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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000799-ME

BRYAN JEROME CRIM

APPELLANT

v. APPEAL FROM LYON CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 11-CI-00208

MISTY MARSHA CRIM

APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: CLAYTON, JONES, TAYLOR, JUDGES.

JONES, JUDGE: This case arises out of the Lyon Circuit Court's order denying Appellant's request for a psychological evaluation as related to the parties' custody dispute. For the reasons more fully explained below, we affirm.

I. BACKGROUND

Appellant, Bryan Crim (Father), and Appellee, Misty Crim (Mother), separated on December 15, 2011. They resolved all significant property issues, but

were unable to reach an agreement regarding the custody of their two minor children (Minor Children). Prior to the final custody hearing, Father filed a motion asking the trial court to order Mother to submit to a mental health evaluation; Father offered to pay for the examination. Father asserted that the examination was necessary because Mother was charged with domestic violence against Father and because Mother admitted to having been previously prescribed Ritalin for approximately two years. Mother filed a response agreeing to submit to such an evaluation provided that Father also undergo an evaluation, pay for both, and that the evaluations be conducted at the location used by the county. Father then requested a continuance of the final hearing so that the parties could undergo the evaluations and obtain the results before the matter was submitted to the trial court for a decision on custody.

Upon review, the trial court denied Father's request for a continuance and placed the motion for an evaluation in abeyance. The trial court held the final hearing as previously scheduled on February 27, 2013. At the close of evidence, Father renewed his motion for the evaluation, which the trial court then denied.

The trial court entered its findings of fact and conclusions of law on April 16, 2013, wherein it awarded the parties joint custody of the Minor Children

and named Mother the primary residential custodian.¹ The trial court established Father's time-sharing in accordance with a modified version of the 56th Circuit guidelines. Father has now appealed asserting that the trial court erred in awarding custody without having ordered and considered the mental health evaluation he requested.

II. STANDARD OF REVIEW

"It is well-settled that a trial court has broad discretion in resolving disputes in the discovery process, and we will not disturb a discovery ruling absent an abuse of that discretion." *Blue Movies, Inc. v. Louisville/Jefferson County Metro Government*, 317 S.W.3d 23, 39 (Ky. 2010). Custody disputes are no exception. *See, e.g., Loveless v. Quertermous*, No. 2005-CA-001276-ME, 2006 WL 2328569, *5-6 (Ky. App. Aug. 11, 2006) ("[W]e identify no abuse of discretion, or error, in the circuit court's denial of [mother's] motion for a forensic custody evaluation.") An abuse of discretion occurs where the appellate court determines that "the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004) (citing [*Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575,](#)

¹ We note that the more appropriate term is "primary residential parent" rather than "custodian." *See Pennington v. Marcum*, 266 S.W.3d 759, 765 (Ky. 2008) ("Additionally, one parent may be designated the "primary residential parent," a term that is commonly used to denote that the child primarily lives in one parent's home and identifies it as his home versus 'Dad's/Mom's house.' This concept is frequently misnamed "primary residential custody.").

[581 \(Ky. 2000\)](#)). It is under this exacting, highly deferential standard that we review Father's claim.

II. ANALYSIS

A trial court must make a determination of child custody in accordance with the best interests of the child. In doing so, a trial 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 \[Kentucky Revised Statutes\] 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.

KRS 403.270(2) (emphasis added).

Effective January 1, 2011, our Supreme Court approved and adopted the Family Court Rules of Procedure and Practice (FCRPP). Pursuant to FCRPP 1, the rules are applicable to all actions:

pertaining to dissolution of marriage; custody and child support; visitation and timesharing; property division; maintenance; domestic violence; paternity; dependency; neglect or abuse; termination of parental rights; adoption; and status offenses, or any other matter exclusively within family law jurisdiction, except for any special statutory proceedings, which shall prevail over any inconsistent procedures set forth in these Rules.

FRCPP 1.²

Rule 6(1) of the Family Court Rules specifically addresses a request for a mental health evaluation as part of a custody dispute. It provides in relevant part that, "a parent or custodian may move for, or the court may order, one or more of the following . . . (b) psychological evaluation[s] of a parent or parents or custodians or child[ren]." FRCPP 6(1)(b).

While KRS 403.270 dictates that the trial court must consider factors (a) through (i) in determining what is in the child's best interests, it does not mandate that the trial court fulfill this obligation in any particular manner or prescribe what evidence the trial court must rely on assessing the various factors.

² The Kentucky Constitution (Ky. Const.) § 116 provides that "[t]he Supreme Court shall have the power to prescribe rules governing its appellate jurisdiction, rules for the appointment of commissioners and other court personnel, and rules of practice and procedure for the Court of Justice."

Indeed, our courts have previously held that the trial court has broad discretion regarding the type and nature of evidence it considers under KRS 430.270.

For example, in *Brown v. Brown*, 510 S.W.2d 14, 16 (Ky. 1974), the mother argued that the trial court should have interviewed her son, aged seven, to determine his custody preference before awarding custody to the father. The court rejected this argument holding that a trial judge has the discretion to decide whether to interview a child. *Id.*

Several years later, a panel of this court considered the same issue that is before us today, whether a trial court must order and/or consider a psychological evaluation. We answered in the negative holding that the trial court has considerable discretion in deciding whether to order an examination to inform its consideration of the mental health factor of KRS 430.270(e):

KRS 403.290(2) does allow a court to order psychological tests of the child, as well as the parents, in order to assist in making the custody determination. The statute is permissive, not mandatory, and the professional's conclusions are merely expert testimony, or evidence to be considered by the courts, *see Brown v. Brown*, Ky., 510 S.W.2d 14 (1974), and not dictates. *See* KRS 403.270; *Atwood v. Atwood*, Ky., 550 S.W.2d 465 (1976); and *Poe v. Poe*, Ky.App., 711 S.W.2d 849 (1986). In reviewing the transcript of evidence, we cannot say the trial court erred in not ordering a psychological examination of the appellee. The evidence of the appellee's sexual misconduct, like the appellant's alcohol abuse, is not relevant unless the misconduct can be shown to affect, or is likely to affect, the child adversely, such that it relates to the best interests of the child. *Krug v. Krug*, Ky., 647 S.W.2d 790 (1983), and *Powell v. Powell*, Ky., 665 S.W.2d 312 (1984). The

evidence in this case was of the misconduct, not the effect on the child.

Chalupa v. Chalupa, 830 S.W.2d 391, 392 (Ky. App. 1992) (*abrogated on other grounds by Fenwick v. Fenwick*, 114 S.W.3d 767, 773 (Ky. 2003)).

We agree with the *Chalupa* court that neither KRS 430.270 nor KRS 430.290 requires the trial court to consider a mental health evaluation, or to order such an evaluation, if requested. Furthermore, we do not believe that FRCPP 6(1) eliminated the trial court's discretion in this regard. The Rule, like the statute, preserves the trial court's ability to consider whether an evaluation would be beneficial to it in the particular case before it. The Rule's use of the word "may" to refer to the trial court's ability to order an evaluation indicates that the Rule vests the trial court with permissive discretion.

Thus, while a party may request a psychological evaluation, neither FRCPP 6(1)(b), KRS 320.270, nor KRS 320.290 requires the trial court to grant such a request. Certainly there are many circumstances where a psychological evaluation is necessary to determine the best interests of the child. However, not every case requires such expert testimony to assist the court in making its custody determination.

This view is in accord with the Supreme Court's prior decisions recognizing that the trial court is best situated to determine whether expert psychological evidence will be helpful to it. For example, in *Krug v. Krug*, 647 S.W.2d 790, 792 -93 (Ky. 1983), our Supreme Court explained:

KRS 403.270(2) does not prescribe the method by which a trial court shall determine whether misconduct affects the parent's relationship to the child. We do not think the statute intended to require the testimony of a child psychologist or a social worker that certain conduct had affected, or would adversely affect, the child as an absolute prerequisite to the consideration of the conduct by the trial judge.

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.

Id.

Based on our review of the record, we are not persuaded that the trial court erred. The trial court's order explicitly indicates that it considered the mental health of the Minor Children, Mother and Father in determining custody. Thus, the trial court satisfied its statutory obligation with respect to mental health under KRS 430.270.

Furthermore, we do not believe that the trial court erred in considering the mental health component of KRS 430.270 in the absence of the psychological evaluation Father requested. Father moved rather early on for the evaluation; the

trial court held the motion in abeyance pending a presentation of the other evidence. After listening to the testimony at the hearing, the trial court determined that mental health was not a sufficient enough concern to warrant a full psychological evaluation. The trial court explained:

Respondent had moved for and lobbied for a psychological evaluation for the Petitioner because of issues he believes are present and which he recognizes because he has a degree in psychology. From the testimony, the Court believes that the parents are mentally healthy, except that their inability to communicate without arguing puts mental pressure on both of them. Mental health is not a tipping point for this Court.

We find that the record amply supports the trial court's decision to forego the mental health evaluation Father requested. The trial court considered Father's allegations of mental instability and concluded from the record that any mental health issues were either nonexistent or insufficient enough that they did not warrant serious consideration. The trial court made this determination only after hearing the parties and other witnesses testify at the final hearing.

In sum, we are unable to conclude that the trial court abused its discretion by denying Father's request for a mental health evaluation.

III. CONCLUSION

Having found no abuse of discretion or other error, we affirm the Lyon Circuit Court.

CLAYTON, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS, WITHOUT SEPARATE OPINION.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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