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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001643-ME

MIA RENEE PHILLIPS — APPELLANT

v.

APPEAL FROM MASON CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 09-CI-00154

SHAWN MARTIN THOMPSON — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, VANMETER AND WINE, JUDGES.

ACREE, JUDGE: Mia Renee Phillips (Mother) appeals a custody order of the Mason Circuit Court granting custody of her son (Child) to his father, Shawn Martin Thompson (Father). After careful review of the record, we affirm.

Mother and Father dated but never lived together. When Child was born in 2003, Mother and her then seven-year-old daughter were residing in the home of Mother's mother.

In early 2004, Father filed a petition in Jefferson Family Court to establish custody and visitation. Mother responded some weeks later but no order was ever entered. In November 2005, the action was dismissed for lack of prosecution. The parties, however, reached an informal, apparently oral, time-sharing and support agreement outside of court and, since then, had been operating in accordance with that agreement.

The parties' agreement provided that Child would reside primarily with Mother in May's Lick, Kentucky, but would visit Father in Louisville, Kentucky, every other weekend and would spend substantial time with him over holidays and school breaks. Both parties allowed for additional flexibility in Child's visitation. Upon the death of Mother's mother in 2007, Child's maternal aunt (Aunt) largely assumed the child-care role previously performed by Mother's mother. Aunt had her own young son to care for as well and, eventually, caring for all three children became a problem for her own family.

On May 1, 2009, Father filed in Mason Circuit Court a pleading initiating this action entitled "Petition for Custody," along with accompanying affidavits.[1] Father was seeking sole custody of Child. These documents expressed concerns Father had about Child's welfare while in Mother's custody. His concerns primarily had to do with a lack of adult supervision in the mornings; this

[1] Simultaneous with the filing of the Petition, Father filed a "Motion for Temporary Joint Custody." This motion was never ruled on and no temporary order was ever entered.

is when Child's eleven-year-old half-sister[2] was responsible for getting him ready for school. Father also worried that Mother was not properly feeding and clothing Child and believed he could offer Child a more stable and nurturing home environment.

A guardian *ad litem* (GAL) was appointed to represent Child. On August 11, 2009, after the court conducted a hearing at which both parties were allowed to testify and present witnesses and other evidence, the circuit court entered an order awarding the parties joint custody, but finding that it is in the best interests of Child that Father has "primary physical custody" which is clearly meant as a designation of Father as the "primary residential parent." *See Pennington v. Marcum*, 266 S.W.3d 759, 764-65 (Ky. 2008). Mother appealed.[3]

The proper standard of review for any custody award is stated as follows:

> Since the family court is in the best position to evaluate the testimony and to weigh the evidence, an appellate

[2] Child's half-sister was eleven years old at the time the petition was filed, but had turned twelve by the time the hearing occurred.

[3] We note that Mother failed to comply with Kentucky Rule(s) of Civil Procedure (CR) 76.12(4)(c)(v) by presenting "at the beginning of the argument a statement with reference to the record showing whether the issue[s she presents on appeal were] properly preserved for review and, if so, in what manner." While "the sufficiency of evidence to support the findings of fact may be raised on appeal without regard to whether there was an objection to such findings or whether there was a post-judgment motion[,]" *Eiland v. Ferrell*, 937 S.W.2d 713, 715 (Ky. 1997), Mother's other arguments should have been brought first to the attention of the trial court. "[A] party is not entitled to raise an error on appeal if he has not called the error to the attention of the trial court and given that court an opportunity to correct it." *Little v. Whitehouse*, 384 S.W.2d 503, 504 (Ky. 1964). Substantively, an error not preserved need not be reviewed at all. Procedurally, because of non-compliance with CR 76.12(4)(c)(v), we would be justified in reviewing the case only for manifest injustice. *Elwell v. Stone*, 799 S.W.2d 46, 47 (Ky. App. 1990). Our decision to proceed with review in this case should not be viewed as establishing any precedent to the contrary.

> court should not substitute its own opinion for that of the family court. If the findings of fact are supported by substantial evidence and if the correct law is applied, a family court's ultimate decision regarding custody will not be disturbed, absent an abuse of discretion. Abuse of discretion implies that the family court's decision is unreasonable or unfair. Thus, in reviewing the decision of the family court, the test is not whether the appellate court would have decided it differently, but whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion.

Coffman v. Rankin, 260 S.W.3d 767 (Ky. 2008)(citing *B.C. v. B.T.,* 182 S.W.3d 213, 219-20 (Ky. App. 2005)). With standard in mind, we consider Mother's arguments.

Mother first argues that Kentucky Revised Statute(s) (KRS) 403.340, governing "Modification of custody decree," sets forth the applicable standard which Father failed to satisfy below. We disagree.

Our Supreme Court said, "The trial judge's 'final' decision about custody is the custody decree. [That is,] a final order adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02." *Frances v. Frances*, 266 S.W.3d 754, 757 (Ky. 2008). There was no custody decree in the case now before us. Because no custody decree exists (or any custody order for that matter), the proper standard for determining this custody issue is set forth in KRS 403.270. *Frances* at 756. In *Frances*, there was an informal agreement of the parties, as here, but also an emergency temporary custody order not present in the current case. *Id.* at 755. Neither the parties'

informal agreement, nor even the temporary order in *Frances*, altered the requirement that the best interests standard of KRS 403.270 be the basis for determining custody. *Id.* at 756 ("KRS 403.270(2) requires the trial court to consider all relevant factors and provides a list of non-exclusive, demonstrative factors to be considered in custodial determinations."). Nor does the existence of the informal time-sharing agreement of these parties alter that requirement here.

Furthermore, the Mason Circuit Court's custody order can hardly be called a modification of the custodial rights of the parties. "To start with they [Mother and Father] are both parents and insofar as to their rights to [Child] are concerned, they have equal rights." *Parker v. Parker*, 467 S.W.2d 595, 596 (Ky. 1971). While Mother alludes to the existence of a prior custody order adjusting those rights, she has never produced it. Absent such an order, Mother cannot claim to have had superior, or sole, custody of Child; she can claim no more than equal, or joint, custody with Father. *See Bond v. Shepherd*, 509 S.W.2d 528, 529 (Ky. 1974)(father's agreement to allow his child to reside elsewhere did not estop him from claiming custodial rights equal to the child's mother). Consequently, it cannot be said that a *modification* was ordered since the status quo regarding custody was maintained when the circuit court ordered joint custody.

Having determined that the circuit court should have applied KRS 403.270 to this custody issue, we must determine whether that is what occurred.

Mother does note correctly that the Mason Circuit Court entered an "Order on Motion to Change Custody" that stated the court "is required to follow

the statutes in this case, including KRS 403.340." However, Father argues that the trial court considered the standards in both statutes – KRS 430.270 and KRS 403.340. And, even Mother agrees that "the trial court does not make it clear in its final order" which standard it uses. (Mother's brief, p. 9; capitalization omitted).

Even presuming the circuit court followed only KRS 403.340, the court necessarily complied with the requirements of the proper statute, KRS 403.270(2). This is because our legislature amended KRS 403.340(3) so that since 2001, even on a motion to modify custody, "the court shall consider the . . . factors set forth in KRS 403.270(2) to determine the best interests of the child[.]" 2001 Kentucky Laws Ch. 161, § 2 (H.B. 123) eff. 3-21-01, codified as KRS 403.340(3)(c). Mother acknowledges the circuit court "appl[ied] KRS 403.340(3) and then set out to do an analysis of each section." (Mother's brief, p. 16). This necessarily would include KRS 403.270(2).

We have examined the substance of the order and conclude that the trial court did apply the proper standard for a determination of initial custody, having substantively considered in its order all applicable sections of KRS 430.270. That statute requires, in pertinent part, that:

> (2) The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all relevant factors including:
>
> > (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;

(b) The wishes of the child as to his custodian;

(c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;

(d) The child's adjustment to his home, school, and community;

(e) The mental and physical health of all individuals involved;

(f) Information, records, and evidence of domestic violence as defined in KRS 403.720;

(g) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;

(h) The intent of the parent or parents in placing the child with a de facto custodian; and

(i) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school.

(3) The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child. If domestic violence and abuse is alleged, the court shall determine the extent to which the domestic violence and abuse has affected the child and the child's relationship to both parents.

. . . .

> (5) The court may grant joint custody to the child's parents, or to the child's parents and a de facto custodian, if it is in the best interest of the child.

KRS 403.270(2), (3), (5).

There was no issue regarding *de facto* custodianship or domestic violence and the circuit court so held; therefore, KRS 403.270(1), (4) and (6) were inapplicable.

Mother next argues that Father failed to comply with KRS 403.350. That statute requires a "party seeking a . . . modification of a custody decree [to] submit . . . an affidavit setting forth facts supporting the requested . . . modification and shall give notice, together with a copy of his affidavit, to other parties to the proceeding, who may file opposing affidavits." KRS 403.350. Despite the fact that Father did not seek a modification, he did submit affidavits that would have satisfied this requirement. Mother did not file opposing affidavits. Nevertheless, because we determined the circuit court applied the proper standard for the initial custody determination under KRS 403.270, this argument is moot.

Mother also argues that there was no satisfactory demonstration or finding "that a change has occurred in the circumstances of the child or his custodian." Such a finding is only required where modification of a custody decree is sought. Therefore, like the previous argument, this argument is moot.

Mother's final argument is that the circuit court's consideration of certain facts rendered its order erroneous. She directs our attention to the following portions of the circuit court's order:

> 7. [T]he mental and physical health of all individuals is good, although the Court does question why respondent would think it acceptable to have three children by three different men, never having married any of them. The Court also questions mother's allowing the now 5 year old child to be cared for primarily by his now 12 year old half sister and by other relatives. The Court has serious concerns about the long-term effect of this type of upbringing on the child.
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> 10. [I]t is clear to the Court that the child has been cared for more by his 10 to 12 year old [half-]sister and by his aunt than by his mother. . . . Although the child's teacher indicates that [Child] is well-adjusted, well-dressed, clean and at school on time, said result is not due to the direct efforts of the mother.
>
> 11. The Court is concerned about removing the child from an environment where he has, to date, been successful. . . . However, the Court also believes [Father's] household is stable, in that he is married, his wife is supportive of the proposed change of custody and the Court believes that the stability promised in the new environment would outweigh the negative effects of a change in the child's primary environment.

Mother contends, based upon her analysis of these findings, that the determination of custody was either (1) the product of reliance upon evidence not in the record or (2) impermissibly motivated by the circuit judge's personal bias or prejudice against Mother.

First, the record does not support Mother's argument that the circuit court relied on evidence not supplied by the parties. All of the findings are clearly based upon the parties' testimony. Mother testified she had three pregnancies by three different men and had not married those men. To the extent those facts are included in the cited paragraphs they were drawn from evidence of record. The

conclusion that the mother did not deserve full credit for getting Child to school on time and appropriately attired is supported by testimony from Mother and Aunt that Child's twelve-year-old half-sister got him ready for school in the mornings. In sum, the record indicates the facts in these findings were based entirely upon information before him at the hearing, and not upon knowledge he acquired elsewhere.

Second, Mother argues *Chenault v. Holt,* 722 S.W.2d 897 (Ky. 1987), should apply to prohibit the circuit judge from relying upon his biases. We do not believe *Chenault* is applicable here.

Chenault is a relatively narrow case holding that the differing race of the custodial parent's new spouse is not a changed circumstance sufficient to justify a modification of custody. *Id.* at 898-99. However, although Mother does not cite to the applicable statute, we believe the gist of her argument is that the trial judge considered factors prohibited by KRS 403.270(3) which states "[t]he court shall not consider conduct of a proposed custodian that does not affect h[er] relationship to the child."

The only portion of circuit court's order which could arguably evince bias on the part of the judge is that which criticizes Mother's decision to have three children by three different men, and to never have married any of them. While the circuit judge's comment may have been inappropriate, it also was irrelevant to the judge's actual findings and conclusions. Indeed, the other portions of the order which Mother cites reflect that the circuit court's decision was based upon

concerns for Child's safety, proper supervision, and stability, as does the opinion as a whole.

We cannot say the custodial determination was animated in any substantial way by bias. More importantly, because the determination was based on substantial evidence, it was not clearly erroneous nor did it constitute an abuse of the court's discretion. Accordingly, we affirm.

ALL CONCUR.

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