RENDERED: JULY 21, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002447-MR

SONJA ROCHELLE FORTENBERRY (NOW HUDSON) — APPELLANT

v.

APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 96-CI-00139

DONALD CRAIG FORTENBERRY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: HUDDLESTON, JOHNSON, KNOPF, JUDGES.

KNOPF, JUDGE. This is a post-dissolution child custody proceeding in which Sonja Rochelle Fortenbery[1] (Sonja) appeals from an order of the Calloway Circuit Court modifying joint custody to award primary residential custody to the appellee, Donald Craig Fortenbery (Craig). Sonja also appeals from an order of the trial court setting aside her supersedeas bond to stay enforcement of the custody modification order pending appeal.

[1]Now Sonja Rochelle Hudson.

The parties were married on June 2, 1990. The marriage produced two children, Donald Seth (Seth), born April 2, 1991, and Zachary Ryan (Zachary), born October 13, 1993. Sonja has a son from a previous relationship, Anthony Roy Fortenbery (Anthony), born April 15, 1987. On May 1, 1996, Craig filed a petition to dissolve the marriage. On July 2 the parties entered into a "Separation Agreement and Property Settlement Agreement." The agreement provided that the parties would have joint custody of Seth and Zachary, and that the children, including Anthony,[2] would reside with each parent on an alternating week basis. On July 17 the divorce decree, into which the separation agreement was incorporated, was entered.

The shared-custody arrangement succeeded for about a year, but then began to fail. On June 20, 1997, Craig filed a motion which sought to have Sonja held in contempt for failure to comply with the separation agreement and, further, requested "that the Court enter an Order awarding him primary joint custody[.]" Sonja, thereafter, likewise requested modification of custody so as to designate her as the primary residential custodian. The case was referred to the Calloway County Domestic Relations Commissioner (Commissioner). Following a series of custody hearings, on August 4, 1998, the Commissioner entered his report recommending that the parties share joint custody of Seth

[2]The agreement provides that "the parties agree that [Anthony Roy Fortenbery] will be treated as a child of the parties for custody and visitation purposes as hereinafter stated." However, in the agreement's provision relating to joint custody, only Seth and Zachary are named. Presumably the parties intended that they would likewise share joint custody of Anthony.

and Zachary with Craig being designated as the primary residential custodian. On September 11 the trial court entered an order adopting the Commissioner's recommendation.

Sonja filed her notice of appeal. Thereafter, Sonja attempted to stay the custody modification by filing a $100.00 supersedeas bond. The trial court denied the bond and the stay. Sonja then filed a motion with this Court seeking an order requiring the trial court to accept her supersedeas bond and stay the judgment. On December 14, 1998, we denied Sonja's motion.

Sonja contends that the trial court's designation of Craig as the primary residential custodian was based primarily on evidence that was irrelevant and which therefore should have been excluded. Sonja identifies two areas of improperly admitted evidence: (1) evidence concerning events which preexisted the initial joint custody decree; and (2) evidence presented by a mental health expert, Dana Hardy.

Sonja contends that the trial court erred by considering evidence predating their July 1996 separation agreement. Sonja "submits that the current de novo standard for joint custody modification proceedings is too liberal and should have some boundaries. She respectfully requests that this Court change the law by limiting the modifying court's review to events which have occurred since the entry of the initial custody decree."

There are two procedural problems with Sonja's argument. First, Sonja does not cite us to her contemporaneous objection to the admission of pre-July 1996 evidence. While

Sonja did raise the issue in her objections to the Commissioner's report, she does not cite us to her objections before the Commissioner. Sonja's failure to object to the admission of the evidence at trial failed to preserve the error. 76.12(4)(c)(iv); Baker v. Ryan, Ky. App., 967 S.W.2d 591, 593 (1997). Second, Sonja does not specify which evidence is pre-July 1996 evidence and where this evidence is presented in the record. While we have extensively reviewed the hearings, we will not speculate as to the specific evidence to which this argument refers.

Aside from the procedural problems with this argument, the parties' July 1996 custody agreement was summarily accepted by the trial court. Pre-July 1996 information had not previously been presented to or litigated before the trial court. The present custody litigation was commenced in July 1997. If the trial court was to accomplish a meaningful best interest inquiry, it was obliged to consider previously unexplored evidence regarding conduct which occurred prior to July 1996. The trial court did not err in considering pre-July 1996 evidence.

In conjunction with the foregoing argument, Sonja "submits that a trial court's inquiry in a joint custody modification proceeding should be governed by the same standard applicable to sole custody modification proceedings." KRS 403.340(2) limits modifications of sole custody after two years to "facts that have arisen since the prior decree or which were unknown to the court at the time of entry of the prior decree." Joint custody may be modified, however, only when there has been a finding that one or both of the parties is unable to cooperate

or has engaged in a bad faith refusal to cooperate in carrying-out the joint custody arrangement.[3] Mennemeyer v. Mennemeyer, Ky. App., 887 S.W.2d 555 (1994). If the trial court makes this threshold finding, it may then modify the joint custody decree by conducting a de novo hearing pursuant to KRS 403.270. In support of her position that Mennemeyer should be abandoned in favor of KRS 403.340, Sonja cites to three sister-state decisions, Monteleone v. Monteleone, 591 So.2d (La. Ct. App. 1991); Davenport v. Manning, 675 So.2d 1230 (La. Ct. App. 1996); and Frafjord v. Ell, 558 N.W.2d 848 (N.D. 1997).

Our review of this issue is foreclosed, however, because Sonja's argument to modify Mennemeyer was not preserved. When Craig filed his motion seeking to modify custody, Sonja did not argue for a change in the Mennemeyer standard. Nor does Sonja cite us to the record where she raised this issue before the trial court. In fact, in contradiction to her position on appeal, Sonja herself sought to modify the existing joint custody arrangement. Sonja may not contend for the first time on appeal that the Mennemeyer standard should be abandoned in favor of the KRS 403.340 standard. McGrew v. Stone, Ky., 998 S.W.2d 5, 8 (1999).

Next, Sonja contends that the trial court committed reversible error by admitting the report and testimony of mental health expert Dana Hardy. Prior to either party's seeking to modify custody, Sonja and Craig jointly retained Hardy to

[3]See Briggs v. Clemons, Ky. App., 3 S.W.3d 760(1999) for application of KRS 403.340(2)(c) to joint custody.

evaluate themselves and the children and to make a report concerning her findings and opinions. Sometime prior to the December 18, 1999, hearing, Hardy completed her report and sent the report directly to the Commissioner. The report recommended that Craig be granted sole custody of the children. The Commissioner read a portion of the report until, realizing what it was, he quit reading it.

At the March 26, 1998, hearing Sonja moved to exclude Hardy's testimony or, in the alternative, Hardy's report "based on the fact that [the] report got to the court before we even saw it." Sonja contends that the Commissioner personally received a copy of the report, read at least a portion of it, and had knowledge of at least some of its contents for several months before Hardy could be cross-examined. According to Sonja, the "portion the [C]ommissioner read became irreversibly tainted as the personal, extrajudicial knowledge of the [C]ommissioner." In support of her argument, Sonja relies on Wells v. Wells, Ky., 406 S.W.2d 157 (1966) and Carroll v. Carroll, Ky., 469 S.W.2d 885 (1971).

Individual or extra-judicial knowledge on the part of the judge, not the subject of judicial notice, cannot form the basis for findings of fact or the decision of a case. Wells, supra; Wyatt v. Webb, Ky., 317 S.W.2d 883 (1958). The facts surrounding the Hardy report do not indicate that the Commissioner impermissibly relied upon extra-judicial knowledge in forming his recommendation. In the course of the discussion at the March 1998 hearing regarding Sonja's motion to exclude

Hardy's testimony and/or report, the following exchange occurred between Craig's attorney and the Commissioner:

> MR. PITMAN (counsel for Craig): Well, Judge [referring to the Commissioner], I would like to ask the Court just for preserving this particular issue if it happens to go up on exceptions or appeal, I mean, do you as the Commissioner, having got this report feel that having scanned it, a couple of pages a few months ago that you're swayed about what's in there or do you . . . ?
>
> COMMISSIONER: No.
>
> MR. PITMAN: Okay.
>
> COMMISSIONER: I can weigh that, you know, she's here to testify. She can testify as to what is in the report and I'll base my decision on what I hear today.

When he received the report, the Commissioner read a few pages of it until, realizing what he was reading, he immediately stopped. He read only a few pages accidently. This occurred at least three months prior to the March hearing. The Commissioner gave his assurance on the record that he would not be swayed by what little he did read. Given the accidental nature of this "extra-judicial knowledge"; the small amount of relatively unimportant information involved; the length of time between the Commissioner's extra-judicial exposure to Hardy's report and the Commissioner's custody recommendation; and Sonja's ability to ultimately cross-examine Hardy in front of the Commissioner we are persuaded that, if there was any error here, the error was harmless in that it did not affect the substantial rights of Sonja. CR 61.01; Davidson v. Moore, Ky., 340 S.W.2d 227 (1960).

As an alternative argument, Sonja argues that Hardy's report and testimony should have been excluded or given less weight because of Craig's "ex parte contacts" with Hardy. In her brief, Sonja contends that "the expert's custody recommendation in favor of the Father was based primarily on voluminous letters and information provided by the Father and his family — much of which was never requested by the expert," and that "[a]fter the evaluation of the parties and the children was completed, the expert visited the Father and children again and admitted that this additional meeting could be seen as self-serving for the Father."

First, according to Hardy's testimony, she made additional visits to Craig because he changed his residence following the first visit. Further, the potential problems cited by Sonja are not sufficient to disqualify Hardy from testifying, or filing her report, in this case. Otherwise, Sonja had an unrestricted opportunity to cross-examine Hardy, and to argue Hardy's bias to the Commissioner and trial court. The weight to be accorded Hardy's testimony was for the fact-finder to determine.

Next, Sonja argues that the trial court abused its discretion in designating Craig as the primary residential custodian. Under the law applicable to this case, a modification of a joint custody decree must be made anew under KRS 403.270 as if there had been no prior custody determination. Mennemeyer at 556. "As a practical matter, joint custody is no award at all when considering modification of the arrangement." Benassi v.

Havens, Ky. App., 710 S.W.2d 867, 869 (1986). "Thus, where there has been an award of joint custody under KRS 403.270, a hearing de novo should be held to determine custody as if no prior custody determination had been made. KRS 403.270 provides that custody should be determined in accordance with the best interest of the child and that equal consideration should be given each parent." Erdman v. Clements, Ky. App., 780 S.W.2d 635, 637 (1989). In this case, the trial court properly carried out its task by conducting a de novo custody determination pursuant to the factors set forth in KRS 403.270 as if no prior custody determination had ever been made.

In deciding which parent should have custody, Kentucky Revised Statute (KRS) 403.270(2) provides that a trial court must determine custody in accordance with the best interests of the child and must give equal consideration to each parent. The statute lists certain mandatory factors to be considered by the trial court in determining the best interest of the child, including the wishes of the child's parent or parents as to his custody; the wishes of the child as to his custodian; 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; the child's adjustment to his home, school, and community; and the mental and physical health of all individuals involved.

The findings of fact in the Commissioner's report were primarily concerned with summarizing the testimony of the witnesses. In setting forth findings of fact and conclusions of

law pursuant to KRS 403.270 and CR 52.01, the better practice is for the fact-finder to make an express determination regarding which of the conflicting testimony is more credible, and to so state in its findings of fact. Nevertheless, the testimony which the commissioner cited in his findings of fact reveal the factors which he considered in arriving at his conclusion to award primary residential custody to Craig. Consequently, we see no need for further factual findings.

In reviewing a child custody determination, we may disturb the factual findings of the trial court only if they are clearly erroneous. Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986); Largent v. Largent, Ky., 643 S.W.2d 261, 263 (1982); CR 52.01. Findings of fact are clearly erroneous if they are manifestly against the weight of the evidence. Wells v. Wells, Ky, 412 S.W.2d 568, 571 (1967). A trial court's legal decision on modification will not be reversed absent an abuse of discretion. Dudgeon v. Dudgeon, Ky., 458 S.W.2d 159, 161 (1970); Gates v. Gates, Ky., 412 S.W.2d 223, 224 (1967). The trial court is in the best position to evaluate the testimony and weigh the evidence, so an appellate court should not substitute its own opinion for that of the trial court. See Reichle, 719 S.W.2d at 444; Bickel v. Bickel, Ky. 442 S.W.2d 575, 576 (1969). Where the evidence is conflicting, we must defer to the judgment of the trial court unless the factual findings are clearly erroneous or the trial court abused its discretion. Gates, 412 S.W.2d at 224.

The trial court adopted the findings of fact in the commissioner's report without modification. Consequently, we

must accept those findings unless they are clearly erroneous. Based upon the evidence presented to the commissioner, we find that there was substantial evidence supporting the trial court's findings of fact. In particular, the commissioner focused on the testimony raising concerns that Sonja's housekeeping skills were deficient to the point of uncleanliness. Moreover, the commissioner gave great weight to the testimony and report by mental health expert Dana Hardy. In her conclusion recommending that Craig be designated the primary residential custodian, Hardy stated her opinion that Sonja had engaged in conduct intended to alienate Craig from the children, and that Sonja had a tendency to act in a hysterical fashion. Upon considering the character and quality of the evidence and the findings, we cannot say the the trial court's decision to award primary residential custody of the children to Craig was clearly erroneous.

Finally, following the entry of the custody order, Sonja filed a $100.00 supersedeas bond in an attempt to stay the court's judgment. Sonja argues that the trial court improperly set aside her superseadeas bond to stay the trial court's order designating Craig as the primary residential custodian of Seth and Zachary.

"[J]udgments respecting the custody . . . of infants may not be superseded." Franklin v. Franklin, 299 Ky. 426, 185 S.W.2d 696, 697 (1945) (criticized on other grounds in Getty v. Getty, Ky. App. 793 S.W.2d 136, 137-138 (1990)); See also, Casebolt v. Casebolt, 170 Ky. 88, 185 S.W. 510 (1916). While Franklin and Casebolt predate the adoption in January 1976 of §

115 of the Kentucky Constitution guaranteeing at least one appeal to another court as a matter of right, we do not perceive those cases as being in conflict with the constitutional provision. Sonja has exercised her right to appeal. In the meantime, there has been a judicial determination that it was in the best interest of Seth and Zachary that Craig serve as their primary residential custodian. Under the circumstances, Sonja was not entitled to stay the custody order by posting a supersedeas bond. However, nothing prevents a parent from requesting the trial court to stay the order pending appeal by motion to alter, amend or vacate pursuant to CR 59.05. Failing that, upon proper motion and proof, this Court inherently has equitable powers to stay orders of lower courts by maintaining the status quo pursuant to CR 62, CR 65, CR 76.33 and CR 76.36(4). Getty at 138.

For the foregoing reasons the judgment of the Calloway Circuit Court awarding primary residential custody of the parties' children to Donald Craig Fortenbery is affirmed.

JOHNSON, JUDGE, CONCURS.

HUDDLESTON, JUDGE, CONCURS WITH RESULT.

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