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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001167-ME

BRAD MILLER — APPELLANT

v.

APPEAL FROM MCCRACKEN FAMILY COURT
HONORABLE CYNTHIA E. SANDERSON, JUDGE
ACTION NO. 07-CI-00665

MELIAH MILLER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND THOMPSON, JUDGES; SHAKE,[1] SENIOR JUDGE.

SHAKE, SENIOR JUDGE: Brad Miller (Brad) appeals, *pro se*, from a McCracken Family Court order denying his motion for time-sharing modification.

[1] Senior Judge Ann O'Malley Shake completed this opinion prior to the expiration of her term of Senior Judge service on September 30, 2011. Release of this opinion was delayed by administrative handling.

Brad claims that the family court made the following errors: (1) The court's decision was manifestly against the weight of the evidence; (2) The decision was based upon inadmissible evidence; (3) The court's issuance of a directed verdict was premature; (4) The court was not impartial. Following a review of the family court order, record, and applicable caselaw, the McCracken Family Court order is affirmed.

Meliah Miller (Meliah) and Brad were married on August 19, 2006. During their marriage, Meliah gave birth to the parties' daughter, Raelyn. Both Meliah and Brad have children from prior relationships. On June 26, 2007, Brad filed a petition for dissolution of marriage. On July 9, 2007, Meliah responded to Brad's petition and filed a counter-petition for dissolution.

On December 12, 2007, the parties entered into a marital settlement agreement. The agreement was incorporated by reference into the family court's supplemental findings of fact, conclusions of law, and decree of dissolution, entered on January 7, 2008. The parties agreed to share joint custody of Raelyn. Meliah was named as Raelyn's primary residential custodian. Brad was awarded weekly time-sharing in accordance with the McCracken County Standard Visitation Schedule, with the addition of weekly overnight visitations. The parties agreed that Brad would pay Meliah $379.00 per month for child support.

Following the final decree, Meliah enrolled in classes to become a dental hygienist. Brad agreed to watch Raelyn additional time. Soon, Brad began keeping Raelyn almost the same amount of time as Meliah.

On December 8, 2009, Meliah moved the court for an increase in child support. The next day, on December 9, 2009, Brad moved the court to decrease child support and modify time-sharing to reflect the equal schedule under which the parties operated. He claimed that his increased time with Raelyn warranted the decrease in his support obligation. Brad also requested that the court order that neither party have overnight guests of the opposite sex while Raelyn is in the home. Brad claims that Meliah only refused to give him additional time-sharing after he filed his motion for modification. He later modified his motion asking for him to be named the primary residential custodian.

Following Brad's testimony, the family court denied Brad's motion in its entirety. This appeal follows.

Appellate review of a trial court's ruling regarding findings of fact in a custody-related matter is limited to the clearly erroneous standard of review, or whether its findings are supported by substantial evidence. *Allen v. Devine*, 178 S.W.3d 517, 523 (Ky. App. 2005). Substantial evidence has sufficient probative value to induce conviction in the minds of reasonable people. *Id*. Appellate

Courts review the family court's application of the law to its findings of fact by a *de novo* standard. *Id*. The family court's custody award will not be disturbed absent an abuse of discretion. *Id*.

First, Brad claims that the family court's denial of his motion was manifestly against the weight of the evidence. KRS 403.320 (3) provides that:

> The 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.

As the party seeking modification, Brad had the burden to prove that modification was in Raelyn's best interest. *Wilcher v. Wilcher*, 566 S.W.2d 173, 175 (Ky. App. 1978).

Brad's proof, which solely consisted of his testimony, indicated that his increased time with Raelyn worked out well. During cross-examination, however, Brad admitted that he had been convicted of DUIs and that his license had been previously suspended as a result of a prior DUI conviction. The trial court orally stated that Brad's convictions were related to his ability to provide Raelyn's needs and emergency care.

On direct examination, Brad testified that Meliah was increasingly less cooperative and less willing to communicate after he filed the motion. On cross-

examination, he admitted that they actually spoke on an almost daily basis. Based on inconsistencies in his testimony and his history with alcohol and DUI convictions, ample evidence existed in the record to support the family court's denial of Brad's motion to modify time-sharing.

Second, Brad argues that the family court erred by basing its decision on the DUI convictions, which were inadmissible. The DUI convictions and evidence of substance abuse are relevant and admissible in custody-related proceedings as long as they impact a party's ability to parent. The trial court directly correlated Brad's alcohol abuse, DUI convictions, and resulting suspended license to an inability to parent. Although Raelyn has not yet been directly harmed by this problem, the court may consider any evidence that could reasonably cause an adverse effect. *Krug v. Krug*, 647 S.W.2d 790 (Ky. 1983).

> We . . . . think the trial court is not precluded from consideration of circumstances where the neglect, abuse, or environment has not yet adversely affected the children but which, in his discretion, will adversely affect them if permitted to continue. In other words, a judge is not required to wait until the children have already been harmed before he can give consideration to the conduct causing the harm.

Id. at 793.

Next, Brad claims that the family court erred by issuing a directed verdict upon the conclusion of his proof. Although we would not refer to a ruling

on a motion heard by a trial court as a "directed verdict," as a practical matter, nothing barred the court from concluding at that juncture that Brad did not meet his burden of proof and ending the proceeding. A directed verdict is "[a] ruling by a trial judge taking a case from the jury because the evidence will permit only one reasonable verdict." *Black's Law Dictionary*, (8th ed. 2004).

Fourth, Brad's claim that the family court lacked the "cold neutrality of an impartial judge" is without merit. To show bias, Brad solely relies upon the following statement, "This is the very reason people should stay out of court. [Meliah] did exactly what everybody would and that is follow a court order to a T." The statement may have been unfavorable to Brad but, in the context in which it was said, does not cast doubt upon the court's impartiality.

Accordingly, the McCracken Family Court order denying Brad's motion for increased time-sharing is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Brad Miller, *pro se*
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BRIEF FOR APPELLEE:

Emil Sampson
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