

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002153-MR

TRACY GAIL SEBASTIAN

APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 97-CI-00285

STACY DARREN SEBASTIAN

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, DYCHE, and GARDNER, Judges.

COMBS, JUDGE. Tracy Gail Sebastian (Tracy) appeals from a decree of dissolution of marriage and judgment entered by the Whitley Circuit Court in which the court awarded the parties joint custody, but named the father, Stacy Sebastian (Stacy), the primary physical custodian of the parties' child. After reviewing the record, we affirm.

The parties were married in June 1996 and separated in May 1997. In May 1997, Stacy filed a Petition for Dissolution of Marriage in which he requested sole custody of the parties' three-year-old daughter. In August 1997, the parties agreed to

temporary joint custody with physical custody of the child alternating on a weekly basis pending a final custody order. In December 1997, the trial court ordered the Cabinet for Families and Children to prepare and provide the court with a home evaluation of each party for purposes of assisting the court in determining child custody. In its order, the trial court ordered that the resulting home evaluation report be filed in the court record and be mailed to both of the parties' attorneys. In February 1998, Tracy filed a motion and affidavit seeking permission to file a response to the divorce petition and requesting sole custody.¹

On May 4, 1998, the two home evaluation reports were filed in the court record as confidential documents. On May 26, 1998, Tracy's counsel filed a motion asking the court to strike certain portions of her home evaluation on grounds that it contained hearsay and requesting a second, more specific custody evaluation. On June 4, 1998, Stacy's counsel filed a response objecting to the motion and noting that Tracy could call the persons interviewed for the home evaluation reports as witnesses at the final custody hearing. On June 8, 1998, the trial court denied the motion and scheduled the custody hearing for June 12, 1998.

On June 12, 1998, the trial court conducted an evidentiary hearing at which seven witnesses testified –

¹In the motion seeking permission to file the untimely response, Tracy's counsel explained that appellant was acting *pro se* prior to December 1998 and had mistakenly sent her initial response only to Stacy's attorney rather than filing it with the circuit court.

including both of the parties. At the hearing, Tracy's attorney attempted to enter into evidence documents related to an April 1997 traffic citation charging Stacy with speeding, driving without a seat belt, and driving without insurance; he also presented photographs of the parties' child, who had been injured in an automobile accident in May 1998 while she was riding as a passenger in a truck driven by Stacy. The trial court sustained the objection to both sets of exhibits and denied their admission into evidence. The court also excluded speculative testimony concerning the child's injury in the May 1998 accident as to whether or not she had been wearing a seatbelt. Following the hearing, the trial court issued a decree of dissolution and judgment awarding the parties joint custody and designating Stacy as the primary residential custodian.

On July 7, 1998, Tracy filed a motion to vacate, alter or amend; a motion for specific findings of fact; and a motion for a new hearing. On July 30, 1998, the trial court issued an order denying the motion to alter, amend or vacate; in denying the motion for a new hearing, it made more specific findings as to the reasons for the decision to award joint custody. This appeal followed.

Tracy raises several evidentiary issues involving the custody hearing and the home evaluations. First, she argues that the trial court erred in refusing to allow her to introduce the photographs of the child taken shortly after the May 1998 accident. The admissibility of photographs is a matter within the sound discretion of the trial court, and we cannot disturb its

ruling absent a clear showing of an abuse of discretion. Litton v. Commonwealth, Ky., 597 S.W.2d 616, 620 (1980). We find no error.

Tracy also complains that the trial court erred in excluding the traffic citation and related documents involving the April 1997 incident in which Stacy pled guilty to speeding, failing to use a seat belt, and failing to have an insurance card. The trial court sustained the objection to admission of these documents after learning that the child was not involved in the incident. The judge noted that he had permitted testimony on the May 1998 accident because the child was present and was personally affected.

In reviewing a trial court's exclusion of evidence based on objections to its relevance, we will not disturb the court's action unless there was an abuse of discretion as the weighing of evidence as to relevancy is again a matter within the sound discretion of the trial court. Partin v. Commonwealth, Ky., 918 S.W.2d 219, 222 (1996). The evidence of Stacy's bad driving habits was apparently presented to impugn his fitness as a custodial parent. We cannot agree that the trial court abused its discretion in excluding the documents related to the April 1997 incident. We also find no error in the court's exclusion of speculative testimony from the police officer who investigated the accident after-the-fact.

Tracy next argues that the trial court erred by failing to exclude as hearsay certain information contained in the home evaluations. In December 1997, the trial court ordered the

Cabinet for Families and Children to prepare home evaluations pursuant to KRS 403.300:

(1) In contested custody proceedings, and in other custody proceedings if a parent or the child's custodian so requests, the court may order an investigation and report concerning custodial arrangements for the child. The investigation and report may be made by the friend of the court or such other agency as the court may select.

(2) In preparing his report concerning a child, the investigator may consult any person who may have information about the child and his potential custodial arrangements. Upon order of the court, the investigator may refer the child to professional personnel for diagnosis. The investigator may consult with and obtain information from medical, psychiatric, or other expert persons who have served the child in the past without obtaining the consent of the parent or the child's custodian; but the child's consent must be obtained if he has reached the age of 16, unless the court finds that he lacks mental capacity to consent. If the requirements of subsection (3) are fulfilled, the investigator's report may be received in evidence at the hearing.

(3) The clerk shall mail the investigator's report to counsel and to any party not represented by counsel at least 10 days prior to the hearing. The investigator shall make available to counsel and to any party not represented by counsel the investigator's file of underlying data, and reports, complete texts of diagnostic reports made to the investigator pursuant to the provisions of subsection (2), and the names and addresses of all persons whom the investigator has consulted. Any party to the proceeding may call the investigator and any person whom he has consulted for cross-examination. A party may not waive his right of cross-examination prior to the hearing. (Emphasis added.)

Tracy raises two objections with respect to the trial court's use of the home evaluation reports. First, she contends

that the reports were not admissible because the procedural requirements of KRS 403.300 were not satisfied. She contends that the circuit court clerk did not mail copies to the attorneys ten days prior to the hearing and that the reports did not contain the addresses of all the persons consulted by the investigator. Counsel for Tracy also maintains that he was unable to subpoena the persons identified in the reports because the final hearing was conducted only four days following a June 8 hearing on a motion to exclude a portion of the evaluation reports. Tracy failed to raise this procedural objection with the trial court, raising it for the first time in her appellate brief. Therefore, this argument is not properly before us:

"[t]he Court of Appeals is without authority to review issues not raised in or decided by the trial court." Regional Jail Authority v. Tackett, Ky., 770 S.W.2d 225, 228 (1989).

Even if we were at liberty to consider these arguments, we find as a practical matter of fact that the record does not support Tracy's contention that she was prejudiced by any noncompliance with the statute. Although it appears the clerk did not send a copy of the reports to Tracy's counsel, counsel was fully aware of the contents of the reports shortly after they were filed with the clerk on May 4, 1998.² On May 26, 1998, Tracy's counsel filed a motion to strike certain portions of the home evaluation report concerning Tracy and requesting a second report. At the June 8 hearing, Tracy's counsel admitted that he

²There is a handwritten note on the envelope containing the reports stating: "Opened by John Grigsby on 5-14-98 and copied."

had reviewed the recorded copies of the reports. Even though the reports did not contain the full addresses of the persons interviewed by the investigators, all of the interviewees were identified by name and were well-known to Tracy. (The persons interviewed included Tracy's sister, aunt, former employer, and Stacy's mother). Thus, counsel has failed to demonstrate how he was prevented from having subpoenas issued for any of these persons for the final hearing; he did not object to the date for the final custody hearing or ask for a continuance. We find no error even if this argument had been properly preserved.

Tracy's second objection to the home evaluation reports deals with the hearsay aspects of the reports. KRS 403.300 clearly contemplates that custody reports will contain information that would ordinarily constitute hearsay. However, KRS 403.300(2) explicitly authorizes the admission of the reports and provides procedural safeguards to protect the parties' due process rights: ordering notice of the contents of the reports to the parties and allowing them an opportunity to cross-examine the investigator and the persons consulted for the report. Additionally, these reports were prepared pursuant to court order to aid the court in obtaining information critical to its task of determining the best interest of the child. Other jurisdictions have wrestled with this hearsay issue in court-ordered reports prepared by a public agency and have held that the procedural safeguards so mitigate the objectionable aspect of the hearsay as to tip the scales in support of admissibility:

The parties are afforded sufficient due process protection by virtue of the

availability of the right to cross-examine the court-appointed investigator. Additionally, a strict adherence to the normal rules of evidence would greatly reduce the effectiveness of such reports, which often contain hearsay The purpose of the rules of evidence is to provide procedures for the adjudication of causes to the end that the truth may be ascertained and proceedings justly determined

Roach v. Roach, 79 Ohio App. 3d 194 202-03, 607 N.E.2d 35, 40 (1992).

In the case before us, Tracy's attorney was aware of the contents of the two home evaluation reports approximately two months before the final hearing, and he had ample opportunity to subpoena any witness connected with the reports for cross-examination at the hearing. We hold that the trial court did not err in refusing to exclude the reports.

Tracy's final issue concerns the trial court's decision to designate Stacy as the primary residential custodian of their child. In a custody determination, the primary consideration is the best interest of the child based on the factors set forth at KRS 403.270. As a general rule, a trial court has broad discretion in determining the best interest of a child when awarding child custody. Squires v. Squires, Ky., 854 S.W.2d 765 (1993); Krug v. Krug, Ky., 647 S.W.2d 790, 793 (1983). Our standard of review is whether the factual findings of the trial court are clearly erroneous or whether the trial court abused its discretion; as the trial court is in the best position to weigh the evidence, an appellate court may not substitute its own opinion for that of the trial court. Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986).

The trial court's initial order referred to the fact that Tracy had lived in several locations while Stacy continued to live in the parties' marital home. Additionally, Stacy's mother would continue to assist in the care of the child as she had since its birth. However, Tracy argues that the trial court's order is incomplete and that it did not consider all of the factors set forth at KRS 403.270. We disagree.

The relevance of each of the factors listed in KRS 403.270 necessarily varies in each case. In its order overruling Tracy's motion to alter or amend the judgment, the trial court explained that it had weighed several factors, including: the stability of Stacy's household, the fact that the child would continue to reside in the marital home, the fact that the child would enjoy the continuity of care and interaction with her paternal grandparents, and the child's relationship with her church and community – counterbalanced with Tracy's lack of stability as evidenced by her numerous jobs and residences. The court specifically found that the evidence did not demonstrate that Stacy had acted in a careless or wanton manner in relation to the May 1998 accident in which the child was injured. Our review of the record indicates that the trial court meticulously considered the statutory criteria and that its factual findings were supported by substantial evidence. We also cannot say that the trial court abused its discretion in awarding joint custody and in designating Stacy as the primary residential custodian.

For the foregoing reasons, we affirm the judgment of the Whitley Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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