

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-002513-MR

HUGH BRENT WELLS

APPELLANT

v. APPEAL FROM CASEY CIRCUIT COURT  
HONORABLE JAMES G. WEDDLE, JUDGE  
ACTION NO. 01-CI-00113

GLEND A S. SINGLETON

APPELLEE

OPINION  
AFFIRMING

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BEFORE: JOHNSON, MINTON, AND TACKETT, JUDGES.

TACKETT, JUDGE: Hugh Brent Wells ("Wells") appeals from an order of the Casey Circuit Court, entered November 6, 2002, which denied his motion to modify custody of the parties' minor child. After thoroughly reviewing the record, the arguments presented by the parties and the applicable law, we affirm.

Wells and Glenda S. Singleton ("Singleton") lived together as an unmarried couple in Casey County, Kentucky, for approximately 13 years. This period of cohabitation produced a

son, Lincoln Brent Wells ("Brent"), who was born on March 5, 1989. After an incident of domestic violence in 2001, Wells and Singleton separated. On June 6, 2001, Singleton filed a petition with the trial court to obtain sole custody of Brent. On August 13, 2001, the Casey Circuit Court entered an order granting sole custody of Brent to Singleton. In its findings of fact, the trial court was troubled by Singleton's testimony concerning Wells' use of alcohol and the potential consequences that it may have on Brent. Moreover, the trial court believed Wells unduly influenced Brent's testimony in an effort to convince the court that it should enter an order granting the parties joint custody of Brent. Wells appealed this judgment. This Court affirmed the trial court's decision to grant sole custody of Brent to Singleton in an unpublished opinion rendered November 27, 2002. Wells v. Singleton, 2001-CA-002242-MR.

On July 9, 2002, Wells filed a motion, with supporting affidavits, to modify the trial court's August 13, 2001 custody order. In his motion, Wells alleged Brent's physical, mental and emotional health had deteriorated while in Singleton's custody. According to Wells' motion, Brent had threatened to harm himself, threatened to run away from Singleton's home, solicited others to murder Singleton and informed others of his unhappiness in Singleton's home.

The trial court conducted hearings on Wells' motion on August 1, 2002 and August 7, 2002. During these hearings, Wells called 14 witnesses to testify concerning his allegations. Dr. David Feinberg, a clinical psychologist, testified that Brent appeared to be angry about his current custody arrangement, that his relationship with Singleton was deteriorating and that Brent desired to live with Wells. However, Dr. Feinberg noted that Brent was diagnosed with attention deficit hyperactivity disorder (ADHD), did not handle anger very well and was naïve. Dr. Feinberg believed that Brent identified himself with Wells, wanted to be just like Wells and, as such, adopted Wells' beliefs. Thus, Dr. Feinberg noted that Brent was easily influenced by his father. The remaining witnesses Wells called to testify, however, provided no information to support Wells' belief that Brent's physical, emotional or mental health was seriously endangered while in Singleton's custody.

Singleton introduced evidence during these hearings that Wells had entered a guilty plea in Jessamine District Court to a charge of driving under the influence of alcohol ("DUI") on May 21, 2002. Singleton also produced evidence that Wells had been arrested on January 13, 2002 in Fayette County and on July 19, 2002 in Casey County for the same offense. Lexington Police Officer Clay Combs testified concerning the January 13, 2002 incident. Officer Combs testified that he observed an unlocked,

unattended vehicle running in a convenience store parking lot near Interstate 75. Officer Combs entered the convenience store to speak with the vehicle's operator about this conduct. Upon entering the convenience store, Officer Combs observed that Wells, who was standing at the front of the store near the checkout counter, immediately went to the back of the store. Officer Combs stated that Wells waited in the back of the store for approximately 15 minutes before returning to the checkout counter. Upon Wells' return to the front of the store, Officer Combs began to suspect that Wells was under the influence of alcohol. Upon questioning, Wells admitted to Officer Combs that he had driven the running vehicle to the convenience store. Officer Combs then conducted several field sobriety tests on Wells, all of which Wells failed. At this point, Officer Combs arrested Wells for DUI. Officer Combs noted that no other individuals were with Wells at the time of his arrest.

Trooper Brandon Curliss of the Kentucky State Police testified concerning the July 19, 2002 incident. Trooper Curliss testified that he stopped Wells' vehicle at a traffic safety checkpoint in Casey County on July 19, 2002. After stopping Wells, Trooper Curliss suspected Wells to be under the influence of alcohol and conducted field sobriety tests. Wells failed all of the field sobriety tests, prompting Trooper Curliss to arrest Wells for DUI. Trooper Curliss testified that

an unidentified woman and male child were passengers in Wells' vehicle at the time of the July 19, 2002 arrest. Trooper Curliss stated that he did not inquire about the identities of the woman or the child, but noted that the male child appeared to be approximately 10 to 12 years of age.

In rebuttal, Wells denied operating a motor vehicle under the influence of alcohol on January 13, 2002 in Fayette County. Wells asserted that a man by the name of David Rodgers was actually driving the vehicle at the time of his January 13, 2002 arrest. Wells did, however, admit to operating a motor vehicle in Casey County on July 19, 2002 after drinking alcohol. Despite this admission, Wells contended that Brent was not the unidentified male child in his vehicle on July 19, 2002. David Rodgers, the unidentified woman or the unidentified male child were not present at the hearings and did not otherwise offer any evidence concerning Wells' DUI arrests.

Finally, the trial court interviewed Brent in chambers. Brent indicated that he preferred to live with Wells. Brent testified that Singleton yells at him every week, smacks and hits him on occasion and told him on one occasion that "I brought you into this world, I can take you out." Brent stated that Singleton drinks alcohol around him and made him deliver two bottles of beer to a neighbor. Brent further informed the trial court that he simply wanted to get away from Singleton.

Brent noted, however, that he has a good relationship with Wells and that Wells has never consumed alcohol around him. Upon further examination by the trial court, Brent acknowledged that he has prevented Wells from operating an all-terrain vehicle after drinking alcohol.

On November 6, 2002, the trial court entered its findings of fact, conclusions of law and order in this matter. In this judgment, the trial court determined that Brent had been "coached" by Wells in an effort to convince the court that Wells should be granted custody. Moreover, the trial court found that Wells was not truthful concerning his DUI arrests. As such, the trial court believed that Wells possessed a serious alcohol problem and that his alcohol abuse posed a serious danger to Brent. After finding that Brent's best interests would not be served by removing Brent from Singleton's custody, the trial court denied Wells' motion to modify custody. This appeal followed.

Wells raises four arguments on appeal. Wells argues that the trial court erred by failing to determine at the hearing whether or not Wells' misconduct affected or would likely affect Brent, erred by considering evidence of his DUI conviction and arrests, erred by "speculating" about his failure to call certain witnesses and erred by failing to find that

Brent's present environment may seriously endanger his physical, mental and emotional health.

In reviewing a child custody determination, the standard of review is whether the factual findings of the trial court are clearly erroneous. Kentucky Rule of Civil Procedure (CR) 52.01; Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986). 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, 570 (1967). Since the trial 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 trial court. Reichle, 719 S.W.2d 442. Ultimately, a trial court's decision regarding custody will not be disturbed absent an abuse of discretion. Cherry v. Cherry, Ky., 634 S.W.2d 423, 425 (1982). Abuse of discretion implies that the trial court's decision is unreasonable or unfair. Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994). In reviewing the decision of the trial court, therefore, the test is not whether the appellate court would have decided it differently, but whether the findings of the trial judge were clearly erroneous or that he abused his discretion. Cherry, 634 S.W.2d 423.

We first address Wells' assertion that the trial court erred by failing to find that Brent's present environment may seriously endanger his physical, mental and emotional health.

Upon review of the record, we observe that Wells did not make a request for more definite findings of fact pursuant to CR 52.04. We are of the belief that the rationale of Cherry, 634 S.W.2d at 425, is dispositive:

The trial judge did not make as in-depth findings of fact as could have been made so as to clearly comply with CR 52.01; however, CR 52.04 provides: 'A final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02.'...

The failure, if there was a failure, on the part of the trial judge to make adequate findings of fact was not brought to his attention as required by CR 52.02 or CR 52.04; consequently, it is waived.... Even though the trial judge may not have made in-depth findings of fact as contemplated by CR 52.01; nevertheless, when the record as a whole is considered, we do not find that the action of the trial judge was clearly erroneous .... (internal citation omitted).

It is well established that if a party fails to request a more definite finding of fact, the issue is deemed waived. Id. As Wells failed to make such a request under CR 52.04, we need not address this argument. See id.

Next, Wells argues that the trial court erred in failing to determine at the time of the hearing whether or not Wells' alcohol-related misconduct adversely affected or was



likely to adversely affect Brent. In addressing this issue, we also consider Wells' contention that the trial court erred by considering evidence of his DUI conviction and arrests.

Kentucky Revised Statute 403.270(3) states, in relevant part, that the "court shall not consider conduct of a proposed custodian that does not affect his relationship to the child." In Krug v. Krug, 647 S.W.2d 790 (1983), the Kentucky Supreme Court provided the standard to be used in considering the misconduct of parties involved in a custody determination. Our Supreme Court held:

[W]hen the misconduct of a proposed custodian is advanced as a factor in the determination of custody, evidence of such misconduct may be heard and received, but before giving any consideration to such misconduct, the court must conclude, in his reasonable discretion, that such misconduct has affected, or is likely to affect, the child adversely. If such a determination is made, the trial court may then consider the potential adverse effect of such misconduct as it related to the best interests of the child.

Id., at 793. Thus, the trial court "is not required to wait until the children have already been harmed before he can give consideration to conduct causing harm." Id.

Here, we believe that the trial court did not err in considering Wells' DUI conviction in Jessamine District Court. This DUI conviction occurred approximately three months prior to Wells filing his motion to modify custody. The record further

showed that Wells had been arrested for DUI in Fayette County in January 2002 and had again been arrested for DUI in Casey County on July 19, 2002. The Casey County DUI charge is highly significant because this arrest occurred not only during the pendency of this action, but placed his passengers, including an unidentified male child, at severe risk of injury. The trial court found, despite Wells' contention that Brent was not the unidentified male child in the vehicle at the time of his Casey County DUI arrest, that Brent was probably a passenger of the vehicle Wells was operating at the time of his arrest.<sup>1</sup> This finding is magnified by Brent's admission that he would not allow Wells to operate an all-terrain vehicle after drinking. As such, we believe that the trial court correctly determined that Wells' behavior posed a potential danger to the child. The "trial court is not precluded from consideration of circumstances where the . . . environment has not yet adversely affected the children but which, in his discretion, will adversely affect them if permitted to continue." Krug, supra at 793. Therefore, Wells' arguments concerning these issues are completely without merit.

Finally, we address Wells' assertions that the trial court erred by "speculating" about his failure to call certain

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<sup>1</sup> Brent was 13 years of age at the time of the Wells' July 19, 2002 arrest for DUI in Casey County.

witnesses to support his testimony concerning the facts underlying his DUI arrests. We reject this argument.

Kentucky law permits the trial court to judge the demeanor and credibility of the witness in any action tried without a jury. CR 52.01. As such, the trial judge is free to make any determinations about the credibility of the witness based upon the evidence presented. Appellate courts must be mindful that the trial court possessed the opportunity to hear and observe the witnesses so as to evaluate their credibility, placing the trial court in the best position to make appropriate findings of fact. Bealart v. Mitchell, Ky. App., 585 S.W.2d 417, 418 (1979).

Having reviewed the record, we cannot say that the trial court erred in finding Wells' testimony concerning his DUI arrests to have little credibility. The trial court did not reach this conclusion by "speculating" about why Wells did not call certain witnesses to support his testimony. Rather, the trial court merely determined that Wells' testimony concerning his DUI arrests was not credible based upon the weight of the evidence of record. Wells could have easily supported his testimony concerning the Fayette County DUI arrest with testimony from David Rodgers. Moreover, other witnesses could have affirmed Wells' contention that Brent was not present during his DUI arrest in Casey County. Instead, Wells

introduced his own self-serving testimony which the court deemed to have little credibility when compared to the testimony of the two arresting police officers. Accordingly, we find no error.

The judgment of the Casey Circuit Court is affirmed.

ALL CONCUR.

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