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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001173-MR

J.A.H. APPELLANT

v.

APPEAL FROM PULASKI FAMILY COURT
HONORABLE DEBRA HEMBREE LAMBERT, JUDGE
ACTION NO. 01-CI-00254

M.L.H. APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; KNOPF,[1] SENIOR JUDGE; MILLER,[2] SPECIAL JUDGE.

COMBS, CHIEF JUDGE: A father, J.A.H., appeals from an order of the Pulaski Family Court denying his request for a change of custody for his minor child, A.H., after a suicide attempt by the child's mother, M.L.H. He argues that the family court erred by failing to change custody. He believes that the court incorrectly relied on the medical opinion of the mother's

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Retired Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

psychiatrist that she was able to care for the child safely. He also cites incomplete findings of fact as a basis for error. After our review, we agree. Accordingly, we vacate and remand.

The parents were married in June 2000, and A.H., a boy, was born March 1, 2001. The mother had one older child, a daughter, from a previous relationship; the daughter resided primarily with her maternal aunt and uncle. After her second child was born, M.L.H. began suffering from epileptic seizures. That second child is A.H., a little boy, who is the subject of these proceedings. The parties separated when A.H. was one week old; they agreed to joint custody with the mother to be the primary residential custodian. A dissolution decree entered on June 27, 2001, formalized their agreement as to custody. A.H. continued to reside with his mother and had regular visitation with his father.

After the dissolution of this marriage, M.L.H. re-married and divorced twice within the next three years. Her lifestyle and experiences were traumatic in many respects. She accused her second husband of sexually assaulting her while they were in the process of divorcing. Her third husband was suspected of stealing her anti-seizure medication and of breaking into her home and punching her in the eye. In addition, M.L.H. was jailed for a short time and pled guilty to falsifying a police report after her home was burglarized.

Shortly after a hysterectomy (performed in April 2004), she was raped by an acquaintance. By June 2004, three years since her divorce from J.A.H., M.L.H. was planning to marry again -- for the fourth time. Her fiancé had moved in with her and A.H., who was now about three years of age. M.L.H. was supporting the family of three by utilizing A.H.'s social security and his child support payments from J.A.H. After her request for her own disability was denied, M.L.H. attempted suicide by a drug overdose. She was hospitalized in a psychiatric unit from June 10-17, 2004.

After learning of his ex-wife's hospitalization, J.A.H. filed a petition on June 16, 2004, requesting a change of custody, seeking to have himself designated as primary custodian with M.L.H. to receive supervised visitation. He alleged that her suicide attempt and turbulent domestic history were endangering the welfare of A.H. At a hearing on July 23, 2004, the family court granted J.A.H. temporary custody of his son while the change of custody petition was pending.

Depositions were taken from M.L.H., her aunt, and Dr. P.D. Patel, a psychiatrist who had been treating her for more than a year. In October 2004, M.L.H. completed a parenting class provided by Adanta Group Clinical Services. Both parties submitted post-hearing memos in November 2004. On February 10, 2005, the family court entered an order denying the request for

change of custody. J.A.H. filed his motion to alter, amend, or vacate, which was denied on May 4, 2005. This appeal followed. M.L.H. did not file an appellee brief.

J.A.H. argues that the family court abused its discretion by failing to consider the character and lifestyle of the mother before determining whether a change of custody was in the best interests of A.H. KRS[3] 403.340(3) does not allow a court to modify child custody:

> . . .unless after hearing it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of 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. When determining if a change has occurred and whether a modification of custody is in the best interests of the child, the court shall consider the following:
> (a) Whether the custodian agrees to the modification;
> (b) Whether the child has been integrated into the family of the petitioner with consent of the custodian;
> (c) The factors set forth in KRS 403.270(2) to determine the best interests of the child;
> (d) Whether the child's present environment endangers seriously his physical, mental, moral, or emotional health;
> (e) Whether the harm likely to be caused by a change of environment is outweighed by its advantages to him; and
> (f) Whether the custodian has placed the child with a de facto custodian.

[3] Kentucky Revised Statutes.

The father contends that M.L.H.'s relationships with abusive men, her serious medical conditions, and the attempted suicide satisfy KRS 403.340(3)(d) so as to warrant modification of custody.

M.L.H. has been married twice since her divorce from J.A.H. At the time of her overdose, she was planning to marry her fourth husband. She alleged that her second ex-husband sexually assaulted her while they were in the process of divorcing and also that she was raped by an acquaintance in April 2004. She suffers from epileptic seizures, diabetes, and depression. At the time of the filing of the petition for change of custody, M.L.H. planned to move into a trailer with her fiancé and A.H. J.A.H. expressed concern that she and his son would be left alone while the fiancé was at work. Without directing us to the record, he contends that A.H. has been present when his mother suffered seizures. However, there is no dispute that A.H. has never been physically harmed while in the care of his mother.

The Kentucky Supreme Court has addressed the issue of allowing a change of custody when a child's custodian places him in an environment where he may be subjected to future harm. In Krug v. Krug, 647 S.W.2d 790, 793 (Ky. 1983), it observed:

> A trial judge has a broad discretion in determining what is in the best interests of children when he makes a determination as to custody. In many instances he will be able

> to draw upon his own common sense, his experience in life, and the common experience of mankind and be able to reach a reasoned judgment concerning the likelihood that certain conduct or environment will adversely affect children. It does not take a child psychologist or a social worker to recognize that exposure of children to neglect or abuse in many forms is likely to affect them adversely. Many kinds of neglect or abuse or exposure to unwholesome environment speak for themselves, and the proof of the neglect or abuse or exposure is in itself sufficient to permit a conclusion that its continuation would adversely affect children.
>
> We also think the trial court is not precluded from consideration of circumstances where the neglect, abuse, or environment has not yet adversely affected the children **but which**, in his discretion, **will adversely affect them if permitted to continue**. (Emphasis added).

J.A.H. relies on Krug to support his contention that the family court erred in denying his request for custody modification. We agree.

A.H. was not present during his mother's suicide attempt, nor was he with her at the time that she was assaulted. However, the court failed to address the incidents at all as to how their possible repetition might endanger the physical, mental, moral, or emotional health of the child. There was no inquiry into the likelihood that the mother may have become involved in a pattern of behavior that would adversely affect A.H.

Dr. Patel testified by deposition that M.L.H.'s seizure condition is under control and that she had been compliant with her psychiatric treatment since she became his patient in 2003. Although she had attempted suicide, she did seek medical help after taking the drug overdose. Based on the treatment that she received while hospitalized and her follow-up care, Dr. Patel initially expressed an opinion that M.L.H. could safely care for a young child -- as long as she continued to take her medications properly.

J.A.H., however, argues that the family court erred in relying on Dr. Patel's opinion after it learned that his opinion was based on an inadequate and false patient history. J.A.H. points out that Dr. Patel had not been aware of a previous psychiatric hospitalization. In addition, Dr. Patel was not informed about the details of her tumultuous personal life.

In her deposition, M.L.H. admitted that she was briefly hospitalized for depression some seven years earlier when she was pregnant with her first child. She denied that she had ever thought about or attempted suicide prior to her June 2004 overdose. Based on a discrepancy in the urine screen performed at the hospital, J.A.H. claims that M.L.H. lied to her doctor about the medications on which she overdosed. M.A.H. told the hospital that she overdosed on Klonopin and Amitryptylines; Dr. Patel stated that her urine screen was

negative for benzodiazepines (which would include Klonopin). Her Dilantin levels were elevated. J.A.H. claims that this discrepancy is evidence that M.L.H. lied to her treating physician about the method she used to attempt suicide.

While the basis of this contradiction has not been resolved by follow-up testimony, it is nonetheless an additional gap in the knowledge on which Dr. Patel based his original opinion of M.L.H.'s fitness for custody. (Page 12 of his deposition).

> Okay, I guess going back down on my statement . . . . If somebody steals your medication and you have a seizure condition, then yes you are predisposing yourself to having seizures and endangering your life and you may not be able to provide for yourself or somebody else who's under your care.

As to the reliability of a medical opinion founded upon a faulty history, the Supreme Court of Kentucky has aptly observed:

> Medical opinion predicated upon . . . erroneous or deficient information that is completely unsupported by any other credible evidence can never, in our view, be reasonably probable.

Cepero v. Fabricated Metal Corporation, 132 S.W.3d 839, 842 (Ky. 2004).

The family court failed to address the discrepancy in Dr. Patel's opinion. It also omitted any consideration or evaluation of M.L.H.'s lifestyle as to its potential (or lack of likelihood) to have an adverse affect upon A.H. Its principal

findings relevant to this appeal contain the following observations:

> 5. In the instant case, the Petitioner had been the primary caregiver for the child during his entire three years of life until a voluntary temporary relinquishment of that role during the pendency of Respondent's motion to modify custody. After Respondent was designated as primary custodian, he relegated the duties of day to day caregiving to his grandparents (the child's great grandparent) for a significant period of time.
>
> 6. At a point in time when the child was not being cared for by the Petitioner, she attempted suicide then sought medical treatment and follow up care. Petitioner's treating mental health professional, **Dr. Patel testified that he saw no problem** with Petitioner being an appropriate caregiver for a three year old child.

Findings of Fact, Conclusions of Law, and Order, February 10, 2005, p. 2. (Emphasis added.)

J.A.H. contends that the family court erred by entering incomplete findings of fact. We agree. CR[4] 52.01 provides as follows:

> In all actions tried upon the facts without a jury or with an advisory jury, the court **shall find the facts specifically and state separately its conclusions of law thereon** and render an appropriate judgment; and in granting or refusing temporary injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review except as provided in

[4] Kentucky Rules of Civil Procedure.

> Rule 52.04. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. . . . (Emphasis added).

The family court requested submission of findings, and the parties complied. J.A.H. proposed numerous factual findings, which included information about M.L.H.'s mental and physical health, her suicide attempt, her multiple marriages, the physical and sexual abuse by the men in her life, the fact that Dr. Patel was not aware of all of these circumstances, and an allegation that her seizures were not under control. Nonetheless, the family court summarily concluded that "the Movant has failed to meet the burden of proof required for a modification of the Court's prior custody order."

We hold that the family court clearly erred in omitting to address and to evaluate the serious and potentially dangerous impact of the problems set forth in J.A.H.'s proposed findings. The incomplete medical history on which Dr. Patel relied is yet another compelling reason that this case must be re-visited and reconsidered by the family court.

Accordingly, we vacate this matter and remand it to the family court for entry of an order re-evaluating this case and specifically setting forth the findings upon which it bases its conclusion.

We vacate the order of the Pulaski Family Court and remand for entry of an order consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Paul F. Henderson
Somerset, Kentucky

NO APPELLEE BRIEF