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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001892-ME

KERRY PAUL ATKINS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOAN L. BYER, JUDGE
ACTION NOS. 09-D-502886 AND 09-D-502886-001

EMILY STRAUS ATKINS — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON AND WINE, JUDGES; LAMBERT,[1] SENIOR JUDGE.

CAPERTON, JUDGE: The Appellant, Kerry Paul Atkins, appeals the issuance of a September 17, 2009, Domestic Violence Order (DVO) by the Jefferson Family Court modifying the existing joint custody arrangement between Appellant and Appellee, Emily Straus Atkins, and restricting Kerry's contact with the minor child of the parties to one hour per week in a supervised facility. Having reviewed the

[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.

record, the arguments of the parties, and the applicable law, we hereby vacate the portion of the DVO modifying custody, as well as the September 17, 2009, Order of Supervised Access entered by the court.

The parties were married on July 5, 2003, and divorced on August 18, 2009. The parties had one minor child, H.A., who was three years old at the time of the filing of Kerry's brief. Pursuant to the August 7, 2009, Marital Settlement Agreement between the parties, they agreed to share joint custody of H.A., with Kerry to have custody on Tuesday, Thursday, Friday, and Sunday of each week.

Thereafter, on August 30, 2009, Emily filed a domestic violence petition wherein she alleged that Kerry had engaged in intimidating behavior directed toward herself.[2] With respect to H.A., Emily stated, "I am concerned for the welfare of me and my minor child," and "All of his erratic behavior is in front of our daughter."[3] An *ex parte* emergency order of protection and summons was issued on August 30, 2009.

The case was heard on September 17, 2009, at which time both parties appeared and testified. During the course of the hearing, Emily testified to a verbal altercation between herself and Kerry during an exchange of their child on August 30, 2009. According to Emily, after H.A. was transferred from her vehicle to Kerry's vehicle, Kerry initiated a conversation in which he requested the return of

[2] Having reviewed the record, we note that these behaviors apparently included verbal abuse beginning shortly after the marriage, a threat to kill Emily made at the time she asked for the separation, ongoing harassment and derogatory commentary, and other erratic behaviors, all of which Emily asserts occurred in front of H.A. Kerry denies the majority of these behaviors, both that they occurred, and that they occurred in front of H.A.

[3] *See* Record, pp. 9-17.

a necklace purchased for H.A. According to Emily, when she refused, Kerry then climbed upon her vehicle and spat on the window. Emily also stated that throughout the transfer from one car to the other, H.A. remained in her car seat, and could have been asleep, although Emily was not certain. Kerry testified that H.A. was asleep when the altercation occurred. Kerry denied climbing on top of the vehicle, but did concede to spitting in Emily's direction.

Emily stated that this was the incident which prompted her to obtain the DVO, as it was one of a string of other incidents which she felt indicated an escalation in Kerry's erratic behavior. Emily also expressed a belief that Kerry was bipolar and exhibited such tendencies, which Kerry denied. Emily testified that after she filed for the DVO, she saw Kerry again shortly thereafter on his bike while she was driving H.A. to daycare. Emily testified that Kerry was within 30-35 feet of her car at the time and that he spat in her general direction upon seeing her. Again, Kerry denies that such an incident occurred.

During the course of the hearing concerning custodial and visitation matters, Emily specifically testified that the relief sought incident to the DVO was an exchange point at The Home of the Innocents, or a place similar thereto, which did not involve direct contact between the parties. When asked whether she was seeking a modification of the custodial and visitation arrangement between the parties, Emily expressed that she was "conflicted." Generally, she stated that she knew father and daughter loved one another and denied that Kerry had ever physically or sexually abused H.A. Indeed, she stated that she knew H.A. loved

her father. Nevertheless, upon questioning, Emily stated that she was concerned about Kerry's escalating erratic behavior and about what he might do when he had H.A. for visitation alone and overnight. Accordingly, Emily stated that she was "not sure" what she was requesting in that regard.

Following the hearing, the court entered the aforementioned DVO, which included standard findings and terms, including a 1000-foot distance restriction. However, in the "Additional Findings" section, the DVO also provided that: "In accordance with the criteria of KRS 403.270, 403.320, and 403.822, temporary custody of H.A. be awarded to Petitioner, Emily Atkins." Simultaneously, the court entered an order of supervised access, wherein Kerry's visitation was restricted to one hour per week, with a "monitor in room with family at all times."[4] It is from the portion of the DVO awarding sole custody to Emily and from the order of supervised access that Kerry now appeals to this Court.

On appeal, Kerry argues that there was simply no evidence in the record to justify the court's modification of custody/visitation, nor the implementation of supervised contact and that, accordingly, the findings made by the court were not supported by the evidence pursuant to Kentucky Rules of Civil

[4] We also note that after the parties had left the courtroom, the trial court indicated that it wished to speak, "on the record" with counsel. During a conversation with counsel from both parties, the court expressed its concern about a number of "red flags" which it felt were evident in this case, including in the dissolution action over which the court had also presided. Specifically, the court was troubled by the allegation that Kerry had threatened to kill Emily and had made a reference to a well-known murder-suicide which had taken place in the Louisville area several years ago. The court also noted concerns over Kerry's increasingly erratic behavior, both as described during the course of the DVO hearing and as indicated through evidence presented during the dissolution action, over which the court was also presiding. The court expressed that it made its decision out of concern for the safety of both the child and the mother.

Procedure (CR) 52.03. Emily has filed no response to the arguments made by Kerry.[5]

At the outset, we note that in addressing the issues raised on appeal, our standard of review is set forth in CR 52.01, which provides that findings of fact shall not be set aside unless clearly erroneous. Thus, the question before this Court is not whether we 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. Absent a finding in this regard, we shall not substitute our opinion for that of the family court. *See B.C. v. B.T.*, 182 S.W.3d 213, 219-220 (Ky. App. 2005). *See also Eviston v. Eviston*, 507 S.W.2d 153 (Ky. App. 2008). Further, with regard to the trial court's application of law to those facts, this Court will engage in a *de novo* review. *Keeney v. Keeney,* 223 S.W.3d 843, 848-49 (Ky. App. 2007).

In reviewing this matter, we certainly acknowledge the authority of the court below to enter an award of temporary custody and to modify or restrict visitation in accordance with KRS 403.320. However, in order to do so, the court must utilize the criteria set forth in KRS 403.270, KRS 403.320, and KRS 403.822. In the matter *sub judice*, our review of the record indicates that the court made no findings as to how the actions allegedly taken by Kerry adversely affected H.A., nor as to how and why it would be in her best interest to have her custodial situation modified from one in which the parents shared joint custody to one in

[5] To this end, we note that from the record, it appears that Emily previously filed a brief in this matter, which was stricken by this Court on February 22, 2010, for failure to comply with CR 98. It appears that no new brief was filed on Emily's behalf.

which she saw her father only one hour per week under supervision. Likewise, under KRS 403.320, the court must have made findings that visitation would endanger seriously the child's physical, mental, moral, or emotional health. We address these provisions in turn.

Turning first to KRS 403.270, we note that KRS 403.270(3) provides that:

> 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.

Indeed, we have clearly held that in the determination of custody, the court may consider evidence of a custodian's misconduct. However, the court must then conclude that such misconduct has affected or is likely to affect the child adversely. Once such a determination has been made the trial court may consider the potential adverse effect of such conduct as it relates to the best interests of the child. *Krug v. Krug*, 647 S.W.2d 790 (Ky. 1983).

While this Court certainly understands the concerns of the court below relative to the behaviors on Kerry's part prior to the divorce, we note that these behaviors clearly occurred prior to the parties' decision to enter into a marital settlement agreement in which they agreed to share joint custody. Indeed, Emily testified that while Kerry has spoken to her in a derogatory manner,[6] he has not

[6] Examples of this included demeaning references to Emily's weight, and disparaging remarks about her parenting style.

made any threats to her physical safety nor that of H.A. in the time since the separation.[7]

KRS 403.340(3) clearly provides that a court shall not modify a prior custody decree unless after a hearing it finds, based upon facts that have arisen *since* the prior decree or that were *unknown* to the court at the time of the entry of the prior decree, that a change has occurred in the circumstances of the child or his custodian and that the modification is necessary to serve the best interests of the child. In this matter, it is certainly clear that Emily was aware of Kerry's actions at the time she entered into the separation and custody agreement. Whether or not she made that threat clear to the court is unclear, but in any regard is not determinative in our opinion.

We believe that Emily's decision to enter into a joint custody arrangement with Kerry *after* he made this alleged threat implicitly indicates a belief on Emily's part that Kerry was not a dangerous individual or unfit custodian at that time. *See*, *e.g., Ward v. Ward*, 407 S.W.2d 709 (Ky. App. 1966).[8] See also *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008)(modifying *Ward* in light of KRS 403.340, thereby increasing the burden when seeking modification of custody within two years of entry of the decree). Further, if Emily believed the facts were

[7] Further, while we understand the court's concern about "red flag" behaviors, we note that the only behavior specifically referenced by the court was Kerry's reference to the murder-suicide at the time of the parties' initial separation. It was after that time that Emily voluntarily entered into an agreement with Kerry for joint custody of H.A.

[8] Wherein divorced father withdrew first motion for modification of divorce decree which gave custody of child to mother, trial court properly treated withdrawal as admission that welfare of child had not been placed in jeopardy by anything that had occurred up to that time and properly refused at time of second motion to consider any claimed change of conditions prior to first motion.

not indicative that Kerry was a dangerous individual or unfit custodian, then we find it difficult that a court could view them as proving danger and unfitness absent additional facts which, when combined together with the initial facts, would indicate danger and unfitness. The latter is not the case *sub judice*. Emily knew of the facts, consciously disregarded them when entering into an agreement, and then sought to use those facts as a basis to set aside a decree based on the agreement. This should not be allowed. Accordingly, we cannot find that those behaviors constitute a sufficient basis for modification of custody pursuant to KRS 403.340.

Left to assess the evidence included in the record provided to this Court, it appears that Kerry may have climbed onto and spat upon Emily's vehicle, spoke disparagingly toward her concerning her weight and parenting style, and may have spit towards her vehicle while riding his bicycle. Further, while Emily asserted that these actions "all" occurred in front of H.A., her testimony to the court was that H.A. may have actually slept through these events which led Emily to obtain the DVO itself. Thus, it is unclear from the record whether H.A. was even aware of the actions allegedly taken by Kerry nor is it clear that the relationship between Kerry and H.A. was in any way adversely affected by these incidents. Accordingly, Kerry's actions, if they occurred as alleged, are certainly not commendable but do not, in the opinion of this Court, constitute a sufficient basis for the restrictive custody modification instituted by the court below absent appropriate findings.

Just as the court is required to make certain findings in order to modify custody, it must also make certain findings in order to modify or restrict visitation, in accordance with KRS 403.320, namely that would endanger seriously the child's physical, mental, moral, or emotional health. Having reviewed the court's order in detail, and for the reasons already outlined herein, we note that the findings which would have been necessary for restricting Kerry's visitation are not included therein.

Wherefore we hereby vacate the September 17, 2009, portion of the order of protection which modifies custody, as well as the order of supervised access entered on that same date, and remand this matter to the trial court below for appropriate findings pursuant to KRS 403.270, KRS 403.320, and KRS 403.822, and all other necessary proceedings not inconsistent with this opinion.

WINE, JUDGE, CONCURS.

LAMBERT, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

LAMBERT, SENIOR JUDGE, DISSENTING: I respectfully dissent from the majority opinion.

While the majority has rendered a technically accurate statement of Kentucky law with respect to the timing and circumstances of the parties' agreement and the occurrence of events subsequent to that agreement, I fear the majority has failed to take account of the explosive nature of the conflict between the parties and what appears to be a high level of anger by Appellant toward

Appellee. In such circumstances I am convinced the better practice is to defer to the views of the trial court, a court that saw and observed the parties, heard their testimony, and presided over the underlying divorce, a divorce that was granted less than two months prior to the trial court's order of protection. Further, it should be noted that the order from which this appeal is taken is subject to subsequent modification by the trial court.

To err on the side of caution is no license to disregard the law. I am convinced, however, that in this case a high level of caution is called for. Moreover, the findings of the trial court were sufficient and the evidence upon which those findings were based was likewise sufficient to justify the relief granted.

I would affirm the trial court's order of protection.

BRIEF FOR APPELLANT:

Katie Marie Brophy
Louisville, Kentucky

NO BRIEF FOR APPELLEE