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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001627-ME

ELIZABETH BAIL ELDER (NOW MORGESON) APPELLANT

v. APPEAL FROM MARION CIRCUIT COURT
HONORABLE DAN KELLY, JUDGE
ACTION NO. 07-CI-00302

JEREMY LEE ELDER APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, MAZE AND NICKELL, JUDGES.

MAZE, JUDGE: Appellant, Elizabeth Elder, appeals a decision of the Marion Circuit Court declining her motion for relief made pursuant to Kentucky Rule of Civil Procedure (CR) 59.05. Though we find appellant's brief lacking under the rules of appellate procedure concerning preservation of error, we elect to review this case on the merits and affirm the order of the trial court.

The parties are the parents of a minor child born February 25, 2004. Subsequent to their divorce, a custody and property settlement agreement was approved by decree entered April 8, 2008, and provided for joint custody. The agreement also set forth a visitation schedule that was modified on several occasions. The parties agree they spend almost equal time with the child. On January 20, 2012, the parties came before the circuit court for a hearing on multiple motions submitted by the parties. The only motions relevant to this appeal are Elizabeth's motion to modify the custody order and grant her sole custody and Jeremy's motion to modify time sharing.

This case was originally assigned to Judge Allan Bertram. However, alleged disagreements between Judge Bertram and Elizabeth's counsel led her to file a motion to transfer the case. Before ruling on the motion to transfer, Judge Bertram made a determination regarding custody and time sharing. Following an interview with the child in which the child expressed her wish for equal time with each parent, the court denied the motion to award Elizabeth sole custody, but altered the visitation schedule. The court did not disturb the allocation of visitation hours. The decision of the court did not alter custody; it merely adjusted the visitation schedule in a manner it believed to be in the best interests of the child. Specifically, the new schedule reduced the amount of police supervised exchanges between the parents from a daily occurrence to a weekly occurrence.

The case was ultimately transferred to Judge Dan Kelly subsequent to which Elizabeth filed a CR 59.05 motion to alter amend or vacate Judge Bertram's

order. The motion was denied. Judge Kelly reviewed the decision of the circuit court and determined that the court's decision was the result of a thorough review of the facts and law. Judge Kelly specifically found that the court considered the factors set forth in Kentucky Revised Statute ("KRS") 403.340 to determine if modification of the custody agreement was warranted.

On appeal, Elizabeth argues Judge Kelly abused his discretion by relying on the testimony of a child who she argues was not competent to testify, erred in failing to find that Judge Bertram was biased against her and for failing to consider the bias in its determination of the CR 59.05 motion. We find all of these arguments unpersuasive.

Appellant first argues that the trial court abused its discretion by relying on its interview with the child in this case in making its determination regarding visitation. She argues that the trial court failed to establish sufficient basis for the child's competence to testify and that the child's responses reflect that she had been coached.

This Court is on the record, and will go on the record again, as saying that counsel's failure to preserve an issue for appeal, or to cite in her brief how the issue was preserved, gives us considerable discretion in whether to review the matter on appeal. We are of the opinion that Appellant failed to preserve this issue for appeal and also failed, pursuant to CR 76, to inform us of how this issue was preserved. Nevertheless, we elect to review briefly the merits of Appellant's argument.

A trial court has the sound discretion to both observe witnesses and to determine whether a witness is competent to testify. *Pendleton v. Commonwealth*, 83 S.W.3d 522 (Ky. 2002). Furthermore, age is not determinative of competency. *Id*. As Appellee points out, Appellant urged the trial court to interview the child. Appellant arranged for the child to be in the courtroom the day of the hearing and made no objection, contemporaneous or otherwise, to her testimony or competency. Hence, it seems disingenuous, at best, for Appellant now to declare vociferously that the trial court erred in relying on the child's testimony. Nevertheless, we further review Appellant's claim under the above-referenced law.

In support of her argument, Appellant points to the child's age, which is not determinative; Appellant take exception to the trial court's abbreviated colloquy with the child before proceeding to examine her, to which there was no objection; Appellant states that the child was "obviously" coached, a determination which lies squarely within the province of the trial court's discretion; and Appellant cites the trial court's "erroneous" reliance on the child's wishes, when in fact the trial court was obligated to consider these wishes under KRS 403.270 and 403.340. In short, the trial court acted precisely as it was supposed to, and was prompted to by both parties. Hence, its reliance on the child's testimony was not an abuse of its broad discretion.

For the remainder of her arguments, Appellant expends much energy in her attempting to establish Judge Bertram's bias against her and her counsel. However, Judge Bertam's predisposition has little effect on our decision if he or

Judge Kelly did not abuse their considerable discretion or otherwise err in denying appellant the relief she sought.

Appellant urges that, because of Judge Bertram's "obvious" bias, Judge Kelly was obligated to consider this bias and to consider the case, not under the factors for granting relief under CR 59.05 dictated in *Guillon v. Guillon*, 163 S.W.3d 888 (Ky. 2005), but under the Kentucky Code of Judicial Conduct's provision regarding judicial impropriety. We could not disagree more.

Again, Judge Bertram's alleged bias is not a factor if Judge Kelly did not in turn allow it to affect his judgment on the CR 59.05 motion. Appellant focuses too much on the former, and provides little more than self-serving argument in favor of the latter. Furthermore, SCR 4.300 simply is not controlling of whether a CR 59.05 motion should be granted. Given the well-established factors for deciding such an issue – which we find the trial court properly considered – nothing in the facts of this case, or in the law of any other authority, persuades us to conclude otherwise.

Finally, Appellant argues that the trial court failed to consider a litany of other factors, such as the lack of cooperation between Appellant and Appellee, in ruling on their respective motions. However, again, Appellant provides no evidence that one or more of the factors under *Guillon* were satisfied, requiring the court to grant the CR 59.05 motion. Appellant merely seems to disagree with the trial court's conclusion. This is not enough to require reversal.

Overall, Appellant provided no evidence of manifest errors, newly discovered evidence, manifest injustice or a change in controlling law. Hence, we find that Judge Kelly properly considered the appropriate facts and law in denying Appellant's CR 59.05 motion. The trial court correctly considered the statutory factors regarding the modification of custody and applied the appropriate factors from *Guillon*. Therefore, the judgment of the Marion Circuit Court is affirmed.

ALL CONCUR.

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