

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000006-ME

A. G.

APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 08-CI-00509

M. M.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MOORE AND WINE, JUDGES; HARRIS,¹ SENIOR JUDGE.

MOORE, JUDGE: A. G., proceeding *pro se*, appeals the Grayson Circuit Court's order awarding joint custody to the parties; ordering that the parties should alternate the tax exemption on their child, K. G; confirming the Domestic Relations Commissioner's (DRC's) report to the extent it conformed with the

¹ Senior Judge William R. Harris, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

circuit court's order; and overruling the DRC's report to the extent that it conflicted with the circuit court's order. After a careful review of the record, we affirm because A. G. has failed to show that her claims satisfy the palpable error standard of review.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. G. and M. M. had a daughter together who was born out of wedlock. A. G. is the mother of the child and M. M. is the father. At the time the father filed his petition for joint custody in the circuit court, the child was eight years old. In his petition, the father also sought to be permitted to take the tax exemption for the child. At the time he filed his petition, the father was married to another woman and he had two children from that marriage.

According to the DRC's report, the father did not pay child support until two to three years before filing his petition for joint custody. The mother used a state program to enforce the child support obligation that had been set by the circuit court, and she settled an arrearage greater than \$16,000.00 by forgiving the debt. Visitation was exercised, and the DRC reported that the mother was "amenable to the standard visitation with the provision that for two Wednesdays in the summer [the father] not have the child so that she can have two weeks vacation with [the mother]." The DRC found this request was "not out of line," and recommended that the father have "standard visitation, including the holidays and summer visit."

The DRC noted the father wanted “to alternate the tax exemption with the [mother],” and the DRC reasoned that because the mother was attending school and working part-time, “[t]he benefit of the tax exemption would inure to the benefit of the child since full utilization of the exemption would be taken advantage of if the [father] were to have it during a period of [the mother’s] low income.”

The DRC then recommended the parties have joint custody of the child. The DRC recommended that the father’s wife try to understand that the father will have to have conversations with the mother, and the DRC stated that there were “obviously some bad feelings in the relationship – given the fact that [the child] was conceived during the [father’s current] marriage. [The child] is, after all, one year younger than the [father’s] oldest child [with his wife].”

The father filed exceptions to the DRC’s report, asserting only that the DRC’s ruling regarding the tax exemption was unclear “and does not definitively state which party received the tax exemption on the minor child.” The father proposed that the circuit court “enter an Order alternating the taxes on the minor child.”

The mother also filed objections to the DRC’s report. She noted that the DRC had recommended joint custody, but had failed to designate which party would be the primary residential custodian. The mother argued that the DRC’s finding regarding the tax exemption failed “to account for [the mother] waiving approximately \$16,000 in child support arrearage,” and it failed to consider that the

mother “financially benefits greatly by claiming [the child] on her taxes each year.” She contended that the DRC’s finding on the tax exemption did not define what it meant by “low income,” and it did not take into account the fact that the father “was only seeking to claim [the child] in alternating years.” The mother requested that the DRC’s recommendation on the tax exemption be overruled “and that an order be specifically entered granting the parties joint custody with [the mother] designated as the primary residential custodian.”

The circuit court awarded joint custody to the parties, with the mother designated as the primary residential custodian of the child. The court also ordered the parties to alternate the tax exemption on the child, with the father claiming her in odd numbered years and the mother claiming her in even numbered years. The court then stated that to the extent the DRC’s report conformed to the circuit court’s order, the report was confirmed, but to the extent it conflicted with the court’s order, the report was overruled.

The mother now appeals, contending that: (a) the circuit court erred in its findings of fact and conclusions of law, which were based upon the clearly erroneous report filed by the DRC; (b) the circuit court erred when it did not find the child to be an abused and neglected child and when it did not find aggravating circumstances present to support the termination of the father’s parental rights; (c) the circuit court abused its discretion when it awarded joint custody to the father; and (d) the circuit court erred in not reviewing a modified child support order

agreement to determine whether it was fair and equitable to the child before ruling that the father could claim the child as a tax exemption.

II. STANDARD OF REVIEW

The mother states in her appellate brief that none of the claims she brings on appeal are preserved for appellate review. However, her claim regarding the tax exemption is preserved for appellate review because she raised the issue in her objections to the DRC's report. As for her remaining claims that are not preserved for our review, we will review them under the palpable error standard set forth in CR² 61.02.

Pursuant to CR 61.02,

[a] palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

“[T]he task of the appellate court in review under CR 61.02 is to determine if (1) the substantial rights of a party have been affected; (2) such action has resulted in a manifest injustice; and (3) such palpable error is the result of action taken by the court.” *Childers Oil Co. v. Adkins*, 256 S.W.3d 19, 27 (Ky. 2008).

An error is palpable only when it is “easily perceptible, plain, obvious and readily noticeable.” *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1997). A palpable error must be so serious that it would seriously affect the fairness to a party if left uncorrected. *Brewer v. Commonwealth*,

² Kentucky Rule of Civil Procedure.

206 S.W.3d 343, 349 (Ky. 2006). Fundamentally, a palpable error determination turns on whether the court believes there is a “substantial possibility” that the result would have been different without the error. *Id.*

Hibdon v. Hibdon, 247 S.W.3d 915, 918 (Ky. App. 2007).

III. ANALYSIS

A. CLAIM REGARDING CIRCUIT COURT’S FINDINGS OF FACT AND CONCLUSIONS OF LAW

The mother first alleges that the circuit court erred in its findings of fact and conclusions of law, which were based upon the report filed by the DRC. She contends that the DRC erred in opining that there must have been ill feelings and a lack of cooperation in the child’s upbringing, and in stating that the mother had feelings of abandonment. The mother also asserts that the DRC erred in concluding that the child was conceived during the father’s marriage to his wife.

However, none of these factual findings or conclusions was relevant to the issues at hand. Thus, the court’s findings and conclusions were not so serious as to affect the fairness to the mother if left uncorrected. Therefore, the circuit court did not commit palpable error in entering these findings.

B. CLAIM REGARDING COURT’S FAILURE TO FIND THE CHILD TO BE ABUSED AND NEGLECTED AND FAILURE TO FIND THE PRESENCE OF AGGRAVATING CIRCUMSTANCES

The mother next asserts that the circuit court erred when it did not find the child to be an abused and neglected child and when it did not find aggravating circumstances present to support the involuntary termination of the father’s parental rights. She contends that because the father was absent for

approximately five years and he had incurred child support arrearages of \$16,000.00, aggravating circumstances were present according to KRS³ 610.127(1) to support a finding that the father had abandoned the child pursuant to KRS 600.020. Therefore, she alleges that based on this abandonment, the circuit court should have ordered the involuntary termination of parental rights under KRS 625.090.

However, the mother never raised these allegations of abuse, neglect, abandonment, or termination of parental rights in the circuit court. Therefore, we will not consider these claims for the first time on appeal. *See Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976).

Moreover, in her objections to the DRC's report, the mother requested joint custody with the father, and she had previously forgiven his debt of \$16,000.00 in child support arrearages. Thus, even if we were to assume, for the sake of argument, that the circuit court erred in failing to find that the child was abused, neglected, or abandoned, such error was not palpable because it was not easily perceptible, plain, obvious and readily noticeable, considering the mother's request for joint custody and her forgiveness of the father's debt. Therefore, this claim lacks merit.

C. CLAIM REGARDING JOINT CUSTODY AWARD

The mother next asserts that the circuit court abused its discretion when it awarded joint custody to the father. However, in her objections to the

³ Kentucky Revised Statute.

DRC's report, the mother requested "an order be specifically entered granting the parties joint custody with the [mother] designated as the primary residential custodian." Consequently, because the mother requested joint custody, we cannot say that the circuit court committed palpable error in awarding it.

D. CLAIM REGARDING MODIFIED CHILD SUPPORT AGREEMENT AND TAX EXEMPTION

Finally, the mother alleges that the circuit court erred in not reviewing a modified child support order agreement⁴ to determine whether it was fair and equitable to the child before ruling that the father could claim the child as a tax exemption. Specifically, she asserts that the father "should not have been excused from paying the arrearages in an amount in excess of \$16,000," even though she acknowledges that she agreed to forgive collection of such arrearages. However, this part of her claim is unpreserved, and we cannot say that the circuit court committed palpable error in accepting the modified child support agreement that she entered into, when she agreed to forgive the arrearages debt.

The mother also contends that the court should not have granted the father permission to take the tax exemption on the child in alternating years because the mother had already forgiven a large sum of child support arrearages and, therefore, the court should have considered that debt forgiveness before allowing the father to take the tax exemption. This claim is preserved for appellate review. In her objections to the DRC's report, the mother argued that the DRC's

⁴ This agreement was not included in the record before us.

recommendation concerning the tax exemption “fails to account for [the mother] waiving approximately \$16,000 in child support arrearage.”

We will not disturb the trial court’s determination unless there was an abuse of discretion. *See generally Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). “Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.” *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994) (internal quotation marks omitted).

In the present case because the circuit court ordered the parties to share joint custody of the child in the future, the parties will effectively have equal financial responsibility for the child from this point forward. The court did not abuse its discretion in ordering the parties to alternate taking the tax exemption. Consequently, this claim lacks merit.

Accordingly, the order of the Grayson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Amanda Grant, *Pro se*
Leitchfield, Kentucky

BRIEF FOR APPELLEE:

Clay Ratley
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