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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000010-ME

S.R., MOTHER — APPELLANT

v.

APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE ROBERT DAN MATTINGLY JR., JUDGE
ACTION NO. 06-CI-00216

J.N., FATHER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, LAMBERT, AND VANMETER, JUDGES.

VANMETER, JUDGE: S.R. (Mother) appeals from the order of the Marshall Family Court modifying a sole custody decree concerning her minor child and awarding joint custody to J.N. (Father). For the following reasons, we affirm.

Mother and Father were married in 2005 and later that year had a son, D.N. In April 2006, the parties separated; however, they reconciled and separated

numerous times before a decree dissolving the marriage was entered on December 12, 2007. Thereafter, Mother married E.R, and they had a minor child. In August 2008, the court awarded Mother sole custody of D.N, noting that Mother had remarried and E.R. "appeared to be a loving and caring spouse and step-Father, and there was no testimony presented regarding any concerns involving his character."

In April 2009, E.R. alerted Father of behavior displayed by Mother that he believed put D.N. at risk. Father filed an emergency custody petition pursuant to KRS[1] 610.010, claiming that Mother had abused or neglected D.N. Father attached to his petition E.R.'s affidavit which alleged that on the night of April 22, 2009, Mother went out drinking, did not return home to care for D.N., and was not able to take him to school the next morning because she was still intoxicated. The family court awarded emergency custody of D.N. to Father and scheduled an adjudication hearing for July 21, 2009.

At the adjudication hearing, E.R. testified to further behavior exhibited by Sandra between January 2009 and April 2009, which the family court included in its July 28, 2009, order, stating:

> 14. Around January of 2009, [Mother] and E.R. began having marital problems which led to heated verbal altercations and throwing items between the two.
>
> 15. On April 22, 2009, [Mother] stayed out all night, lied to E.R. about where she was and did not return home to care for her two children until the next morning.

[1] Kentucky Revised Statutes.

> 16. E.R. signed an Affidavit in support of [Father]'s Complaint for emergency custody in the above-styled action and testified at the adjudication hearing that:
>
> (a) From January, 2009 to April, 2009, [Mother] failed to come home on five different occasions and had left [D.N.] in his care on three of those occasions;
>
> (b) [Mother] drinks excessively at times when the children are in her care;
>
> (c) [Mother] comes home with alcohol on her breath;
>
> (d) [Mother] fails to take her prescription medications for her mental health issues;
>
> (e) [Mother] is often very aggressive, both verbally and physically; and
>
> (f) [Mother] lies a lot about where she is going and what she is doing.

S.R. v. J.N., 307 S.W.3d 631, 634-35 (Ky.App. 2010). The court concluded D.N. was an "abused or neglected child" pursuant to KRS 600.020 and placed him in Father's care.

Mother appealed the order on the basis that the family court failed to determine the truth or falsity of the allegations in Father's complaint as required by KRS 620.100(3); instead relying on evidence outside of the record. On appeal, this court held that the family court only determined the truth or falsity of findings (14) and (15); with respect to finding (16), the family court merely stated that such allegations were made by E.R., but did not determine the truth or falsity of those allegations. *Id*. at 635-36. As a result, this court held that the allegations determined by the family court to be true were insufficient to support a finding that

D.N was "an abused or neglected child." This court vacated the July 28, 2009, order and remanded the matter to the family court for further proceedings. On remand, the family court entered an amended adjudication order dismissing the action.

In the underlying action, Father filed a motion to modify custody on August 24, 2010. Prior to the adjudication hearing, the family court notified the parties that it intended to take judicial notice of all petitions, motions and supporting affidavits, as well as all judgments and orders entered involving D.N, including E.R.'s allegations, numbered (14) – (16). Ultimately, the court modified the custody arrangement from sole to joint custody between the parties and named Father as primary residential parent. This appeal followed.

On appeal, Mother first argues the family court erred by taking judicial notice of, and relying upon, finding (16) regarding the allegations in E.R.'s affidavit and his testimony presented at the July 21, 2009, adjudication hearing. Mother maintains that since the July 28, 2009, order was vacated by this court, the allegations contained in finding (16) were never reduced to a finding by the family court.

Mother failed to properly preserve this claim of error; thus, our review is governed by the palpable error standard of review. CR[2] 61.02. Under CR 61.02, "[a] palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved

[2] Kentucky Rules of Civil Procedure.

for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." Such an error is only cause for reversal if a substantial possibility exists that the result would have been different but for the error. *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006) (citation omitted).

KRE[3] 201 governs the practice of taking judicial notice and provides, in part:

> (b) . . . A judicially noticed fact must be one not subject to reasonable dispute in that it is either:
>
> > (1) Generally known within the county from which the jurors are drawn, or in a nonjury matter, the county in which the venue of the action is fixed; or
> >
> > (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

KRE 201(b). Typically, a finding of fact in a previous order of the circuit court is not subject to reasonable dispute, and when judicially noticed, is done so under section (2) of KRE 201(b). *S.R.*, 307 S.W.3d at 637.

This court previously addressed this issue in *S.R.*, wherein we noted that a family court may take judicial notice "of its own records and on its own initiative." *Id*. at 637. However, a court cannot take judicial notice of, and rely upon, evidence that was presented in an earlier proceeding that was not reduced to a finding by the court or stipulated to by the parties. *Id*. In other words, a court "cannot adopt by judicial notice the *evidence* introduced in [one] case for the purpose of proving a

[3] Kentucky Rules of Evidence.

similar proposition in another case." *Johnson v. Commonwealth*, 12 S.W.3d 258, 263 (Ky. 1999). Accordingly, in the case at bar, the family court erred by taking judicial notice of E.R.'s allegations from a prior proceeding since the allegations were never reduced to a finding of fact by the court. However, the error did not result in manifest injustice to Mother because the order was still supported by substantial evidence as explained below.

Mother next argues the family court erred by (1) failing to find that a change has occurred in the circumstances of the child or his custodian and (2) failing to consider the necessary factors to determine if modification of a custody decree is in the best interests of the child. We disagree and find that substantial evidence supports the family court's finding that changes in the circumstances of the parties and their minor child have occurred so as to necessitate a modification of the custody decree in accordance with the best interests of D.N.

An appellate court may set aside findings of fact only if those findings are clearly erroneous, *i.e.*, not supported by substantial evidence. *Allen v. Devine*, 178 S.W.3d 517, 523 (Ky.App. 2005). Substantial evidence is evidence that, when taken alone or in light of all the evidence, has sufficient probative value to support a conclusion. *Id*. (citation omitted).

KRS 403.340 establishes the guidelines for the modification of a custody decree. It provides, in part:

> (3) If a court of this state has jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act, the court shall not modify a prior custody decree 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.

KRS 403.270(2) specifies:

> The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all relevant factors including:
>
> (a) The wishes of the child's parent or parents, and any de facto custodian, as 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 best interests;
>
> (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.

Here, the record reveals that the focus of the family court's findings were that (1) Mother is no longer married to E.R. and has failed to adequately address the court's concerns for her mental health, and (2) while in Father's care, D.N. progressed educationally. The family court specifically noted that since the initial custody decree, Mother and E.R. are no longer married and she has moved into a government subsidized two-bedroom apartment. Mother does not have custody of

her minor child with E.R. Further, D.N.'s teacher testified that D.N. made progress in his educational development while in Father's custody. Other witnesses testified to a close and loving bond between Father and D.N. Mother admitted to not knowing what school D.N. attended while living with Father, and the court found D.N.'s educational development regressed while in Mother's custody. The family court found that Father is now able to provide a more stable home life for the child.

Additionally, the court expressed concern over Mother's mental health, and had previously ordered Mother to undergo a mental health assessment at Four Rivers Mental Health; instead, Mother underwent an evaluation by a person not approved by the court. Based on the foregoing, we find the family court properly applied the standards found in KRS 403.340 and KRS 403.270, and substantial evidence in the record supports the family court's modification of the custody decree. As a result, a substantial probability does not exist that the family court's error of taking judicial notice of evidence from a prior proceeding affected the outcome of this case, and no manifest injustice resulted.

Finally, Mother argues the family court erred by admitting the testimony of Shelly Allen on grounds of hearsay. Specifically, Mother contends the hearsay exception of statements made for the purpose of medical diagnosis does not apply since Allen was not D.N.'s treating therapist. We disagree.

KRE 803(4) permits the admission of "[s]tatements made for purposes of medical treatment or diagnosis and describing medical history, or past or present

symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis." Statements made for such a purpose fall under KRE 803(4) even though they are made to a therapist, rather than a physician. *Cabinet for Health and Family Services v. A.G.G.*, 190 S.W.3d 338, 343-44 (Ky. 2006). Additionally, "the adoption of KRE 803(4) . . . eliminated any distinction between treating and examining physicians with respect to such testimony." *Id*. at 344 (citing *Garrett v. Commonwealth*, 48 S.W.3d 6, 14 (Ky. 2001)).

Here, Mother maintains that since she had sole custody at the time of Allen's therapy sessions with D.N., and did not consent to Allen's treatment of D.N., Allen was not D.N.'s treating therapist for purposes of KRE 803(4). However, the record reflects that Allen is a licensed therapist who held therapy sessions with D.N., and her testimony was relevant to the matter of a modification of custody. Despite Mother neither knowing of, nor consenting to, the treatment, Allen still examined D.N. for purposes of the hearsay exception found in KRE 803(4). Accordingly, the family court did not abuse its discretion by admitting Allen's testimony as an exception to the hearsay rule.

The Marshall Family Court's order is affirmed.

ALL CONCUR.

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