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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001431-ME

AUDREY P. LUTZ APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NO. 13-CI-500008

RAPHAEL V. WILLIAMS, JR. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, MAZE AND STUMBO, JUDGES.

STUMBO, JUDGE: Audrey Lutz appeals from a judgment of the Jefferson Family Court which awarded Raphael Williams, Jr. sole custody of their minor daughter. Along with the custody issue, Appellant also argues the trial court erred when it awarded Appellee attorney fees, reduced her child support, and ordered her to undergo counseling. We find no error and affirm.

The parties to this case were never married, but had a child together in 2009.[1] The parties lived together until February of 2010 when Appellee asked Appellant to move out. Appellant did so and took the minor child with her.[2] The relationship did not end at this point. Periods of reconciliation alternated with periods of bitter separation. Appellant filed multiple emergency protective orders ("EPO") and three domestic violence order ("DVO") petitions against Appellee. Two child abuse allegations have also been filed against Appellee with the Cabinet for Health and Family Services ("Cabinet"). One EPO was granted in 2011; however, no DVOs were ever issued. The child abuse investigations by the Cabinet were all unsubstantiated.

In 2012, Appellee deployed to Afghanistan for a one year long deployment.[3] Upon his return, Appellant would not allow him to visit with the child. In January of 2013, Appellee filed a petition for custody seeking joint custody of the child with Appellant. Appellant retained her mother to act as her counsel in the case. During the pendency of this case, extensive discovery was conducted, numerous hearings were held, counseling sessions were ordered, and the parties underwent a custodial evaluation performed by Dr. Kaveh Zamanian, a psychologist.

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[1] Because it will be relevant later in this opinion, we must mention that Appellant is Caucasian and Appellee is African American.

[2] After Appellant moved out of Appellee's residence, she was the primary residential parent and primary caregiver of the minor child.

[3] Both parties are members of the Kentucky Air National Guard.

On May 8, 2014, a trial was held in this matter. On July 8, 2014, the trial court entered its judgment. The 40-page judgment found that the parties could not co-parent together and awarded Appellee sole custody. It split parenting time 50/50 and set forth specific and detailed instructions concerning each parent's visitation schedule. It also awarded Appellant $106 a month in child support.[4] The court also ordered Appellant to undergo individual counseling until released by her therapist or further order of the court. Then, on August 18, 2014, the trial court entered another order awarding Appellee $13,000 in attorney fees. This appeal followed.

Appellant's first argument on appeal is that the trial court failed to consider the appropriate factors in awarding sole custody to Appellee and erred in awarding a 50/50 split in parenting time. Appellant claims that the trial court did not consider some facts which were more beneficial to her case because they were not discussed in the judgment.

> In reviewing the trial court's decision, we must determine whether it abused its discretion by awarding custody of the children to [the parent at issue]. An abuse of discretion occurs when a trial court enters a decision that is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000); *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). We will not substitute our own findings of fact unless those of the trial court are "clearly erroneous." *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Further, with regard to custody matters, "the test is not whether we would have decided differently, but whether the findings of the trial judge were clearly erroneous or

[4] This was reduced from a previously ordered amount of $615.40.

> he abused his discretion." *Eviston v. Eviston*, 507 S.W.2d 153, 153 (Ky. 1974); *see also Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982).

Miller v. Harris, 320 S.W.3d 138, 141 (Ky. App. 2010). Kentucky Rules of Civil Procedure (CR) 52.01 directs that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." A judgment "supported by substantial evidence" is not "clearly erroneous." *Owens–Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence is defined as "evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable men." *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972).

Kentucky Revised Statute ("KRS") 403.270(2) sets forth the relevant factors a trial court must consider when determining child custody. KRS 403.270(2) states in relevant part:

> 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[.]

As stated previously, the trial court issued a 40-page judgment in this case. That judgment was very detailed and it is clear that the trial court considered all the facts of this case to determine child custody. Simply because all the facts of the case were not set forth in the judgment does not mean that they were not considered by the judge. The trial court relied on the record, which contains over 1,000 pages of documents, numerous hearings, and a 45-page custodial evaluation report written by Dr. Zamanian.

The judgment discussed the following issues and detailed facts relevant to each: both parents wished to have sole custody of the child; both parents had a strong relationship with the child and vice versa; that the parties' relatives were involved or wanted to be involved in the child's life and were able to help the parents care for the child; each party had an appropriate home for the child; the mental health of both parties (with Appellee suffering from insomnia and anxiety and Appellant most likely suffering from some undiagnosed psychological issues due to past emotionally traumatic events); [5] and the multiple EPOs, DVO petitions, and Cabinet investigations. The trial court also interviewed the child *in camera* in order to determine if she was competent to testify at the trial. The court ultimately decided she was not. Not considering the wishes of the child in this case was appropriate and within the court's discretion. *Jarvis v. Commonwealth*, 960

[5] We decline to elaborate on the past traumatic events for privacy reasons.

S.W.2d 466 (Ky. 1998). Finally, the trial court detailed the parties' work schedules[6] and specifically discussed the hostility in the case and its belief that Appellant was trying to exclude Appellee from the child's life.

We believe it prudent to set forth some of the specific conclusions the court came to as to why it chose to award Appellee sole custody. The court stated:

> When Raphael initiated this action, he requested joint custody of [the child] and an equal parenting time schedule. However, the parties' parenting relationship continued to deteriorate rapidly, with Audrey increasing her already concerted effort to exclude him from every aspect of their child's life. He is now requesting sole custody and a parenting schedule where the child resides primarily with him. Similarly, Audrey is not amenable to co-parenting and wants Raphael's time with the child to be as limited as possible.
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> Dr. Zamanian initially recommended joint custody, with reservations and the hope that the parties could learn to work together for the benefit of their child. The Court does not believe that such an outcome is likely, as there is no viable launch point for joint custody in this case. In fact, throughout the pendency of this action, Audrey has absolutely refused to communicate with Raphael. She has intentionally excluded him from every aspect of their child's upbringing. She has repeatedly, and without good cause, withheld the child from him. Audrey has also doggedly pursued every litigious avenue imaginable, with no apparent concern for the truth of her allegations. Her actions have threatened Raphael's professional and personal life, and have drawn the parties' very young child increasingly into the adult conflict. Audrey has no concern whatsoever for Raphael, but more disturbingly, she has no concern for [the child's] very real attachment to him.
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> . . .
>
> In considering an award of custody the only factor in Audrey's favor is that she has been [the child's] primary caregiver throughout her life – though with ample and

[6] Appellant is a nurse and Appellee is a police officer.

> continuing assistance from family – and the child has thrived in her care. However, there is nothing to suggest that [the child] would not be equally happy, healthy and well-adjusted in Raphael's care. [The child] is very attached to Raphael, and he has the knowledge, ability and resources to provide for her. Raphael is far more emotionally stable than Audrey, as evidenced by his remarkable comportment throughout this trying litigation. He has strong, supportive family that has no ill will toward Audrey, despite her onslaught of allegations against them. Raphael has stable employment and is able to provide financially for [the child's] needs.

In this case, the trial court followed the requirement of KRS 403.270(2) and considered all the factors to determine what custody situation would be in the child's best interests. The trial court considered all the facts of this case in determining that sole custody should go to Appellee and that the parties should have a 50/50 parenting time split. The court's determination was not clearly erroneous as it was supported by substantial evidence and there was no abuse of discretion. We find no error in the court's judgment.

Appellant's next argument on appeal is that the trial court arbitrarily ordered Appellee to pay Appellant $106 in child support. Appellant does not state why such an award was arbitrary or cite to any case law or statute to support her argument. "As are most other aspects of domestic relations law, the establishment, modification, and enforcement of child support are prescribed in their general contours by statute and are largely left, within the statutory parameters, to the sound discretion of the trial court." *Van Meter v. Smith*, 14 S.W.3d 569, 572 (Ky. App. 2000) (citations omitted). "The statutory guidelines offer sufficient

flexibility to allow the trial court to fashion appropriate and just child support orders." *Plattner v. Plattner*, 228 S.W.3d 577, 580 (Ky. App. 2007). "The period of time during which the children reside with each parent may be considered in determining child support, and a relatively equal division of physical custody may constitute valid grounds for deviating from the guidelines." *Id*. at 579 (citations omitted). We find that the trial court did not abuse its discretion in this instance due to each party having equal parenting time.

Appellant also argues on appeal that the trial court erred in awarding Appellee $13,000 in attorney fees and did not give her an opportunity to be heard on the issue. The trial court found that Appellant's "vexatious behavior resulted in extreme litigation costs" for Appellee and that she filed a "barrage of meritless motions." The court also found that Appellant was "represented by her mother, and so she can do so with little to no financial consequence."

KRS 403.220 allows a trial court to award attorney fees in custody cases.

> The amount of an award of attorney's fees is committed to the sound discretion of the trial court with good reason. That court is in the best position to observe conduct and tactics which waste the court's and attorneys' time and must be given wide latitude to sanction or discourage such conduct.

Gentry v. Gentry, 798 S.W.2d 928, 938 (Ky. 1990).

In the case at hand, after the custody judgment was entered, the trial court allowed Appellee's counsel to file an affidavit setting forth the attorney fees Appellee had incurred. Counsel filed said affidavit and included Appellee's

itemized bill. The bill indicated Appellee had incurred almost $20,000 in fees. Appellant and her counsel were then given the opportunity to respond. Appellant did respond in a motion objecting to the attorney fees filed on July 18, 2014. We believe the trial court did not abuse its discretion in awarding Appellee attorney fees. The circumstances of the case made the award reasonable.

Appellant's final argument is that the trial court's order mandating that she attend counseling is absurd and should be reversed. The trial court ordered Appellant to undergo counseling because she had experienced significant emotional trauma in her past and the court believed Appellant was the primary obstacle to effective co-parenting. Kentucky Family Rule of Practice and Procedure ("FCRPP") 6(4) allows for a court to order a parent to undergo counseling in cases concerning child custody. The trial court was within its authority to order Appellant to attend counseling sessions.

Based on the foregoing, we find no error and affirm the judgment of the trial court.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Deborah Y. Payton Louisville, Kentucky	Felicia J. Nu'Man Louisville, Kentucky