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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001877-ME

T.L., MOTHER — APPELLANT

v.

APPEAL FROM HARDIN FAMILY COURT
HONORABLE MATTHEW B. HALL, JUDGE
ACTION NO. 03-CI-00985

T.M., FATHER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; ACREE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: T. L. (Mother) appeals from an order of the Hardin Family Court awarding sole custody of her minor son to T.M. (Father) following his motion to modify custody. For the reasons stated herein, we affirm.

Mother and Father were never married but had one child, "the child," born of the relationship on April 6, 1997. Subsequently, on June 9, 2003, Mother

filed a petition for custody of the child. Eventually, the family court awarded joint custody of the child to both parents and designated Mother as the primary custodian. Father was granted visitation pursuant to Hardin County's Local Rules.

On September 13, 2006, Father filed a modification of custody motion for the designation of himself as the primary custodial parent of the child. On September 20, 2006, a temporary order was entered in which Father was awarded primary physical custody of the child pending the resolution of Father's motion to designate himself as the child's primary custodial parent. On June 13, 2007, the family court conducted a hearing.

During the hearing, Father testified that Mother had been deceptive regarding the child's location and had interfered with his visitation rights. According to Father's testimony, after Mother and the child relocated to Caldwell, New Jersey, she returned the child to Elizabethtown so that he could attend a friend's birthday party. Pursuant to the court's order, Father was entitled to visitation that weekend but was not notified that the child had returned to Elizabethtown. After learning of his son's presence in town, he attempted but was denied visitation with the child by the child's maternal grandmother. Further, according to Father's testimony, although the child was present in Elizabethtown from approximately August 11 through 21, he was denied any visitation with his son throughout the entire period.

During Father's testimony, certified records of the Caldwell Police Department were admitted in their entirety. Some of the documents indicated that

Mother and D.D., her live-in boyfriend (boyfriend), had been involved in incidents of domestic violence. During one incident, her boyfriend was arrested for assaulting Mother, and Mother was arrested for acts of violence in another incident. Further, police records indicate that Mother's three children, including the child, were present during one of the domestic altercations based on a statement in the record that an officer had transported the children from the residence following the altercation.

Subsequently, during the hearing, post-incident police photographs were admitted into evidence which depicted bruising on Mother's neck, on the hip region of her body, and on her arm. Father testified that Mother's parents traveled to Caldwell and retrieved her three children following these incidents. Father further testified that Mother's father returned the child but not his other siblings to New Jersey immediately after Father filed a motion for temporary custody modification. After the family court awarded temporary custody of the child to Father, the child was returned to Kentucky.

Father further testified that Mother relocated to Elizabethtown and was soon followed by her boyfriend where they resumed their relationship. However, he testified that Mother filed an emergency protective order (EPO) against her boyfriend on December 1, 2006. Mother's EPO petition was then introduced wherein she alleged that her boyfriend had struck her on the right side of her face creating a red mark and causing numbness. Additionally, in her EPO petition, Mother alleged that her boyfriend told her that he was going to "unleash

the beast" against her and hers. This petition was later dismissed at Mother's request.

Father further testified that the child was behind academically when he gained temporary custody of him in late September 2006. According to Father's testimony, after obtaining a tutor, the child quickly caught up with his classmates and received all A's in his classes except for one B. Father testified that he had taken the child off medication for Attention-Deficit Hyperactivity Disorder (ADHD) and that the child had responded well without the medication. He testified that the child enjoys his new neighborhood and interacts well with Father's fiancé and her daughter.

According to Mother's testimony, no acts of domestic violence occurred in New Jersey. She testified that the first alleged incident of domestic violence occurred when a neighbor called police to her residence after she and her boyfriend were having a discussion. She testified that she and her boyfriend were taken to the police station where she informed police that her boyfriend had assaulted her. However, she testified that her boyfriend had in fact never assaulted her; rather, she had made the false statement under duress after she was threatened with the removal of her children. Further, when asked to explain her injuries, she testified that the bruise on her neck was a hickey, the bruise on her hip was from falling over furniture inside her apartment, and the bruise on her arm was caused by the Caldwell Police.

With respect to Mother's EPO petition, Mother testified that she obtained the dismissal of the EPO petition about two weeks after it was filed. She then testified that she resumed living with her boyfriend in their apartment after the petition was dismissed. Mother also testified about her family's support with raising her children and that the child and his siblings get along well. She also testified that her romantic relationship with her boyfriend had been permanently over since late December 2006.

Outside the presence of the parties, the child testified to the family court that his Mother and Father did not get along well. He further testified that his best friend lived in his Father's neighborhood but that he did not have many friends when he stayed with his Mother. Finally, he testified that he wanted to live with his Father because he attended school in the district where his Father resided and that he had more friends in his Father's neighborhood. Following the hearing, the family court issued an order, entered June 18, 2007, granting Father sole custody of the child but granting Mother visitation rights. This appeal followed.

On appellate review of a child custody determination, a family court's findings of fact shall not be set aside unless the factual findings are clearly erroneous. *Eviston v. Eviston*, 507 S.W.2d 153 (Ky. 1974). The family court's findings of fact are not clearly erroneous if supported by substantial evidence of probative value. *Black Motor Co. v. Greene,* 385 S .W.2d 954, 956 (Ky. 1964). Substantial evidence is evidence that has sufficient probative value to induce

conviction in the mind of a reasonable person when taken alone or in light of all the evidence. *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky.App. 2005).

A family court has broad discretion when determining matters pertaining to custody of children. *Futrell v. Futrell*, 346 S.W.2d 39 (Ky. 1961). A family court's custody award will not be disturbed unless the decision constitutes an abuse of discretion. *Allen v. Devine*, 178 S.W.3d 517, 524 (Ky.App. 2005). Discretion is only abused when the family court's decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004).

Finally, "[an appellate court] must bear in mind that in reviewing the decision of a [family] court the test is not whether [it] would have decided it differently, but whether the findings of the family court were clearly erroneous or that he abused his discretion." *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). Mere doubts regarding the correctness of the family court's decision are not sufficient grounds for reversal. *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967).

Mother first contends that the family court erred when it applied the incorrect statute and standard to the modification of the parties' custody of their child. She contends that the family court relied on Kentucky Revised Statutes (KRS) 403.270 in granting Father's modification motion but argues that KRS 403.340(3) should have been relied on in deciding whether to modify custody. Therefore, Mother contends that the family court failed to place the burden on Father to prove that there was a change in circumstances to warrant the change of

custody. Consequently, Mother contends that the application of the wrong statute warrants a reversal in this case.

While Mother correctly contends that KRS 403.340(3) is specifically applicable to custody modifications, the family court did not misapply the applicable custody modification statutory provisions merely because its order listed KRS 403.270 as the "controlling statute." Although KRS 403.270 and 403.340(3) primarily address different custody proceedings, initial custody decrees and modifications respectively, the two statutes are intimately intertwined with one another. Therefore, when both statutes are cited in an order as here, the family court's findings of fact and application of law to the facts are reviewed for abuse of discretion.

As a background for the two statutes in question, prior to issuing an initial custody decree, a family court must decide what custodial arrangement will be in the best interest of the child pursuant to KRS 403.270(2). *London v. Collins*, 242 S.W.3d 351, 356 (Ky.App. 2007). Under KRS 403.270(2), the family court must consider nine specific factors before determining what is in the best interest of the child. *Id.* "Once these proceedings are concluded and a 'custody decree' is entered, KRS 403.340 allows for modification only under very limited circumstances." *Id.* However, in making its determination regarding modification, the family court must consider the child's best interest as provided in KRS 403.270(2). KRS 403.340(3)(c).

In its custody modification order, the family court highlighted testimony and evidence regarding the environment in which the child lived during his time with his Mother. The family court noted that the child had been used as a pawn between his parents with his Mother being the primary manipulator. The family court further noted that Mother had moved the child out of Hardin County, Kentucky, on two previous occasions and failed to notify Father of the relocations.

The family court further stated:

> In August, 2006 the Petitioner [Mother] then filed a motion for contempt against the Respondent [Father] and the Respondent countered with a motion to further define his visitation rights. The Petitioner had moved from Ohio County, Kentucky to New Jersey with a boyfriend and had not told the Respondent of the move, nor the information concerning the boyfriend who was residing with the Petitioner and her minor child in New Jersey. The Respondent filed a motion to allow him parenting time with the minor child prior to the move to New Jersey, which had already occurred. In fact, the Petitioner had already moved to New Jersey, had a Domestic Violence occurrence in New Jersey with [her boyfriend], asked the petitioner's parent to retrieve the children from New Jersey and return them to Kentucky.
>
> A second incident of domestic violence took place in New Jersey where [her boyfriend] took a petition out on the Petitioner and the Petitioner was hospitalized. Apparently the child or children were in the home when the domestic violence took place between the Petitioner and [her boyfriend]. Based upon the above occurrences in New Jersey, the Respondent filed for and was granted temporary custody of [the child]. The Petitioner then moved to Kentucky and among other things had a domestic violence EPO issued against [her boyfriend], who followed her here to Kentucky and they had resided together in Kentucky. This EPO was dropped some ten (10) days later. The Petitioner is now pregnant with [her

> boyfriend's] child, but states that he is out of her life for good now.

The family court further noted that it had heard "hours of testimony from the [Father] and [Mother] concerning this matter and has heard the testimony from several other witnesses, including the child's school counselor, teacher, reading specialist and maternal grandmother as well as the minor child." Additionally, the family court noted that it was apparent "that [Mother] has used the legal process and any means at her disposal to thwart the [Father's] visitation and physical custody of [the child]." Based on the above mentioned evidence, the family court decided that it was in the child's best interest that Father be awarded sole custody.

After reviewing the record, we conclude that the family court's findings of fact were not clearly erroneous. There was substantial evidence in the record consisting of testimony and documentary evidence from the many witnesses that supported the factual findings of the family court. Additionally, the family court's decision regarding the child's custody modification did not constitute an abuse of discretion. Stated another way, the family court's decision was not arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

The family court's decision was based, in part, on: Mother's unannounced decision to relocate the child out of this Commonwealth; Mother's decision to have the child's environment be a place where repeated acts of domestic violence occurred; Mother's decision to thwart Father's visitation of the

child; and the testimony from the child's teacher, counselor, and the child himself. Based on this evidence, the family court obviously found that circumstances had changed because of the detrimental circumstances surrounding the child when he lived with his Mother.

Mother next contends that the family court erred when it failed to impose the burden of proof to demonstrate a change of circumstances upon the moving party, Father. Specifically, Mother cites *Quisenberry v. Quisenberry*, 785 S.W.2d 485 (Ky. 1990) and *Wilcher v. Wilcher*, 566 S.W.2d 173 (Ky.App. 1978), wherein the *Wilcher* Court held that the moving party had the burden of proving a substantial and continuing change of circumstances resulting in the terms of the initial custody decree having become unconscionable. *Id*. at 175. Additionally, Mother contends that there was insufficient proof that the child was present during any domestic violence or that he personally observed the domestic violence or that he was adversely affected by the domestic violence. We disagree.

The strict standards for modification in the pre-2001 version of the modification statute, which was the law when *Quisenberry* and *Wilcher* were decided, were designed to inhibit further litigation regarding child custody. *Fowler v. Sowers*, 151 S.W.3d 357, 359 (Ky.App. 2004). "In enacting the amendments, the General Assembly not only relaxed the standards for modification of custody, but it also expanded upon the factors to be considered when modification is requested." *Id*. The amended statute directs the family court to award a change of custody based on the factors enumerated in KRS 403.340 and

KRS 403.270(2). *Id*. Accordingly, when the family court applied the applicable statutes to its factual findings, it properly applied the modification statute and did not fail to properly assign the burden of proof.

Additionally, the Mother's own testimony placed her children, including the child, in the apartment at the time her boyfriend was arrested for assaulting her. During her testimony, Mother testified that neighbors called police to her apartment when her daughter screamed after her two brothers had agitated her. Following the arrival of police, her boyfriend was arrested and Mother gave incriminating statements against her boyfriend, and photographs depicting numerous injuries were taken of Mother. Thus, there was sufficient evidence regarding the child's presence in the apartment at the time that an act of domestic violence occurred.

Mother next contends that the family court abused its discretion in its application of the statutory standards of KRS 403.340 and that the family court erred when it failed to make adequate findings of fact and conclusions of law to support its recommendation as required by KRS 403.340 and 403.270. We disagree.

If we were to simply ignore the family court's other findings, its finding that the child was placed in an environment where there was domestic violence in itself could constitute a ground for a change of circumstances. KRS 403.340(4)(d). Additionally, when this violent environment is removed from the location in which the child had previously lived, the modification statute permits a

finding of a change of circumstances. *Fowler v. Sowers*, 151 S.W.3d 357, 359 (Ky.App. 2004). Therefore, we conclude that the findings of facts and conclusions of law of the family court were sufficient for appellate review.

Mother next contends that the family court erred when it improperly modified the parents' award of custody from joint to sole custody to Father. Mother contends that it was not in the child's best interest to award sole custody to Father because the award terminated her previous ability to have input in decisions regarding the child's education and medical care. We disagree.

As previously stated, a family court's decision regarding child custody cannot be disturbed absent an abuse of discretion. *Allen v. Devine*, 178 S.W.3d 517, 524 (Ky.App. 2005). Discretion is only abused when a family court's child custody decision is arbitrary or capricious and constitutes an unreasonable and unfair decision. *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994).

While there was lengthy testimony regarding the child's parenting, it was the family court's role to weigh the testimony of all the witnesses and decide the appropriate custody arrangement. Although Mother's contention regarding her son's custody is heartfelt, it is clear that the family court decided that the constant use of the child as a "pawn" and the continued inability of the parents to work together or to communicate civilly regarding parenting decisions were detrimental and necessitated a sole custody award. Because these findings were supported by substantial evidence and were not an abuse of discretion, we cannot substitute our judgment for the family court and, thus, we will not disturb its decision.

Mother next contends that the family court erred when it permitted the introduction of police records. Mother contends that these records constituted inadmissible hearsay and are specifically exempted from the public records exception to the hearsay rule under Kentucky Rules of Evidence (KRE) 803(8)(A). Consequently, Mother contends that the blanket introduction of police records from the Caldwell Police Department by the family court was erroneous.

KRE 803(8)(A) provides that "[i]nvestigative reports by police and other law enforcement personnel" are not within the public records exception to the hearsay rule. Accordingly, a blanket admission of police reports without regard to the contents contained in the records is an improper evidentiary practice.[1] However, despite the fact that police reports do not fall within the public records exception, KRE Rule 801A(a)(1) permits the admission of a prior inconsistent statement of a witness if the witness' trial testimony is inconsistent with the prior out-of-court admission. *Gray v. Commonwealth*, 203 S.W.3d 679, 686-687 (Ky. 2006).

During the hearing, Mother testified that neither she nor her boyfriend had committed domestic violence while they were living in New Jersey. However, in a police report, an officer wrote Mother's statements to him following her boyfriend's arrest, and these statements indicate that she was physically attacked

[1] We also note that the entries in a public record are not admissible in their entirety simply because they are contained in a document which qualifies as a public record. *Prater v. Cabinet for Human Resources*, 954 S.W.2d 954, 958 (Ky. 1997). Therefore, "[i]f a particular entry in the record would be inadmissible for another reason, it does not become admissible just because it is included in a . . . public record." *Id*.

by her boyfriend. Clearly, her prior statements to police were inconsistent with her hearing testimony that her boyfriend did not commit domestic violence against her in New Jersey. Moreover, there were photographs of Mother's injuries taken by Caldwell Police that were consistent with domestic violence. These photographs were admissible because the requirements of KRE 403 and 901 were satisfied. *Gorman v. Hunt*, 19 S.W.3d 662, 668-669 (Ky. 2000).

From the admissible evidence, there was sufficient proof for the family court to find that Mother had placed the child in an environment where domestic violence had occurred. Moreover, this violent environment continued as evidenced by Mother's EPO filed in Hardin County, Kentucky. Even after she was assaulted in Hardin County, Mother decided to obtain the dismissal of the EPO and to resume living with her boyfriend. Based on this admissible evidence, regardless of the admission of any inadmissible evidence, we conclude that any error was harmless.

For the foregoing reasons, the order of the Hardin Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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