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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000175-ME

JESSIE HALL

APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE ROBERT DAN MATTINGLY, JR., JUDGE
ACTION NO. 13-CI-00316

DANIEL WATSON

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, COMBS, AND VANMETER, JUDGES.

CAPERTON, JUDGE: Jessie Hall appeals the Marshall Family Court's findings of fact, conclusions of law, and judgment of January 3, 2014, wherein the court granted Jessie and Daniel Watson joint custody of the parties' child, designating Daniel as the primary residential custodian. After a thorough review of the parties'

arguments, the record, and the applicable law, we find no reversible error and accordingly, affirm.

Prior to entering the judgment now on appeal, the trial court held a hearing concerning the custody, visitation, and child support of the parties' minor child on December 10, 2013. The court heard testimony from the parties and from Jessie's ex-husband Josh Hall.¹ At the time of the hearing, the child was approximately five months old and had resided solely with Jessie because she breast fed him. The child was Jessie's second and youngest child and Daniel's first child. The parties were never married² but had cohabitated prior to the birth of their child. At the time of the hearing, Jessie's relationship with Daniel had ended and she had moved back in with Josh.

Prior to her relationship with Daniel, Jessie was married to Josh; Jessie and Josh had filed domestic violence petitions against one another in 2011 that were later dismissed by the Livingston District Court upon a mutual restraining order entered by the Livingston Circuit Court in their divorce case. The couple was divorced in 2011 in Livingston County.

Despite the restraining order, Jessie and Josh began cohabitating again until Josh filed another domestic violence petition in June of 2012 against Jessie, alleging that she yelled at their child and his daughter from another relationship

¹ Additional witnesses were presented to the court; however, it appears that the majority of the court's findings were based on the testimony of these three people.

² Daniel filed a motion to establish paternity four days after the birth of the child. By agreed order of October 2, 2013, Daniel was declared to be the father of the child.

and that Jessie had hit and made holes in the walls of his home. From the record it appears that Jessie had not been served with the petition and that no domestic violence order was entered. Jessie denied these allegations whereas Josh testified at the custody hearing that they were true.

After Jessie and Josh's breakup in 2012, Jessie and Daniel began dating and subsequently moved in together. Their son was born on July 11, 2013. Daniel and Jessie had separated prior to their child's birth. Jessie began living with Josh again.

Daniel testified that he is a laborer with a construction company and earns between \$20.25-21.25 per hour depending on the type of work being performed. He works from 6:50 a.m. to 3:20 p.m., Monday through Friday, and described his full-time employment as stable. Jessie works from 10:00 p.m. to 6:00 a.m. at the Five-Star convenient store and earns \$7.25 per hour, thirty-eight hours per week.

Daniel testified that he owned his own home and had a room furnished for the child, whereas Jessie had moved multiple times in a short period. He testified that he had experience caring for children as he worked at a daycare at a community center. Daniel testified that he did not smoke and that Jessie did; that he was free from mental health issues, and that Jessie had prior mental health issues; that his car was safe for transporting the child, whereas Jessie's was not; and that he had a good support system of family that was not available to Jessie.

Daniel had offered to provide support for the child prior to the hearing, but Jessie had declined it.³ Daniel had applied for health insurance for the child.

Jessie testified and admitted that she did smoke, but testified that she was trying to quit, that she had moved multiple times in a few years, that she and Josh had a rocky relationship and that they both had “done things out of anger,” and that she was currently living with Josh. Jessie denied having serious mental health issues. Jessie alleged that Daniel drank too much alcohol.

Jessie and Josh had filed domestic violence petitions against one another in 2011 that were later dismissed by the Livingston District Court upon a mutual restraining order entered by the Livingston Circuit Court in their divorce case. Despite the restraining order, Jessie and Josh began cohabitating again. Josh filed another domestic violence petition, this time in Marshall County, in June of 2012, against Jessie, alleging that she yelled at their child and his daughter from another relationship and that Jessie had hit and made holes in the walls of his home.

From the record, it appears that Jessie had not been served with the 2012 petition and that no domestic violence order was entered. Jessie denied the allegations alleged by Josh in the 2012 petition whereas Josh testified at the custody hearing that they were true.

At the hearing, the court questioned Jessie extensively about the domestic violence petition she filed in 2011 as well as the petitions filed by Josh.

³ There were allegations that Daniel had offered to pay for diapers which Jessie declined due to the Commonwealth providing diapers with her assistance.

As concerns the petition filed by Jessie, she denied some of the allegations therein when questioned by the court.⁴ Thereafter, the court questioned Josh about the recent domestic violence petitions. Josh testified that Jessie had put two holes in the walls of his home last year out of anger.

After hearing the evidence at the custody hearing, the court entered its findings of fact, conclusions of law, and judgment of January 3, 2014, wherein the court concluded that it was in the best interest of the child to grant the parties joint custody, with Daniel being the child's residential parent and Jessie being granted visitation.

In reaching this conclusion, the court took into consideration its findings of fact, the factors set forth in Kentucky Revised Statutes (KRS) 403.270(2), and the conclusions that Daniel could provide a more stable home environment than Jessie, that Daniel had a larger family support system, that Jessie suffered from depression and was unable to control her anger, that there was insufficient evidence of Daniel's drinking too much alcohol, and that Jessie was residing again with her ex-husband with whom there had been a history of domestic violence. The court then ordered Jessie to pay Daniel child support in the amount of \$173.42 per month, based on her gross income of \$1,257.00 per month and Daniel's gross income of \$3,597.00 per month. It is from this judgment that Jessie now appeals.

⁴ Upon our review of the record, we note that Jessie was equivocal as to whether domestic violence had occurred. She admitted that both she and Josh had "done things out of anger" but denied that domestic violence occurred. Instead, it seems she filed the petition on the advice of her stepmother to further her goals in the divorce proceedings.

On appeal, Jessie argues: (1) the court's use of allegations made in domestic violence petitions⁵ filed and dismissed was improper requiring reversal; (2) other palpable errors occurred that deprived Jessie of a fair hearing resulting in manifest injustice in this case; and (3) the court's deviation from Kentucky's child support statute was clearly erroneous.⁶ Daniel disagrees with the arguments asserted by Jessie and instead argues: (1) the court applied the proper best interest of the child standard in determining who should be the child's primary custodian; (2) substantial evidence supports the court's findings; (3) the court did not improperly use past evidence of Jessie's domestic violence history; (4) the trial was conducted in a fair and proper manner; and (5) child support was set in accordance with KRS 403.211. With these arguments in mind, we turn to the issues presented, namely whether the court erred in designating Daniel as the residential custodian and whether Jessie received a fair hearing.

At the outset, we note that when determining an award of child custody, KRS 403.270(2) directs the circuit court to give equal consideration to both parents and to award custody in accordance with the best interests of the child. The standard of review regarding child custody issues is whether the trial court's decision was clearly erroneous and constituted an abuse of discretion.

⁵ We note that below no objection was made concerning Kentucky Rules of Evidence 801 and thus, any hearsay argument is now unpreserved.

⁶ Briefly we shall address this argument. We do not see how the trial court deviated from the child support guidelines. While Jessie moved for child support and custody, she did not file a motion for temporary child support to be set prior to the hearing. She declined support when offered from Daniel prior to the hearing. When questioned by the court, she again seemed to decline retroactive temporary child support. We believe any issue in this regard to have been waived.

Eviston v. Eviston, 507 S.W.2d 153 (Ky. 1974). The appellate court will only reverse a circuit court's child custody decision if the findings of fact are clearly erroneous or the decision reflects a clear abuse of the considerable discretion granted to trial courts in custody matters. Kentucky Rules of Civil Procedure (CR) 52.01 and *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). "A finding of fact is clearly erroneous if it is not supported by substantial evidence, which is evidence sufficient to induce conviction in the mind of a reasonable person." *B.C. v. B.T.*, 182 S.W.3d 213 (Ky. App. 2005). "Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994) (citations omitted). Additionally, the clearly established law of this Commonwealth dictates that it is the trial court, and not the appellate court, that has the sole authority to determine the credibility of the witnesses, to draw reasonable inferences from the evidence, and to weigh conflicting evidence. See *Whittaker v. Rowland*, 998 S.W.2d 479 (Ky. 1999).

KRS 403.270 sets forth the factors that a trial court shall consider in determining custody in accordance with the best interests of the child, and provides, in pertinent part, as follows:

(2) 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.

We conclude that the trial court properly considered the factors set forth in KRS 403.270 based upon review of the trial court's January 3, 2014, findings of fact, conclusions of law and judgment concerning the issue of custody. It is well-established that the trial court has broad discretion in determining what is in the best interests of a child in making a custody decision. *Krug v. Krug*, 647 S.W.2d 790 (Ky. 1983); KRS 403.270. *Sub judice*, the trial court believed that joint custody was in the child's best interest and designated Daniel as the primary residential custodian. We find no error in such a determination given the evidence

presented that Daniel could provide a stable environment and the testimony of possible domestic violence between Jessie and Josh. Accordingly, we affirm.

Next, we address whether the court erred in relying upon the past domestic violence petitions. Jessie argues that the court improperly took judicial notice of these petitions, one of which was neither served upon Jessie nor granted. The court did issue a notice of its intention to take judicial notice of any of its past filings and orders. Therein, the court directed counsel that it would behoove them to look into any past filings involving the child or the parties.

Ultimately, the court did not take judicial notice of any facts in the petitions in question; instead the court inquired about the petitions and elicited testimony regarding them. We agree with Daniel that since no judicial notice was taken, then no error was committed; instead the court relied upon the testimony presented by the parties about the petitions. From the testimony, the court learned that both Jessie and Josh had “done things out of anger,” that they both had filed domestic violence petitions,⁷ and Josh asserted that recently Jessie had lashed out in anger and put holes into the walls of his home. We believe that the court properly considered such testimony in reaching its determination that Daniel should be the primary residential custodian. Thus, we find no error.

Last, Jessie argues that multiple palpable errors occurred that deprived her of a fair hearing resulting in manifest injustice. She requests palpable error review

⁷ We note that the court inquired into the veracity of these petitions and the petitioners. We do not find any error in this.

under CR 61.02.⁸ In support thereof, Jessie points to questions asked by the court which elicited hearsay and speculation, and which amounted to badgering the witness. There was no objection made below.

In *Childers Oil Co., Inc. v. Adkins*, 256 S.W.3d 19, 27 (Ky. 2008), our Kentucky Supreme Court explained, “the task of the appellate court in review under CR 61.02 is to determine if (1) the substantial rights of a party have been affected; (2) such action has resulted in a manifest injustice; and (3) such palpable error is the result of action taken by the court.” Given that Jessie alleges error with some of the court’s questions, we believe that it is beneficial to summarize these questions.

Jessie argues that the court’s questioning⁹ regarding the domestic violence petitions amounted to hearsay, badgering of the witness, and speculation. Specifically, the court asked Jessie, prior to Josh’s testifying, if Josh had told her he had filed the second domestic violence petition against her and it inquired whether the affidavit in support of Jessie’s petition was truthful and, if not, then

⁸ CR 61.02 states:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

⁹ Jessie argues that Daniel offered hearsay evidence regarding the breast milk she supplied smelling like smoke. Jessie also argues that Terry Watson testified to hearsay regarding conversations she had with Jessie’s stepmother about Jessie and Josh’s relationship and that Jessie’s other child said that, “You hurt my mom.” We decline to address these perceived errors as we are limiting our palpable error review under CR 61.02 to actions taken by the court and the lines of questioning at issue here do not appear to have been undertaken by the court. *See Fraley v. Rice-Fraley*, 313 S.W.3d 635, 641 (Ky. App. 2010) (We review the perceived error with the emphasis on the action of the court).

what was be the purpose of a false affidavit. Lastly, the court inquired into who had instructed Jessie to file a false affidavit. While we understand Jessie's concerns, we simply do not believe that manifest injustice has resulted from the court's questioning because the judgment did not rely upon these perceived errors. We decline to reverse on this basis.

In light of the aforementioned, we affirm.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
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