carson Br. 25). To take another example of Mr. Carson's deviation from the record, he claims that Ms. Fairchild has "continued to hold many of the boys' possessions in storage, despite their demands for their things" (Carson Br. 7), although she testified that the children had not asked for anything that remained in storage, but had told her to "[j]ust keep it there" (A 463). Mr. Carson also claims that he "picks [the children] up from school everyday [sic]" (Carson Br. 7), when the uncontroverted testimony established that Ms. Fairchild picks them up about half the time (A 368-369, 440).

In focusing not on our challenges to the trial court's decision, but instead on the facts (or purported facts) in the record that are favorable to him, Mr. Carson seems to be inviting this Court to evaluate the evidence itself under the correct legal standard. But that is not how appellate review of custody orders proceeds. As this Court has explained, when a trial court has not complied with the requirements of the custody statute, such as by not addressing the factors enumerated in Section 16-914(a)(3), "this [C]ourt is left without a basis for meaningful appellate review of the custody order." Dumas, 914 A.2d at 679. This Court's consistent approach has been to remand the case to the trial court to "reconsider and articulate the reasons for its decision in light of the guidance" provided by appellate review. Ysla, 684 A.2d at 782. If the trial court here had faithfully applied the statutory framework – including giving appropriate consideration to Mr. Carson's intrafamily offenses – the court, like the GAL, might have concluded that the children's best interests favored an award of custody to Ms. Fairchild.

V. MR. CARSON OFFERS NO PERSUASIVE DEFENSE OF THE TRIAL COURT'S DENIAL OF APPEAL TRANSCRIPTS

Mr. Carson's "Note On Appeal Transcripts" (see Carson Br. 22-24) is largely unresponsive to our explanation of why the trial court erred in denying Ms. Fairchild, an in forma pauperis litigant, free transcripts to prosecute her appeal of the Custody Order. See Fairchild Br. 41-49. But two points merit a short reply.

First, Mr. Carson suggests that Ms. Fairchild has not suffered any harm from the denial of her transcript motion, because her pro bono counsel subsequently purchased the necessary transcripts. Carson Br. 22. Notably, Mr. Carson does not suggest that counsel's action rendered Ms. Fairchild's challenge moot, as indeed it did not. If this Court concludes that the trial court erred in denying the transcript motion, it can order that counsel be reimbursed. Because Ms. Fairchild's issues on appeal could not have been adequately presented without the transcripts, if

not for the fortuity of her finding pro bono counsel willing and able to advance the costs of their preparation, the trial court's denial would have effectively deprived her of any appellate review of those issues. In forma pauperis litigants like Ms. Fairchild should not have to depend on the grace of pro bono counsel to obtain appellate review of non-frivolous issues, especially where – as here – a fundamental right is involved. See Fairchild Br. 41-46.

Second, Mr. Carson contends that the trial court correctly held that Ms. Fairchild "has not presented a substantial issue on appeal" because she did not "demonstrate[] that the findings of fact made by the Trial Court were not supported by the evidence." Carson Br. 22. Mr. Carson, like the trial court, seems to misunderstand the applicable legal standard for a in forma pauperis litigant to obtain the free transcripts that are necessary to her appeal. Ms. Fairchild did not have to demonstrate that she would prevail on appeal, but only that she had one or more non-frivolous issues to present to this Court. She identified several such issues in her transcript motion, including that the trial court had not considered all statutory factors relevant for a custody determination, that the court had incompletely and incorrectly analyzed other factors, and that the court had relied on an improper factor in holding her flight to Wisconsin against her. Each of these issues was sufficient independently for an appeal transcript under Rule 10(b)(5)(A) of this Court's Rules. See Fairchild Br. 47-48.

CONCLUSION

For the reasons stated above and in our opening brief, the trial court's Order for Custody of Two Minor Children and Order denying appeal transcripts should be reversed.

Respectfully submitted.

Jessica L. Ellsworth

Barbara McDowell (No. 414570)
Legal Aid Society of the District of Columbia
1331 H Street, N.W., Suite 350
Washington, D.C. 20005
PH: (202) 628-1161
FX: (202) 727-2132

Lorane F. Hebert (No. 463398)
Jessica L. Ellsworth (No. 484170)
Hogan & Hartson LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
PH: (202) 637-5600

Counsel for Appellant[7]

[7] As previously noted, counsel intend to divide argument time, with Ms. McDowell addressing the issues presented in No. 06-FM-165 and Ms. Ellsworth addressing the issue presented in No. 06-FM-1609.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Reply Brief of Appellant to be deposited in first-class mail, postage prepaid, this 4th day of September, 2007, addressed to:

Curt S. Hansen
Hansen & Associates
419 Seventh St., N.W.
Suite 201
Washington, D.C. 20004

Jessica L. Ellsworth