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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001758-ME

TAMMYE M. GAUNCE — APPELLANT

v.

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE MICHAEL L. MCKOWN, SPECIAL JUDGE
ACTION NO. 07-CI-00412

PATRICK WAYNE GAUNCE — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT AND NICKELL, JUDGES.

NICKELL, JUDGE: Tammye M. Gaunce appeals from an order of the Barren Circuit Court directing her to share custody and the role of primary residential custodian of her two minor children with her former husband, Patrick Wayne Gaunce. Tammye claims the trial court's decision was arbitrary because she alone had been the children's primary residential custodian throughout the two-year custody battle, during which the court acknowledged watching her demeanor

change. In light of her improved temperament, Tammye claims it was unreasonable for the court to conclude her young children would live with Patrick during the week and attend school in Barren County and then reside with her in neighboring Warren County on the weekends. Having reviewed the extensive record, the briefs and the law, we affirm.

FACTS

Tammye grew up in Greenville, in Muhlenberg County, Kentucky. Patrick attended school in Glasgow, in Barren County, Kentucky, where he has lived most of his life. Patrick's family owns and operates several fast food restaurants around the nation that have allowed him to amass considerable wealth. Patrick met Tammye in 1989 while she was employed by Gaunce Management, Inc., a company launched by Patrick's father. Tammye and Patrick began a relationship a few years later, married in 2002, and established their marital home in Glasgow.

As a result of owning franchises around the nation, Patrick travels frequently on business and admits to being a workaholic. Tammye ceased working outside the home when she and Patrick married. Patrick argued strongly for a prenuptial agreement but no pact was ever signed. Two children were born to their union, a daughter, T.G., in 2003, and a son, P.G., in 2005.

The couple separated on June 4, 2007, when Tammye moved herself and the children to an apartment[1] in Bowling Green in Warren County, and petitioned the Warren Circuit Court[2] to dissolve the marriage. The next day, Patrick, who has remained in the marital home in Glasgow throughout the litigation and has stated an intention to remain there permanently, petitioned[3] the Barren Circuit Court to dissolve the marriage. Patrick asked the court to name him the children's primary residential custodian, both temporarily and permanently.

The battle to be named primary residential custodian, bifurcated from issues of property division and dissolution,[4] consumed more than two years in the Barren Circuit Court and resulted in nearly twenty separate hearings. The couple's attempts at reconciliation were futile. While the matter was pending, Tammye served as the children's primary residential custodian.

This appeal deals exclusively with the award of custody. Where the children would attend school has been a major point of contention. On October 4,

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[1] When Tammye moved to Warren County in 2007 she had no family or friends there, although both she and Patrick had volunteered with civic groups in Warren County. Tammye has since purchased a home in Warren County and plans to continue living there.

[2] *Gaunce v. Gaunce,* Warren Circuit Court Case No. 07-CI-00867.

[3] In July 2007, Tammye sought dismissal of Patrick's dissolution petition arguing her petition was filed first and, therefore, should control under *Blanton v. Sparks,* 507 S.W.2d 156, 157 (Ky. 1974). Ultimately, the Warren County action was dismissed on Patrick's motion due to lack of venue. We affirmed the dismissal in *Gaunce v. Gaunce,* 2008 WL 4822258 (Ky. Ap. 2008) (2007-CA-001623-MR) (unpublished, rendered 11/7/2008), and the Supreme Court of Kentucky denied discretionary review on February 11, 2009.

[4] On January 26, 2009, the circuit court granted Patrick's motion for entry of a bifurcated decree. Finding the marriage to be irretrievably broken, the court dissolved the marriage and reserved for future proceedings the issues of child custody and support, maintenance, identification of nonmarital property, and division of marital property.

2007, Dr. Robert Fane, a licensed psychologist, was ordered by the court to conduct psychological evaluations of both Tammye and Patrick. The court then required Tammye and Patrick to submit to individual counseling and appointed Dr. Fane as the counselor. On April 14, 2008, Tammye moved the court to appoint Dr. Fane to perform a custodial evaluation of the couple's minor children, which the court granted on April 17, 2008, "[s]ubject only, however, to any conflict he feels might exist in preparing such an evaluation."

While performing his court-appointed duties, Dr. Fane became embroiled in an attempt to mediate a postnuptial agreement between Tammye and Patrick. At a hearing held on June 19, 2008, the trial court heard testimony from Dr. Fane about the mediation and his evaluation of the parties and the children. In an order entered on August 6, 2008, the court found the parties did not enter into a legally binding settlement agreement as a result of the mediation. Because the school year was about to begin, the court ordered that if the couple's daughter was to begin school she:

> should be enrolled in school in Barren County. While the Court has made no decision as to custody, the fact that most of the child's family except Tammy lives in Barren County (apparently Tammye has some family in Muhlenberg County, but not Bowling Green), that the child lived in Barren County for all of her life prior to the parties' separation, and that Tammye is temporarily living in an apartment in Bowling Green is sufficient for the Court to require that the child's formal schooling begin in Barren County.

Tammye moved the court to reconsider the order because she was living in Warren County and it would be a hardship for Tammye, T.G. and P.G. to get T.G. to Barren County each morning for school. On September 22, 2008, the trial court overruled Tammye's motion to alter, amend or vacate the order entered on August 6, 2008, and granted Patrick's motion to alter time sharing. As a result of the change, Patrick was given

> time sharing with the children from Monday afternoon until such time as TG returns to school on Friday morning. [Patrick] shall deliver TG to school on Friday morning and then meet [Tammye] in the parking lot of Buckhead Café in Glasgow, Kentucky at 8:00 a.m. to deliver PG to her.

On July 31, 2009, the trial court entered a 26-page order recounting the protracted litigation and awarding permanent shared custody to both parents. The court found: at least four individuals have assisted Tammye and Patrick in caring for their two children; whether these workers should be called "nannies" or "babysitters," and the extent of their responsibilities, is disputed; in 2000, Patrick attended a month-long psychiatric residency program to help him address his workaholic tendencies and other life issues; Tammye said the purpose of the program was to help Patrick wean himself from his overdependence on his parents, a statement with which Patrick did not disagree; in 2005, Patrick was diagnosed with colon cancer for which he underwent surgery and chemotherapy; following cancer treatment, Patrick underwent hernia surgery; he considers himself to be in good health now; Patrick suffers from sleep apnea but does not use a breathing

machine or take a sleeping aid (Ambien) while the children are in his care; Tammye suffered a separated pelvis during the birth of their second child and may require surgery for back problems in the future; both Tammye and Patrick have engaged in sexual indiscretions; Patrick worked long hours and traveled extensively on business during the marriage, however, in the wake of his illness, Patrick has tried to curtail his work obligations to spend more time with his family; Patrick sold some of his business interests to a family trust; Patrick testified that since separating from Tammye he has scaled back his business commitments and does not work when he has custody of the children, nor will he work in the future when the children are with him.

The court further found Tammye and Patrick agree on very little when it comes to who is caring for the children. They agree that: Tammye was T.G.'s primary caregiver for the first few months of her life; Tammye breastfed both children when they were infants; Patrick's mother usually picked up T.G. from school and spent Monday nights with her; and from a very young age, the children spent eight or nine weekends a year with Patrick's parents, siblings and cousins at the family's home on Kentucky Lake. Otherwise, the parents painted very different pictures of who was actually caring for the children. According to Patrick, Tammye usually slept late and spent little time at home during the day; Patrick fixed breakfast for T.G.; and unless he was traveling, he would come home to have lunch with both children. In Patrick's view, the nannies were the primary caregivers once the children reached a few months of age. Patrick testified he

attended most of the children's doctor visits and the family usually attended Glasgow Baptist Church in Barren County.

Three nannies/babysitters echoed Patrick's testimony that they, not Tammye, were the children's primary caregivers. They also confirmed that Patrick prepared and ate breakfast with his daughter, often came home to have lunch with the children and, while Tammye provided some care for the children, she was often away from home at the gym, shopping or playing golf. In contrast, Tammye said she took care of the children most of the time with little assistance from Patrick or the babysitters, who were assigned only minimal duties.

The court found that prior to the separation, T.G. attended the Montessori School in Glasgow and was to attend the same program during the summer of 2007 and the following school year. She also attended a weekly art class at the school. After the separation, however, Tammye discontinued these activities because they were done without her agreement. The court also found that, before the separation, Tammye was jailed following an act of domestic violence in the marital home. Tammye believes this resulted from Patrick's vast influence in Barren County. She believes his influence is so strong that people will lie for him and, therefore, doubts she would be treated fairly in Barren County.

Since separating, the party's disagreements about school enrollment, church attendance and doctor visits have caused the court to "micromanage" the family's lives. The court additionally found: Tammye allowed Patrick to see the children only five of the first sixty-seven days of the couple's separation; Tammye

accused Dr. Fane of improperly touching T.G.; and Patrick enrolled the children in the Montessori School. After causing a scene at the Montessori School when the owner did not provide paperwork to her quickly enough, Tammye was banned from the premises. Tammye attempted to enroll T.G. in a Warren County school. When the court ordered T.G. to be enrolled in a Barren County school, Tammye enrolled the child without allowing Patrick any input into the school selection.

After considering the factors listed in KRS[5] 403.270, the court wrote:

> This Court . . . believes it has devised a solution that is in the best interest of the Children. This Court orders that the parties shall have shared custody, a subset of joint custody, of Children. Both parents shall have legal custody subject to the following:
>
> 1) Patrick shall be primary residential parent of the Children during the period from the beginning of school until the end of school with Tammye having shared parenting time as directed by the standard visitation guidelines presently in effect in the 38th Judicial Circuit. However, during the summer break, time-sharing guidelines shall not apply.
>
> 2) Instead, two days after the beginning of summer break, Tammye shall assume the role of primary residential parent. During this time, Patrick shall have shared parenting time as the guidelines state, plus further, he shall have the children for ten continuous days during the summer break. He shall give Tammye at least 30 days written notice of when he will exercise this time period.
>
> 3) Tammye shall relinquish the role of primary residential parent to Patrick at least two days before school reconvenes in late summer.

[5] Kentucky Revised Statutes.

> This Court thus holds that the parties shall be joint custodians of their children with the parties sharing the role of primary residential parent as set out above. The Court conditions the foregoing on Patrick's promise to scale down his business pursuits. Patrick shall spend the majority of Children's waking time outside of school with Children, when Patrick is the primary residential parent.

(Footnotes omitted).

On August 10, 2009, Tammye moved the court to alter, amend or vacate the order entered on July 31, 2009, arguing that Patrick will not reduce his work commitments and proposing changes to the co-parenting schedule. Two days later, Patrick filed his own motion to alter, amend or vacate, or in the alternative, to clarify the order entered on July 31, 2009. Following a hearing, the court denied portions of Tammye's motion and made some changes to its prior order. The court denied Patrick's motion to alter, amend or vacate as untimely, but did clarify its prior order. Thereafter, Tammye filed a notice of appeal challenging the order denying her motion to alter, amend or vacate as well as the court's custody order. This appeal followed.

PRESERVATION

We begin with a comment about preservation. CR[6] 76.12(4)(c)(v) requires the appellant's brief to contain:

> [a]n "ARGUMENT" conforming to the statement of Points and Authorities, with ample supportive references to the record and citations of authority pertinent to each issue of law and which shall contain at the beginning of

[6] Kentucky Rules of Civil Procedure.

> the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.

Tammye has complied with this rule regarding only one of her seven arguments. Additionally, a trial court must be given the opportunity to rule on an issue for it to be properly preserved for our review. *See Tamme v. Commonwealth*., 973 S.W.2d 13, 33 (Ky. 1998) (citing *Harrison v. Commonwealth*, 858 S.W.2d 172 (Ky. 1993)) (error unpreserved if wrong reason stated for objection.). Tammye's failure to adhere to CR 76.12 requires us to perform not only our own function, but part of the function of counsel. This task is made all the more difficult when the record is voluminous, as in this case. We are authorized to strike in its entirety any brief that does not comport with the requirements of CR 76.12(c)(v). CR 76.12(8)(a). Alternatively, as we do here, we may review the allegations of error for manifest injustice rather than considering them on the merits. CR 61.02.

ANALYSIS

Tammye's first argument on appeal is that the trial court abused its discretion by naming Patrick as the primary residential parent during the school year. She argues that the nearly two years of hearings held by the court did not satisfy KRS 403.310(1), which directs that "[c]ustody proceedings shall receive priority in being set for hearing." However, Tammye has not directed us to the place in the record where she preserved this argument before the trial court as required by CR 76.12(4)(c)(v), a fact noted by Patrick in his brief, and we will not search the voluminous record to confirm that the trial court was given the

opportunity to rule on the issue. *Tamme*. Furthermore, Tammye has cited no legal authority for the proposition that two years is too long for a custody battle to rage. Nor has she alleged that when requested, a hearing date was not promptly provided. Indeed, she requested a continuance due to her cocounsel's scheduling conflict, which the court granted. Thus, we deem no basis for relief on this ground.

Tammye's second argument, again without a statement of preservation, is that she should have been named the primary residential parent on a permanent basis because she had served in that capacity during the two-year custody battle. KRS 403.270(2) directs the court to make a custody determination that serves the best interests of the children. In so doing, the court must 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.

Under KRS 403.280, temporary custody may be awarded "under the standards of KRS 403.270 after a hearing."

Without citation to legal authority, Tammye suggests that the parent who receives temporary custody should also receive permanent custody. She further suggests that, absent a decrease in her parenting skills or an increase in Patrick's parenting skills, the trial court abused its discretion in awarding Patrick primary residential custody during the school year. Tammye's view is inconsistent with the legal standard which requires us to affirm the trial court unless its decision is unsupported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 353-54 (Ky. 2003). Having read the court's detailed order, we deem its award of primary residential custody to Patrick during the school year to be supported by substantial evidence and, therefore, not clearly erroneous.

Tammye's third argument, again with no statement of preservation, is that the court had to accept or reject, in its entirety, Dr. Fane's recommendation as the court-appointed custody evaluator. We disagree. As the fact-finder in the present case, it was the trial court's sole responsibility to weigh the probative value

and credibility of all the evidence presented and to choose the evidence it found to be the most convincing. *Commonwealth, Dep't of Highways v. Dehart*, 465 S.W.2d 720, 722 (Ky. 1971). This included Dr. Fane's recommendation that Tammye be named primary residential parent because she did not work outside the home and Patrick did. The trial court's order demonstrates the court considered this recommendation, but found it to be unpersuasive because it was supported by neither Dr. Fane's report nor his testimony. Contrary to Tammye's assertions, the trial court was not bound to accept as true any testimony from any witness, including Dr. Fane. *Dunn v. Commonwealth*, 286 Ky. 695, 151 S.W.2d 763, 764-765 (Ky. 1941).

Tammye's fourth complaint, again with no statement of preservation, is that she did not receive a copy of Dr. Fane's report ten days prior to his testimony as mandated by KRS 403.300. Again, Tammye's failure to include a statement of preservation hampers our review of this allegation. Without the required statement of preservation, we are not convinced the court had an opportunity to rule upon this issue and, if it was not given that opportunity, then the issue was not preserved for our review. *Tamme.* As part of this issue, Tammye asserts that Dr. Fane's report contained hearsay, but fails to identify the hearsay or specify how and where she objected to it. Due to the circumstances under which the report was prepared and released, we discern no error.

First, the court appointed Dr. Fane to conduct the custody evaluation at Tammye's request. Second, at the hearing on June 19, 2008, Dr. Fane testified

he does not normally do a custody evaluation in just two weeks, but he agreed to do this one because the parties agreed to it and the judge requested it. He further explained that the judge had directed him not to release his report to the parties until it was finished and the report was not completed until the morning of the hearing. Third, at the beginning of the hearing, the court announced that Dr. Fane's report would not be discussed until testimony about the settlement agreement had ended. The court then gave the parties fifteen minutes to review the report. That would have been the appropriate time for an objection, but none was voiced. Nor was an objection voiced during hearings in November of 2008 or February of 2009. Having failed to give the trial court an opportunity to rule upon the issue, it is not properly before us. *Tamme.*

Tammye's fifth complaint, the only one that mentions an objection, is that the trial court erroneously admitted and relied upon a tape recording of telephone conversations and a transcript of the recording. On October 15, 2007, Tammye objected to the introduction of telephone conversations Patrick had recorded between himself and Tammye on a digital voice recorder, and then had transferred to a compact disc. Patrick also had the conversations transcribed but there was no attempt to interpret inaudible portions of the recording. Tammye never denied the conversations occurred. To the contrary, she explained the circumstances under which they occurred.

Citing *Commonwealth v. Brinkley,* 362 S.W.2d 494 (Ky. App. 1962), and *Sanborn v. Commonwealth,* 754 S.W.2d 534 (Ky. 1988), Tammye argues the trial court erred in considering the recording and transcript. We disagree. "It is within the discretion of a trial judge to decide whether because portions of a tape are inaudible or indistinct, the entire tape must be excluded." *Sanborn,* 754 S.W.2d at 540 (citing *United States v. Robinson,* 707 F.2d 872, 876 (6th Cir. 1983)). As the trial court stated in its order overruling Tammye's motion, the court was able to ignore "the inaudible portions of the recording" and Tammye "did not deny that the conversation occurred or that she made the statements on the tape."

Sanborn is distinguishable on two significant grounds regarding the transcript. First, in *Sanborn* the transcript was provided to a jury, not a judge. Second, the transcript was prepared by the Commonwealth and contained the prosecutor's version of inaudible portions of the tape. Here, this matter was tried by a judge and there was no attempt to interpret inaudible portions of the recording. In *Brinkley,* the Commonwealth sought certification of the law regarding the admissibility of recordings where a sheriff had secreted himself in a car trunk and recorded a conversation with permission of the prosecuting witness. Following the lead of the Supreme Court of Georgia in *Steve M. Solomon v. Edgar,* 92 Ga.App. 207, 88 S.E.2d 167 (Ga.App. 1955), a seven-point foundation was announced for the admission of a recording. However, in *Commonwealth v. Prater,* 714 S.W.2d 492 (Ky. App. 1986), we declined to apply *Brinkley* to a fact pattern in which "there is no intrusion by the state or any of its agents into

constitutionally protected areas." There being no state action involved in the case under review, the seven factors mentioned in *Brinkley* are not the test of admissibility of the tape recording in this case. *Prater,* 714 S.W.2d at 493. Rather, the applicable test is the one that applies to photographs—"the witness needs only to testify that the pictures are 'accurate and faithful representations' of what they show." *Id.* Patrick identified Tammye's voice in the recordings and established the calls recorded were made to or from a telephone routinely used by Tammye. As a result, we hold the trial court did not abuse its discretion in admitting the recording and the transcript.

As part of this issue, Tammye comments on the court's reliance upon two alleged hearsay statements contained in Dr. Fane's report. We will not comment further on this assertion, since there is no statement of preservation showing the trial court was given the opportunity to rule on the admissibility of the statements. *Tamme.*

Tammye's sixth complaint, again with no statement of preservation, is that the trial court abused its discretion in adopting Patrick's assertions that he would reduce his work commitments. It is well settled in this Commonwealth that the "trier of fact has the right to believe the evidence presented by one litigant in preference to another. The trier of fact may believe any witness in whole or in part." *Bissell v. Baumgardner*, 236 S.W.3d 24, 29-30 (Ky. App. 2007) (quoting *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996) (internal citations omitted)). Thus, as there was no jury impaneled, the trial court alone was vested

with discretion to determine the credibility of the witnesses. It is not surprising that Tammye disbelieves Patrick will spend more time with his children, but the trial court did believe him and we cannot say the trial court erred in its assessment of the evidence.

Tammye's seventh and final allegation is that the trial court abused its discretion in naming Patrick the primary residential custodian under KRS 403.270(2). In *Moore*, 110 S.W.3d at 353-54, the Supreme Court of Kentucky held a reviewing court may set aside a trial court's findings only if those findings are clearly erroneous; meaning, they are unsupported by substantial evidence. *Moore* went on to explain:

> "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence. [footnotes omitted].

Id. at 354. We review the trial court's application of the law to those facts de novo. *Lindley v. Paducah Bank & Trust*, 114 S.W.3d 259, 263 (Ky. App. 2002). Because trial courts are granted broad discretion in determining the best interests of children

when making custody awards, *Krug v. Krug*, 647 S.W.2d 790, 793 (Ky. 1983), custody determinations will not be disturbed in the absence of an abuse of that discretion. *Allen v. Devine*, 178 S.W.3d 517, 524 (Ky. App. 2005); CR 52.01. Based upon a careful review of the record, we conclude the trial court's decision was supported by substantial evidence and its determination of which evidence was most credible was not clearly erroneous.

In its twenty-six page order, the trial court commented upon each of the relevant factors mentioned in KRS 403.270(2), and ultimately concluded both Tammye and Patrick love their children and "are capable of parenting their children." However, the court stated it could not:

> overlook Tammye's actions at the time of separation and since that time. Much of her behavior indicated a lack of concern for the best interests of the Children. Indeed she behaved in (sic) manner intended to control Patrick and the Children, often using the Children to hurt Patrick.
>
> . . .
>
> The Court recognizes that these parties will have a difficult time reaching decisions together and seriously considered awarding sole custody to Patrick. But courts have decided that this is not a reason to shy away from joint custody. *See Squires v. Squires,* Ky. 854 S.W.2d 765, 769 (1993). "Joint custody can be modified if a party is acting in bad faith or is uncooperative. The trial court at any time can review joint custody and if a party is being unreasonable, modify the custody to sole custody in favor of the reasonable parent. Surely, with the stakes so high, there would be more cooperation which leads to the child's best interest, the parents' best interest, fewer court appearances and judicial economy." *See Chalupa v. Chalupa,* Ky. App., 830 S.W.2d 391, 393 (1992).

The trial court issued its findings of fact based upon evidence developed during multiple hearings. Although conflicting evidence was presented, there was evidence of substance to support the trial court's findings. It is apparent from a review of the record and the court's order that the trial court carefully and thoroughly reviewed and weighed the evidence presented. Thus, we discern no grounds for reversal.

Therefore, the order of the Barren Circuit Court naming Patrick as the primary residential custodian during the school year, and its separate order denying Tammye's motion to alter, amend or vacate its custody order, are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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