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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001632-ME
AND
NO. 2006-CA-001199-ME

BARBARA ANN SCHLATTERER (NOW REID) — APPELLANT

v.

APPEALS FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 03-CI-00281

KEVIN JOSEPH SCHLATTERER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND TAYLOR, JUDGES; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: Barbara Ann Schlatterer (now Reid) ("Ann") brings two appeals from orders entered by the Marshall Circuit Court relating to the custody and visitation of her minor daughter, Grace. In 2006-CA-001199-ME, Ann asks for review

[1] Senior Judge Michael Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

of the circuit court's denial of her motion made pursuant to Kentucky Rules of Civil Procedure (CR) 60.02, in which she sought to reverse an award of primary residential custody to her former husband and Grace's father, Kevin Joseph Schlatterer. As grounds for the motion, Ann questioned the validity of a custody evaluation report submitted by a court-appointed expert, claiming that the report was based on a psychological test which the expert was not licensed to administer. In the accompanying appeal, 2005-CA-001632-ME, Ann contends that the court erred in denying her motion for expanded visitation with Grace.

Ann and Kevin were married in California on February 19, 2002, and moved to Kentucky shortly afterwards. Their daughter, Grace, was born on September 18, 2002. Kevin filed a petition for dissolution of marriage in the Marshall Circuit Court on June 30, 2003. During the pendency of the dissolution action, Ann served as the temporary primary residential custodian of Grace.

Prior to the final custody hearing, the Domestic Relations Commissioner (DRC), appointed an expert, Dr. Steven Alexander, a licensed professional counselor, to conduct a full psychological evaluation of both parents. The evaluation was conducted between October 22 and December 17, 2003. As part of his evaluation, Dr. Alexander administered three standardized tests to Ann and Kevin, including a Personality Assessment Inventory (PAI) test. This test is described in his report as "a standardized instrument that is designed to assess psychopathological syndromes[.]" Dr. Alexander also conducted personal interviews and home evaluations of Ann and Kevin. In his

report, Dr. Alexander concluded that Ann suffered from Borderline Personality Disorder. His report recommended the appointment of Kevin as Grace's primary custodial parent. Dr. Alexander also testified regarding his findings at the final custody hearing. In his findings of fact, conclusions of law and recommendation, the DRC adopted Dr. Alexander's recommendation, and wrote that he had placed "much weight" on Dr. Alexander's custody evaluation. The DRC also recommended that Ann should be awarded visitation in accordance with the standard schedule used by the court. On June 24, 2004, the circuit court entered an order adopting in full the DRC's recommendations as to custody and visitation.

Shortly before the entry of this final order, Ann filed a CR 60.02 motion with an attached affidavit from her former attorney, in which he stated that he believed Dr. Alexander had recently provided false information to a local court. The motion was denied. No appeal of the denial was filed.

About eighteen months later, in November 2005, Dr. Alexander was charged with several counts of practicing psychology without a license in neighboring Calloway County. He was ultimately acquitted of the charges, but it was discovered in the record of the criminal case that he had entered into an "Assurance of Voluntary Compliance" with the Kentucky Board of Examiners of Psychology. In that agreement, Dr. Alexander swore that he was not credentialed by the Board to practice psychology, although he was credentialed as a "Licensed Professional Counselor." He also swore that

he had not and would not administer certain psychological tests, one of which was the PAI. This agreement had been signed on February 7, 2004.

On the basis of this information, Ann filed another motion pursuant to CR 60.02 in January 2006, arguing that Dr. Alexander had not been qualified to administer the PAI, and that therefore his recommendations as to custody were suspect. Ann also had her PAI questionnaire re-scored by a licensed psychologist who concluded that the test did not support the diagnosis of Borderline Personality Disorder.

The DRC initially scheduled a hearing on the motion; he later canceled the hearing and issued an order that his recommendation would be based solely on the pleadings. He subsequently recommended denial of the motion; the recommendation was accepted by the circuit court and this appeal followed.

"Any action under CR 60.02 addresses itself to the sound discretion of the court and the exercise of that discretion will not be disturbed on appeal except for abuse." *Richardson v. Brunner*, 327 S.W.2d 572, 574 (Ky. 1959). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

The DRC gave the following reasons for his decision to recommend against granting the CR 60.02 motion: that Dr. Alexander had never represented himself as a psychologist licensed in Kentucky, and that this fact could easily have been ascertained with due diligence; that KRS 403.290(2) permits the court to seek the advice of

professional personnel at the court's discretion, and that such individuals are subject to examination by the parties and their legal counsel; and that Dr. Alexander had consistently testified that the PAI is a standardized test which is graded and evaluated by the company that created it, and that he had simply provided the test to the parties and then mailed it off to the company to get the results. "The ultimate results and conclusions from the PAI were not Steven Alexander's but said results were used by him in his investigation and report to the court," the DRC observed. Finally, the DRC noted that "The PAI was just one of many factors considered in his custodial report to the court just as Alexander's custodial report was just one of many factors considered in the Commissioner's recommendation to the court. The PAI played only a small role in the ultimate recommendation regarding custody."

Ann nonetheless argues that the PAI was Dr. Alexander's "primary" tool, and that his interpretation of the test resulted in Ann being diagnosed with a serious psychological disorder and consequently losing primary residential custodianship of her daughter.

We have reviewed Dr. Alexander's report and his testimony at the hearing, and we agree with the DRC that the PAI results formed only a part of the evidence underlying his conclusions. Many of Dr. Alexander's comments regarding Ann's alleged mental instability appear to be based on his conversations with her, and his evaluation of her personal history, rather than on the PAI results. Furthermore, Ann was given ample opportunity to challenge Dr. Alexander's credentials and his interpretation of the PAI

prior to and during the custody hearing. Ann's own expert, Karen Diane Reed, who is also a licensed professional counselor, reviewed the PAI and concluded that Ann's clinical profile was within normal limits. This evidence was before the DRC when he made his custody recommendation. Under these circumstances, it was not an abuse of discretion for the circuit court to deny the CR 60.02 motion.

Ann's other appeal, 2006-CA-001199-ME, concerns the trial court's denial of her motion for expanded visitation, which she filed approximately two months after the entry of the final order. Ann argues that the court improperly gave presumptive weight to the standard visitation schedule in establishing visitation, thereby disregarding our holding in *Drury v. Drury*, 32 S.W.3d 521 (Ky.App. 2000). In *Drury*, this Court emphasized that trial courts should not give undue weight to standard visitation schedules, although we did not hold that a trial court's use of a standard visitation schedule was automatically grounds for reversal. *Drury*, 32, S.W.3d at 524-25. Kevin has argued that this was an issue that could and should have been raised in a direct appeal of the final order. We agree. If Ann believed that the court improperly gave presumptive weight to the local guidelines in establishing her visitation schedule, she should have directly appealed that order. As the DRC noted in recommending denial of the motion, "[t]he Respondent/Mother's motion to modify visitation appears to be nothing more than an attempt to re-litigate the issues previously heard and decided by this court." As it is, we can only review whether the trial court erred in denying her motion to modify the original visitation arrangement, not whether that arrangement was in itself erroneous.

The controlling statute, KRS 403.320(3), states that

> [t]he court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health.

"Matters involving visitation rights are held to be peculiarly within the discretion of the trial court." *Drury*, 32 S.W.3d at 526.

Grace attends daily daycare for 50 hours per week. Ann appears to be arguing that her work schedule would allow her to have visitation with Grace during some of the time that she is currently in daycare. In recommending the denial of her modification motion, the DRC stated that "visitation was set pursuant to this court's standard visitation schedule after much consideration was given to the testimony given at both the temporary and final custody hearings." The DRC then explained that Ann had failed to present any facts to show that circumstances had changed in the six months since that determination had been made that would warrant a modification hearing. We find no abuse of discretion in the circuit court's adoption of his report, which essentially held that there was no change in circumstances to justify modifying a visitation arrangement that had been made in Grace's best interests.

For the foregoing reasons, the judgment of the Marshall Circuit Court is hereby affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT IN
2005-CA-001632-ME:

Delbert K. Pruitt
Paducah, Kentucky

BRIEFS FOR APPELLANT IN
2006-CA-001199-ME:

Raymond D. McGee
Smithland, Kentucky

BRIEFS FOR APPELLEE:

Charles W. Brien
Benton, Kentucky