

RENDERED: OCTOBER 7, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000958-ME

TAMARA HOBGOOD (NOW
NELSON)

APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE SUSAN WESLEY MCCLURE, JUDGE
ACTION NO. 08-CI-00424

MELECIA HOLLIE
TITUS HOLLIE

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON AND NICKELL, JUDGES; SHAKE,¹ SENIOR JUDGE.

¹ Senior Judge Ann O'Malley Shake completed this opinion prior to the expiration of her term of Senior Judge service on September 30, 2011. Release of this opinion was delayed by administrative handling.

SHAKE, SENIOR JUDGE: Tamara Hobgood (Hobgood) appeals from a Hopkins Family Court Decree of Custody with Orders of Visitation, in which the family court awarded primary residential custody of Nahari Harris (Nahari), Hobgood's biological daughter, to Melicia and Titus Hollie (the Hollies), Hobgood's aunt and uncle. Hobgood was awarded visitation. On appeal, Hobgood claims that: (1) the trial court's findings concerning custody lacked specificity; (2) the trial court erroneously characterized the custody evaluator's testimony; (3) the trial court violated Hobgood's due process rights by placing a time limit on the custody hearing; and (4) the court abused its discretion by designating the Hollies as Nahari's primary residential custodians. Following a careful review of the record, briefs, and applicable law, we affirm the Hopkins Family Court.

I. Factual Background

On September 24, 2006, Hobgood gave birth to her daughter, Nahari. Over the next several years, Hobgood identified several men as Nahari's father. Most recently, Hobgood claimed that her current husband, E'toyi Nelson (Nelson), was Nahari's father. Following testing orders from the Hopkins Family Court, DNA testing concluded that Nelson is not Nahari's father.

In 2007, Hobgood became employed but did not have reliable transportation. Her aunt and uncle, the Hollies, agreed to take Hobgood to and

from work and babysit Nahari. The Hollies continued to babysit Nahari until July 2007, when Hobgood moved to Hopkinsville without Nahari. Hobgood claimed that her lack of transportation prevented her from taking her daughter. The Hollies agreed to take care of Nahari.

From July 2007 through June 2008, the Hollies provided Nahari's food, shelter, clothing, toys, child-care expenses, and medical care. Hobgood testified that, during this time, she sent approximately \$70 every few months for Nahari's care. She also claimed that she sent money to her mother as needed. Hobgood claimed that she only sent money when her mother told her that it was needed. The Hollies acknowledged receiving approximately \$20 from Hobgood's mother.

Hobgood occasionally visited Nahari and kept her daughter overnight approximately eight to ten times. Hobgood's mother and sister also visited Nahari and occasionally kept her on overnight visits.

Although Titus Hollie was convicted of a felony in 1993, it is undisputed that he has changed his life. He owns and operates a car-detailing business. The Hollies are active members of their church and community. The Hollies, who do not have children, have mentored and cared for several young family members, including Hobgood.

On May 23, 2008, the Hollies petitioned the Hopkins Family Court to be declared *de facto* custodians of Nahari and to be awarded permanent custody. The petition was filed after Hobgood moved to Little Rock, Arkansas, without Nahari. Hobgood contested the *de facto* custodial designation.

During a *de facto* custodial hearing, Hobgood claimed that she allowed the Hollies to take care of her daughter but did not expect them to “steal her.” Nelson accompanied Hobgood to the hearing. He testified that he believed himself to be Nahari’s father. Hobgood and Nelson both testified that they were in the process of filling out paperwork for DNA paternity testing. Hobgood claimed that she and Nelson wanted Nahari to visit their home and were in the process of preparing a bedroom and bathroom for her. They both testified that they were steadily employed and could provide for Nahari.

The Hollies testified that they were concerned about Hobgood’s reliability. They claimed that she infrequently called to check on Nahari and did not provide financial support. Titus testified that he doubted Hobgood and Nelson’s paternity claim in light of the men previously named as Nahari’s father. The Hollies also claimed that Hobgood was previously diagnosed with bipolar disorder. Hobgood admitted that she had been previously diagnosed with bipolar

disorder and was no longer taking medication to treat the condition. She claimed that she “out-grew” the disorder.

Following the hearing, the Family Court designated the Hollies as *de-facto* custodians and awarded temporary joint custody to the Hollies. Hobgood was awarded visitation to take place on alternate weekends in Kentucky. The trial court clearly stated that its decision, in part, was based upon Hobgood’s failure to show that she was mentally and emotionally stable to care for Nahari. The trial court also ordered DNA testing to determine whether Nelson was Nahari’s father.

During a final hearing to determine permanent custody, the trial court heard testimony from Hobgood’s mother, Hobgood’s sister, Titus, Nelson, and Hobgood. The court also heard testimony from Dr. Roger Laird, the custody evaluator appointed by the court.

The trial court heard much of the same testimony in the permanency hearing as was presented in the *de facto* custodial hearing with a few major differences. First, DNA testing concluded that Nelson was not Nahari’s father. Second, Hobgood and Nelson thoroughly described her lifestyle in Little Rock, claiming to own their own home and claiming to earn a substantial family income. During the pendency of this action, they claimed to send Nahari large amounts of

clothing and shoes. They claimed to be active in their community and respected within their church.

Dr. Laird testified that he found Hobgood to be a “fit parent.”

However, he admitted that his evaluation focused on Hobgood’s “fitness” rather than determining whether Hobgood and the Hollies were equally fit.

The trial court asked whether the parties had any pending court dates. Each person claimed they did not. Also, the parties submitted to a drug urinalysis screening. At the conclusion of the hearing, the trial court informed the parties that the court had received information that Hobgood had been arrested the night before the hearing. Hobgood immediately responded that she had been cited for speeding but did not have a court date. The court responded that a court date had been set for Hobgood on the charge of driving on a suspended license. The court also stated that Hobgood tested positive for barbiturates and marijuana. Hobgood claimed that she was lawfully using prescription pain medication for an injury.

In an order, entered on April 20, 2010, the court awarded joint custody of Nahari to the Hollies and Hobgood. The Hollies were named Nahari’s primary residential custodians. Hobgood was granted time-sharing.

This appeal followed.

II. Claims

A. Specific Findings of Fact

When making custody determinations, KRS 403.270(2) instructs trial courts to consider the following factors when determining the best interests of the child:

- (a) The wishes of the child's parent or parents, and any de facto custodian 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 interest;
- (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.

In addition, the court must make specific findings regarding the above factors. Kentucky Rules of Civil Procedure (CR) 52.04; *McFarland v. McFarland*, 804 S.W.2d 17, 18 (Ky. App. 1991). Hobgood claims that the court's order lacked specificity and lacked true consideration of the KRS 403.270(2) factors. We disagree.

The family court specifically listed each factor named in KRS 403.270(2). The court then named specific facts, or noted the absence of facts, related to each individual factor. The following excerpt from the order is an example of the court's detailed analysis:

e. KRS 403.270(2)(e): The Court has considered the mental and physical health of all individuals involved. There was no evidence to indicate that any of the parties have a physical impairment or disability that would interfere with his or her physical ability to care for the child. However, there has been evidence to suggest that [Hobgood] has a history of mental or emotional illness. During a previous hearing, she testified that she has been diagnosed with a bi-polar disorder and there was evidence to indicate that she has been hospitalized in a mental care facility.

The court's detailed account of the evidence was sufficient.

Hobgood's claim that the order lacked specificity is without merit.

B. Dr. Laird's Testimony

Next, Hobgood claims that the family court mischaracterized Dr. Laird's testimony. Hobgood's brief states, "The Court found [Dr. Laird] to be reliable, however, the Court noted that the testimony was not reliable. The Court stated, 'Dr. Laird may be confused about his parameters in the evaluation.'" A review of the trial court's order does not support Hobgood's interpretation. In regard to Dr. Laird's testimony, the court provided:

The Court finds the testimony of Dr. Laird to be reliable; however, it is noted that he stated that he "may have been confused" about his parameters in the evaluation. His report speaks primarily to [Hobgood's] "fitness," and his testimony indicates that he believed he was evaluating whether [Hobgood] was a "fit" parent, as opposed to an understanding that the [Hollies] had been determined on equal footing with [Hobgood] in the custody determination.

The order also noted that Titus misunderstood several questions asked by Dr. Laird. The family court determined that Dr. Laird's confusion concerning Nahari's current custodial status and Titus's confusion diminished the reliability of Dr. Laird's evaluation.

Although the court must consider a custodial evaluator's testimony as evidence, the court has no duty to rely on the testimony. *See Reichle v. Reichle*, 719 S.W.2d 442, 445 (Ky. 1986). As the finder of fact, the family court is vested with the responsibility of weighing and evaluating the credibility of witnesses and

the reliability of evidence. *B.C. v. B.T.*, 182 S.W.3d 213, 219 (Ky. App. 2005).

An appellate court will not disturb a family court's characterization of testimony absent an abuse of discretion. *Id.* The trial court's interpretation and utilization of Dr. Laird's testimony was reasonable and based upon specific facts which had been developed during the hearing.

C. Due Process Claim

Third, Hobgood claims that her due process rights were violated when the trial court set a time limit for the hearing. Although Hobgood claims that she did not have sufficient opportunity to call additional witnesses, she does not identify any prejudice that resulted from the time limit. Counsel for both parties were present when the date of the hearing and time limit were assigned. The hearing lasted almost twice the allotted time. Following Nelson's testimony, the trial court stated that the time allotment had been exceeded. The Court noted that much of the testimony had been irrelevant and duplicative. Neither party objected.

Absent manifest injustice, an appellate court will not review an issue that has not been precisely preserved. *Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990). The trial court must be given sufficient opportunity to rule on an issue before it is appealed. *Id.* There is no showing that manifest injustice has resulted from the time limit.

D. Abuse of Discretion

Finally, Hobgood claims that the family court's award of custody to the Hollies constituted an abuse of discretion and was not based upon the evidence. As previously stated, appellate courts must review a trial court's custody determination under a clearly erroneous standard. *Reichle*, 719 S.W.2d at 444. Findings of fact are clearly erroneous if they are manifestly against the weight of the evidence. *Wells v. Wells*, 412 S.W.2d 568, 570 (Ky. 1967).

The trial court clearly stated the specific factors that led to its custody decision. The record contained testimony that Hobgood left her daughter with the Hollies for many months without financial support. Testimony indicated that Hobgood had a mental disorder, for which she is not currently treating. She was untruthful about her arrest the night before the final hearing. She tested positive for drugs at the time of the final hearing. She ascribed paternity to at least three individuals. Her daughter has resided with the Hollies in a stable home and community for most of her young life. The record includes more than ample evidence to support the court's ruling.

Accordingly, the Hopkins Family Court Order is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Daniel Sherman
Greenville, Kentucky

BRIEF FOR APPELLEES:

Wendell Holloway
Madisonville, Kentucky