

RENDERED: JANUARY 15, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001023-ME

DOUGLAS W. WILSON

APPELLANT

v. APPEAL FROM HART CIRCUIT COURT
HONORABLE JOHN DAVID SEAY, JUDGE
ACTION NO. 06-CI-00294

CHRISTY J. GROCE

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: KELLER AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

KELLER, JUDGE: Douglas W. Wilson (Wilson) appeals from the May 5, 2009, Findings of Fact, Conclusions of Law, and Order of the Hart Circuit Court denying him unsupervised visitation with his minor son, S.A.G. For the reasons set forth below, we affirm.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

FACTS

The pertinent facts of this case are not in dispute. On December 1, 2006, S.A.G.'s mother, Christy J. Groce (Groce), filed a verified complaint requesting sole custody of him. On August 7, 2007, the Hart Circuit Court entered an order granting sole custody of S.A.G. to Groce. Neither party initially moved the court for an order relating to Wilson's visitation rights. However, it appears that at some point the court permitted Wilson to visit S.A.G. only when supervised by workers from the Cabinet for Health and Family Services (Cabinet), and that the parties accepted this arrangement by agreement. On August 29, 2007, Wilson petitioned the court for modification of visitation and requested that his visitation with S.A.G. be unsupervised. The court held a hearing on Wilson's motion on October 16, 2007. Upon hearing the testimony of Wilson, Groce, and Tonya Dishman (Dishman) from the Cabinet, the court concluded that unsupervised visitation was not in the best interest of the child.

Wilson appealed the trial court's decision. On May 30, 2008, this Court remanded the case to the trial court for further findings after determining that the trial court never made a specific finding that S.A.G.'s health would be in danger of physical, mental, moral, or emotional risk pursuant to Kentucky Revised Statutes (KRS) 403.320(3).² After reviewing the October 16, 2007, hearing and the exhibits admitted into evidence, the trial court issued its Findings of Fact, Conclusions of Law, and Order on May 5, 2009, concluding that Wilson's

² *Wilson v. Groce*, 2008 WL 2219917 (Ky. App. 2008)(2007-CA-002449-ME).

unsupervised visitation would endanger S.A.G.'s physical, mental, moral, or emotional health. This appeal followed.

STANDARD OF REVIEW

“[T]his Court will only reverse a trial court’s determinations as to visitation if they constitute a manifest abuse of discretion, or were clearly erroneous in light of the facts and circumstances of the case.” *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky. App. 2000); *see also Bales v. Bales*, 418 S.W.2d 763, 764 (Ky. 1967). The trial court’s findings of fact are not erroneous if supported by “evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people.” *Sherfey v. Sherfey*, 64 S.W.3d 777, 782 (Ky. App. 2002). In reviewing the trial court’s decision, we must give due regard to that court’s judgment as to the credibility of the witnesses. *Id.* at 782. With this standard in mind, and having reviewed the record, we hold that the trial court did not abuse its discretion.

ANALYSIS

Although it is not clear from his brief, it appears that Wilson’s first argument is that the trial court improperly considered a 2002 judgment terminating

his parental rights to two other children³ as the sole criteria for its determination that he should not receive unsupervised visitation with S.A.G. We disagree.

KRS 403.320(3) provides 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.

The trial court did consider the fact that, in 2002, Wilson's parental rights were terminated to two other children due to abuse and/or neglect charges as provided in KRS 600.020(1). The abuse and neglect by Wilson of his other children is evidence that Wilson's unsupervised visitation poses a danger to S.A.G.'s physical, mental, moral, and/or emotional health. Thus, the trial court did not err when it considered the 2002 judgment terminating Wilson's parental rights as a factor in making its determination to deny Wilson unsupervised visitation of S.A.G.

While it was appropriate for the trial court to consider the 2002 judgment terminating Wilson's parental rights, that was not the only factor the trial court considered. As clearly reflected by the trial court's order, there was considerable evidence that the trial court relied on to support its ruling.

Specifically, the trial court found that on three separate occasions between 1998 and 2000, the Cabinet substantiated reports that Wilson physically abused two of

³ Wilson's brief and the trial court's order dated May 5, 2009, from which this appeal is taken, only refer to the termination of Wilson's parental rights to two of his children, V.S. and C.S. However, after reviewing the record, it appears that Wilson's parental rights were involuntarily terminated for three children - V.S., C.S., and R.S. - instead of two. It appears that Wilson questions the parentage of the third child, R.S., and refers to him as his stepson.

his children, as well as A.K., the daughter of Deborah Slaughter, who was at the time living in Wilson's household. The trial court also noted that the Cabinet substantiated allegations that Wilson yelled at A.K., called her a "little tramp," and hit her with a backhand slap on her left jaw. Moreover, the trial court found that Wilson was in denial with respect to the substantiated allegations and to the termination of his rights to his other children.

Furthermore, the results of the Minnesota Multiphase Personality Inventory (MMPI) test administered to Wilson by Christopher A. Catt, Psy.D. (Dr. Catt) revealed that Wilson exhibited anti-social traits. Dr. Catt's psychological evaluation concluded that Wilson had anger control difficulties, that he lacked insight with respect to some of his behaviors, and that his decision-making was problematic at times. Additionally, the trial court noted that the Cabinet's representative, Dishman, strongly recommended that Wilson's visitations with S.A.G. continue to be supervised. Based on the foregoing, the trial court was not clearly erroneous in finding that S.A.G.'s health would be in danger of physical, mental, moral, or emotional risk if the trial court granted Wilson unsupervised visitation.

Next, Wilson argues that Dishman's testimony that Wilson's stepson, R.S., told his therapist that he was sexually abused by Wilson was inadmissible hearsay. However, Wilson does not indicate how this alleged error was preserved for appellate review. *See* Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(v). Neither Wilson's brief nor the record reflects that Wilson objected to Dishman's

testimony about the alleged sexual abuse by Wilson of his stepson. It is well-established that this Court will neither review nor decide issues not raised in the lower court. *Reg'l Jail Auth. v. Tackett*, 770 S.W.2d 225 (Ky. 1989). Because Wilson did not object to Dishman's testimony, this issue was not addressed by the trial court. As such, we will not review this issue on appeal.

Wilson also contends that the trial court erred when it did not allow him to call his stepson and one of his daughters as witnesses. In making its decision, the trial court noted that Wilson was not allowed to call these witnesses to testify because he failed to provide Groce with his witness list prior to the hearing. We refer to Chapter IV, subsection J of the local rules for the 10th Judicial Circuit, which provides as follows:

no later than fourteen (14) days prior to the trial date, the parties shall exchange witness lists and exhibits expected to be introduced at trial. Failure to make these disclosures may result in the exclusion of witnesses and exhibits at trial, or other appropriate relief, in the discretion of the Commissioner.

Thus, the trial court properly acted within its discretion when it excluded Wilson's witnesses because he failed to produce a witness list prior to the hearing.

Wilson's next argument is that the trial court erred when it determined that a letter faxed from Dr. Catt to Wilson explaining the results of Wilson's MMPI test was inadmissible hearsay. The letter provided an explanation by Dr. Catt that his evaluation of Wilson only indicated that Wilson had antisocial traits and that he did not diagnose Wilson with Antisocial Personality Disorder.

Additionally, the letter provided that Wilson's Global Assessment of Function (GAF) score of 60 was not problematic.

Kentucky Rules of Evidence (KRE) 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The general rule is that hearsay is inadmissible except as provided by KRE or Supreme Court Rules. KRE 802. In the case *sub judice*, the letter was offered to prove the truth of the matter asserted therein, *i.e.*, that Wilson was not diagnosed with Antisocial Personality Disorder and that his GAF score was not problematic. Moreover, the letter did not fall within any of the exceptions to the hearsay rule. Thus, the letter constituted inadmissible hearsay, and the trial court did not err in excluding it from evidence.

In addition to the arguments set forth above, Wilson makes two arguments with respect to alleged errors that occurred at a prior hearing - the August 7, 2007, custody hearing. First, Wilson argues that his Due Process rights were violated when, at the custody hearing, Dishman could not state who made the October 9, 2006, referral to the Cabinet that S.A.G. was at risk of abuse because he was living with Wilson. Wilson also argues that the trial court erred when it allowed Dishman to testify about Wilson's felony conviction at the custody hearing. However, this appeal is from the May 5, 2009, order denying Wilson unsupervised visitation of S.A.G. and is not from the August 7, 2007, custody hearing and order. If Wilson wanted to appeal the August 7, 2007, order he could

have done so within thirty days of that order pursuant to CR 73.02. Accordingly, these issues are not properly before this Court.

Finally, although it is not clear from his brief, it appears that Wilson is arguing that the trial court erred in terminating his parental rights in 2002 of C.S. and V.S. Again, if Wilson wanted to appeal the trial court's 2002 order terminating his parental rights of C.S. and V.S., he should have done so pursuant to CR 73.02. Thus, this issue is not properly before this Court.

CONCLUSION

We have discerned no abuse of discretion by the trial court with respect to its Findings of Fact, Conclusions of Law, and Order denying Wilson unsupervised visitation. Therefore, we affirm the Hart Circuit Court.

ALL CONCUR.

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