

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000344-ME

S. D. N.

APPELLANT

v.

APPEAL FROM ESTILL CIRCUIT COURT
HONORABLE MICHAEL DEAN, JUDGE
ACTION NO. 12-CI-00212

K. D. N.

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** * * * * *

BEFORE: COMBS, D. LAMBERT, AND VANMETER, JUDGES.

VANMETER, JUDGE: S.D.N. (“Mother”) appeals from the Estill Circuit Court’s order denying her motion to alter, amend or vacate the circuit court’s order confirming the Special Domestic Relations Commissioner’s (“DRC”) recommendations concerning child custody. For the following reasons, we affirm

in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Mother filed a petition for dissolution of her marriage to K.D.N. (“Father”) in September 2012. The parties have three minor children: one boy and two girls.¹ In June 2013, the assigned DRC, Hon. Michael Dean, recused himself, stating that he had previously represented Mother in a civil matter. A special DRC, Hon. Patrick O’Neil, was appointed to hear the matter. After a hearing, the DRC’s recommendations were entered and confirmed by the circuit court on November 8, 2013. At that time, the court adopted a visitation schedule agreed upon by the parties in a previously filed agreed order. Father filed a motion to reconsider, claiming that the agreed order was only intended to be temporary. The court remanded the custody and visitation issue to the DRC, who was ordered to interview the parties’ children for the entry of a permanent custody order.

Prior to a hearing at which the children could be interviewed, the Kentucky State Police and the Department of Protection and Permanency began an investigation into the parties’ older daughter’s allegations of sexual abuse committed by Father. After a hearing with the DRC, the DRC entered recommendations on February 10, 2014 (“February report”). The DRC recommended that until the investigation into the allegations of sexual abuse was

¹ The parties also have a fourth child who is of the age of majority and therefore not subject to the court’s custody decree.

concluded, Father's visitation with the children should be suspended. The DRC further recommended that if the allegations were substantiated, the court should defer to the juvenile petition and/or conditions of release imposed on Father.

However, if the allegations were not substantiated, the DRC recommended that the parties have joint custody, with their son staying primarily with Father, and their daughters staying primarily with Mother. The DRC's recommendations did not address how to proceed if the allegations were substantiated, but Father was not convicted. The court confirmed the recommendations by docket entry on March 19, 2014, but no written order was entered.

The abuse allegations were substantiated on April 21, 2014, and an Abuse, Neglect or Dependency Petition was filed shortly thereafter in the Estill District Court. The juvenile petition was ultimately dismissed by the Estill District Court on September 3, 2014.² Mother filed a motion to modify custody with the circuit court on August 11, 2014, alleging that changed circumstances, namely the allegations of sexual abuse against Father, warranted a modification of the custody order. Another hearing on Mother's motion to modify custody was heard, and the DRC entered his recommendations on October 2, 2014 ("October report"). The DRC found that the motion to modify custody was premature since no final custody order had been entered in the case. The DRC noted that the prior

² The DRC's findings indicate that the juvenile petition was dismissed in August 2014. However, the guardian ad litem ("GAL") assigned to represent the children in the juvenile case indicated in her notice of appeal to the circuit court, appealing the district court's dismissal of the juvenile petition, that the petition was dismissed on September 3, 2014. At the time of entry of the appealed order in this case, no ruling on the GAL's appeal had been entered.

recommendations did not address the current circumstances, and that those recommendations had not been confirmed. Nonetheless, the DRC proceeded as if the sexual abuse allegations had never been substantiated; joint custody was recommended with the parties' son primarily residing with Father and the parties' daughters primarily residing with Mother. Timesharing was ordered on the first and third weekend of each month, although the parties' oldest daughter was not required to have visitation with Father.

In November 2014, Hon. Michael Dean was elected as Estill Circuit Court judge. The prior judge presiding over this case did not enter an order regarding the DRC's October report prior to vacating the bench. Judge Dean adopted the DRC's October report on January 21, 2015.³ Mother filed a motion to alter, amend, or vacate the court's order confirming the DRC's recommendations. Following a hearing, the court denied Mother's motion via a docket order, and this appeal followed. Additional facts will be discussed below as necessary.

On appeal, Mother makes four arguments concerning the DRC's October report and the circuit court's confirmation of that report. First, she claims that Judge Dean should have recused himself as presiding judge given his prior relationship with Mother and his previous recusal as DRC. Second, she argues that because Judge Dean did not sign the order confirming the DRC's

³ The circuit court's confirming order does not indicate that the order is final and appealable, but it does appear that the order disposed of all issues. The parties do not raise this issue, but the best practice would be for the court to make the appropriate recitation pursuant to Kentucky Rules of Civil Procedure (CR) 54.02.

recommendations within 10 days of the time for filing exceptions to those recommendations, the order is untimely pursuant to FCRPP⁴ 4(b). Third, Mother alleges that the findings and recommendations of the DRC are erroneous. Lastly, Mother argues that this case demonstrates that a family court, rather than a DRC, is necessary in every county in Kentucky.

II. STANDARD OF REVIEW

This court has thoroughly described the standard of review in a child custody case as follows:

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 283, 219-20 (Ky. App. 2005) (internal citations omitted).

III. ARGUMENTS

⁴ Family Court Rules of Procedure and Practice.

A. RECUSAL AND JURISDICTION

First, Mother argues that Judge Dean should have recused in these proceedings given his prior representation of Mother and his prior recusal as DRC. She contends that because Judge Dean should have recused, he lacked jurisdiction to enter an order confirming the DRC's recommendations. Mother cites SCR⁵ 4.300 Canon 3(E)(1), which provides: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned[.]" Because she claims Judge Dean should have recused, Mother cites KRS⁶ 26A.020(1), which states:

When, from any cause, a judge of any Circuit or District Court fails to attend, or being in attendance cannot properly preside in an action pending in the court, or if a vacancy occurs or exists in the office of circuit or district judge, the circuit clerk shall at once certify the facts to the Chief Justice who shall immediately designate a regular or retired justice or judge of the Court of Justice as special judge. If either party files with the circuit clerk his affidavit that the judge will not afford him a fair and impartial trial, or will not impartially decide an application for a change of venue, the circuit clerk shall at once certify the facts to the Chief Justice who shall immediately review the facts and determine whether to designate a regular or retired justice or judge of the Court of Justice as special judge. Any special judge so selected shall have all the powers and responsibilities of a regular judge of the court.

Filing of a KRS 26A.020 affidavit for disqualification deprives the circuit court of jurisdiction. *Shafizadeh v. Shafizadeh*, 444 S.W.3d 437, 443 (Ky. App. 2012).

⁵ Rules of the Supreme Court.

⁶ Kentucky Revised Statutes.

When particular case jurisdiction is lacking, the judgment is rendered voidable. *Hisle v. Lexington-Fayette Urban Cty. Gov't*, 258 S.W.3d 422, 431 (Ky. App. 2008).

“As the Kentucky Supreme Court has explained, a party or counsel may seek to disqualify or recuse a judge from proceeding further in a matter either by filing an affidavit pursuant to KRS 26A.020, by filing a motion with the judge pursuant to KRS 26A.015, or by filing both.” *Kenney v. Hanger Prosthetics & Orthotics, Inc.*, 269 S.W.3d 866, 876 (Ky. App. 2007) (citing *Nichols v. Commonwealth*, 839 S.W.2d 263, 265 (Ky. 1992)). Here, neither party, nor their counsel, filed either an affidavit pursuant to KRS 26A.020 or a motion pursuant to KRS 26A.015. Thus, the circuit court’s jurisdiction was never suspended pending a determination of the challenge to the judge’s impartiality pursuant to KRS 26A.020. Furthermore, the circuit court never had an opportunity to rule on a motion to recuse pursuant to KRS 26A.015. Since no action was taken by the trial court on this issue, no error exists for this court to review. *See Kenney*, 269 S.W.3d at 876 (court found no action by the trial court and no alleged error to review when no motion to recuse pursuant to KRS 26A.015 was filed). While we agree that Judge Dean probably should have recused in this matter, no error exists for this court to review.⁷

⁷ In addition, this argument was never brought before the trial court; Mother raises it for the first time on appeal. An argument may not be raised for the first time on appeal. [*Reg'l Jail Auth. v. Tackett*, 770 S.W.2d 225, 228 \(Ky.1989\)](#). On remand, if the parties wish for Judge Dean to recuse, they should file the appropriate affidavit or motion.

B. TIMELINESS OF THE ORDER CONFIRMING THE DRC'S

RECOMMENDATIONS

Next, Mother argues that the circuit court's order confirming the DRC's October report was untimely. FCRPP 4(4)(b) states, in relevant part, "[t]he circuit court shall sign any recommended temporary or post-decree order within 10 days after the time for filing exceptions has run **unless a motion for a hearing on the exceptions has been filed.**" (Emphasis added). A party has ten days after being served with the DRC's recommendations to file written objections. FCRPP 4(4)(a). Mother's exceptions to the DRC's October report were timely filed on October 8, wherein she noticed the motion for hearing on November 6. Father's response to those exceptions was filed on October 16. The record includes a docket order, dated November 17, which states that the exceptions were submitted at motion hour. The DRC filed no report concerning the exceptions, and the October report was confirmed by the circuit court on January 21, 2015, well over ten days from the time the exceptions were due, and well over ten days from when the exceptions were submitted. Mother alleges that this means the court's confirmation order was untimely.

We disagree. FCRPP(4)(4)(b) clearly makes an exception to the ten-day rule for cases in which the exceptions are to be heard. Here, the exceptions were noticed to be heard, and were presumably heard.⁸ The only guidance FCRPP

⁸ The parties have provided no video or recording of the hearing held on November 17. When the record is silent, we must assume the omitted record supports the decision of the trial court. *Hatfield v. Commonwealth*, 250 S.W.3d 590, 601 (Ky. 2008).

4 provides in this instance is “[i]f exceptions have been filed, entry of the final decree shall occur within 10 days of disposition of the exceptions.” FCRPP 4(4)(d). The circuit court’s January 21, 2015, order adopting the findings and recommendations of the DRC itself constitutes the disposition of the exceptions, and so indicates in its text. No other disposition of the exceptions exists in the record. Accordingly, the court’s order is timely.

Mother also argues that the circuit court’s order adopting the DRC’s October report is improper because the court stated,

[Mother] filed exceptions based primarily on sexual abuse allegations against [Father]. The Estill District Court having dismissed a neglect and abuse action finding that the allegations were not proven, and this Court having affirmed the dismissal on appeal, the Court hereby adopts in its entirety, the findings and recommendations as set forth in the Special DRC’s Recommendations[.]

At the time this order was entered, the circuit court had not yet affirmed the dismissal of the district court action on appeal. Procedurally, the status of the district court appeal, a separate action, is irrelevant to the confirmation of the DRC’s recommendation in this action. Thus, the circuit court’s order confirming the DRC’s report was not untimely or improper for this reason.

C. CHILD CUSTODY ORDER

Third, Mother claims that the DRC’s October report was erroneous in three ways: 1) the DRC erred by finding that her motion to modify custody was premature; 2) the DRC relied solely on the dismissal of the district court abuse and

neglect petition in making its custody decision; and 3) the DRC failed to utilize the best interests of the child test set forth in KRS 270(2).

In reviewing a child custody award, the test is whether the factual findings of the family court are clearly erroneous, or whether they are supported by substantial evidence; substantial evidence is evidence sufficient to induce conviction in the mind of a reasonable person. *B.C. v. B.T.*, 182 S.W.3d 213, 219 (Ky. App. 2005). “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.” *Id.* “Abuse of discretion implies that the family court’s decision is unreasonable or unfair.” *Id.*

First, we do not believe the DRC erred by finding that Mother’s motion to modify custody was premature. Mother claims that the November 8, 2013, order adopting the parties’ agreed timesharing order was a final custody decree and that the circumstances surrounding the sex abuse allegations against Father permit a motion to modify within two years of entry of that final decree. KRS 403.340(2)(a). However, as Father points out, this order was effectively vacated when the matter was remanded to the DRC for an investigation into the sex abuse allegations. We agree with the DRC and the circuit court that no final custody order had been entered prior to Mother’s motion to modify custody. Thus, despite the changed circumstances in this case, a motion to modify custody is not appropriate when a final custody decree has not yet been entered.

Next, we agree with Mother that the circuit court erred by giving blanket deference to the outcome of the district court proceedings. The court is required by KRS 403.270(2) to consider the best interests of the child when making a custody determination. KRS 403.270 provides, in relevant part:

(2) The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall 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.

(3) 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.

The DRC's October report exclusively focuses on the outcome of the district court petition and the DRC's previous recommendations pertaining to the outcome of that action. Although the DRC could consider the outcome of the district court petition in making his decision as part of the best interests test, he was required to apply all of the best interest of the child factors contained in KRS 403.270. We did not believe he did so. While the abuse and neglect petition was dismissed, the abuse itself was substantiated. Regardless of the DRC's recommendations in the February report⁹ relating to the outcome of the district court case, the DRC was still required to make findings concerning the best interests of the parties' children, especially in light of the substantiated abuse. Therefore, the circuit court erred by confirming the October report, and on remand, should order the DRC to make thorough findings concerning the best interests of the children prior to making a custody recommendation.

⁹ We note that even the DRC's February 10 recommendations do not contain a particularly thorough analysis of the best interest factors.

D. FAMILY COURT

We decline to address Mother's argument concerning the establishment of a family court in every county. She did not raise this issue before the trial court, and thus we cannot address it. "An appellate court 'is without authority to review issues not raised in or decided by the trial court.'" *Meyers v. Commonwealth*, 381 S.W.3d 280, 285 (Ky. 2012) (citing [*Tackett*, 770 S.W.2d at 228](#); [*Matthews v. Ward*, 350 S.W.2d 500 \(Ky.1961\)](#)). Further, such an issue is not within the province of this court.

IV. CONCLUSION

For the above reasons, the order of the Estill Circuit Court is affirmed in part, reversed in part, and remanded for further proceedings in which the court should provide a clear analysis of the best interests of the children prior to making an award of custody.

ALL CONCUR.

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