RENDERED: NOVEMBER 4, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001483-ME

RODNEY HADLEY APPELLANT

v.

APPEAL FROM GREEN CIRCUIT COURT
HONORABLE DAN KELLY, JUDGE
ACTION NO. 09-CI-00111

MARLA HADLEY APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, MOORE, AND STUMBO, JUDGES.

CAPERTON, JUDGE: Rodney Hadley appeals from the Green Circuit Court's decision concerning the parties' custody and parental timesharing arrangement. After reviewing Rodney and Marla Hadley's arguments, the record, and the applicable law, we reverse the trial court's order of May 18, 2010, and remand this matter for further proceedings.

Marla filed for the dissolution of her marriage to Rodney on July 6, 2009. The parties are the parents of two minor children who were eight and four years old when the trial court considered the divorce action on May 11, 2010. Rodney filed a motion for *pendente lite* orders and the parties negotiated an agreement concerning temporary custody issues shortly thereafter. A final hearing was scheduled for May 11, 2010. Prior to the final hearing, the parties negotiated an agreement concerning the division of their property and agreed to share joint custody of their children. At the final hearing two issues remained to be resolved, namely, the proper calculation of child support and the designation of the primary residential custodian.

At the final hearing, the trial court interviewed the parties' eight-year-old daughter *in camera* outside the presence of the parties or counsel. The court also considered the arguments of counsel and heard summaries of the parties' expected testimony. The court declined to hear from the parties themselves after having a colloquy with counsel in which it was evident the parties were not bringing additional evidence before the court beyond the court's initial assessment that either party was a fit and competent custodian.

Thereafter, the court announced from the bench that it would adopt the current shared custody arrangement with a modification concerning Sundays. The trial court did not designate either party as the children's primary residential custodian. On May 18, 2010, the trial court entered its written order in which it maintained its award of joint custody to the parties and declined to designate either

party as the residential custodian. However, in this order the trial court deviated from the current custody arrangement by changing Rodney's allotted parenting time with the children. Prior to the order, Rodney had picked up the children each day from school; thereafter, he picked up the children on Tuesdays and Thursdays and kept them until 6 pm. Additionally, he kept them on Monday evenings following Marla's weekend until 6 pm.

While both parties filed motions to alter, amend, or vacate, neither party addressed the trial court's deviation in its written order from its ruling on the bench. Rodney's motion to alter, amend, or vacate requested that he either be made the residential custodian or that the parties split parenting time equally and that an evidentiary hearing be held on the matter. The trial court denied the motions. It is from the May 18, 2010, order that Rodney now appeals.[1]

On appeal Rodney presents two arguments, namely, (1) the trial court denied the parties' due process right to a meaningful opportunity to be heard; (2) the trial court's decision must have been based on extraneous factors not in evidence and, therefore, is arbitrary. In response, Marla argues that it was not error to limit the evidence at the final hearing since the testimony would have unduly delayed the court and would have resulted in cumulative evidence. Additionally, Marla argues that any error that may have occurred as a result of the trial court's action in limiting the testimony of the parties was harmless error. With these arguments in mind we turn to our applicable standard of review.

[1] Marla has not appealed from the trial court's denial of her motion.

This Court in *B.C. v. B.T.*, 182 S.W.3d 213, 219-20 (Ky.App. 2005) addressed the applicable standard of review regarding a child-custody award. Therein we stated:

> In reviewing a child-custody award, the appellate standard of review includes a determination of whether the factual findings of the family court are clearly erroneous. A finding of fact is clearly erroneous if it is not supported by substantial evidence, which is evidence sufficient to induce conviction in the mind of a reasonable person. Since the family court is in the best position to evaluate the testimony and to weigh the evidence, an appellate 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.

B.C. v. B.T., 182 S.W.3d 213, 219-20 (Ky.App. 2005) (internal citations omitted). *See also* CR 52.01. With this standard in mind we now turn to the first argument presented by Rodney, namely, that the trial court denied the parties' due process right to a meaningful opportunity to be heard.

Rodney's first argument, that the trial court denied the parties' due process right to a meaningful opportunity to be heard, is not preserved for our review. At no time prior to the issuing of the court's ruling did Rodney object to the court not hearing the testimony of the parties, nor did Rodney seek to offer this

proof by avowal. KRE 103(a)(2). Rodney has not requested that we review this unpreserved error for palpable error under CR 61.02. Thus, we decline to do so and, accordingly, find no error.

We now turn to Rodney's second argument, that the trial court's decision must have been based on extraneous factors not in evidence and, therefore, is arbitrary. In support thereof, Rodney argues that the trial court must have taken extraneous factors into consideration because after it noted that either party was a fit and competent custodian, the court restricted Rodney's parenting time instead of allotting an equal time division.

We note that prior to the trial court issuing its order, the court interviewed *in camera* the parties' eldest daughter. Clearly, the *in camera* interview could have been considered by the trial court in making its determination of parenting time.[2] However, the trial court could not accept the statements of counsel that either party was a fit and competent custodian as evidence. *See Frazier v. Cupp,* 394 U.S. 731, 735-36, 89 S.Ct. 1420, 1423, 22 L.Ed.2d 684 (1969) (Court's admonition that attorney statements are not evidence cured prejudice). Without substantial evidence upon which to base its findings, the

[2] We note that the parties did not challenge the *in camera* interview, nor have they addressed where said interview is contained within the record. In *Couch v. Couch*, 146 S.W.3d 923, (Ky. 2004) our Supreme Court held that if a family court accepts and acts upon testimony made by a child during an *in camera* interview, minimum due process requires that the child's testimony, if not subjected to cross-examination, must be recorded and disclosed to the parties to provide them an opportunity for rebuttal. *Couch* at 925. However, *Couch* further recognized that these minimum due process rights are subject to waiver by the parties. *Id.* In light of *Couch*, the parties' failure to challenge the *in camera* interview or cite to where said interview is contained within the record, we must conclude the parties have waived these rights.

findings of the trial court concerning the child-custody award are clearly erroneous.[3] Accordingly, we must reverse the trial court's order of May 18, 2010, and remand this matter for further proceedings.

In light of the aforementioned, we hereby reverse the trial court's May 18, 2010, order and remand this matter for further proceedings not inconsistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jonathan G. Hieneman
Campbellsville, Kentucky

BRIEF FOR APPELLEE:

Dawn Lynne Spalding
Lebanon, Kentucky

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[3] We note that the parties did not actually stipulate to the fact that both parents were fit and competent custodians; thus, that issue is not before us and we offer no opinion thereon. *See* Thomas L. Osborn, *Kentucky Handbook Series, Trial Handbook for Kentucky Lawyers*, (2010) § 21:4.