

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000552-ME

GINO LANEY

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE CHRISTOPHER J. MEHLING, JUDGE
ACTION NO. 13-CI-02611

HEATHER FIELDS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; JONES AND NICKELL, JUDGES.

ACREE, CHIEF JUDGE: Gino Laney urges reversal of the Kenton Family Court's order of child custody and visitation. More specifically, Gino contends that the Family Court findings were not based on the evidence presented, and it unreasonably restricted his visitation rights. We disagree and affirm.

FACTS AND PROCEDURE

Three children were born to Gino and Heather, an unmarried couple: Damien in 2001, and twins Jaxson and Deacon in 2003. Heather has four other children: Brady, born in 1995, during a previous relationship,¹ and three younger girls with her current husband, Jake Fields.

Shortly after Gino and Heather met in 1999, Gino was struck by a forklift while shopping at Wal-Mart, resulting in severe injuries and three spinal surgeries. Gino's injuries caused him chronic pain which led to depression. Gino turned to alcohol. According to Heather, Gino drank "almost on a daily basis" until he was "obliterated"; he was "rarely home at night" leaving Heather to rear Brady and Damien on her own; and when Gino drank he became irrational and violent.

The relationship between Gino and Heather was, by all accounts, tumultuous and fueled by domestic violence. They separated shortly after Damien's birth, and Gino filed a petition for custody in Campbell Circuit Court. That court awarded Heather temporary custody of Damien and awarded Gino supervised visitation. According to Heather, Gino inconsistently exercised his parenting time.

Shortly thereafter, the twins were born, and Gino and Heather reconciled. Sadly, the parties' relationship did not stabilize. More allegations of domestic violence surfaced and Gino was arrested more than once. By order entered March 29, 2004, the parties agreed to joint custody of Damien and equal parenting time. However, nine months later, an emergency protective order (EPO) was taken out

¹ Brady's father died in a car accident shortly after Brady's birth.

by Heather against Gino; the EPO was later converted to an agreed domestic violence order (DVO).

An Agreed Final Decree was entered in August 2006 affording the parties joint custody of all three boys and awarding Gino liberal parenting time. Heather testified that Gino continued to be absent from the children's lives and inconsistently exercised his parenting time. In March 2010, the court entered another agreed order which granted Gino parenting time every other weekend starting at 6 P.M. on Friday. The order also provided that Gino would forfeit his parenting time if he was more than thirty minutes late to the exchange without notifying Heather.

The record reflects little controversy for the next three years. That changed in December 2013. Gino, acting on the boys' behalf, obtained an EPO against Heather, but the EPO was subsequently dismissed. Gino then filed a petition for custody in Kenton Family Court.²

An agreed order was entered granting the parties equal and unsupervised weekday and weekend parenting. The family court also ordered: that Jake, Heather's current husband, be supervised at all times when around the children; that neither party use corporal punishment; that the parties notify each other of all of the children's activities and appointments; and that all prior orders, unless inconsistent with this one, remain in effect.

² The parties agreed to transfer the case from Campbell County to Kenton County.

A three-day trial began on August 15, 2014, and continued on January 8, 2015 and February 19, 2015. Two school officials, two football coaches, Gino, and Heather each testified.³ At the conclusion of the August 2014 hearing, the family court specifically ordered Gino not to consume *any* alcohol.

On March 12, 2015, the family court entered detailed findings of fact, conclusions of law, and a judgment awarding Heather sole custody of all three children and awarding Gino supervised visitation. The following legal conclusions are critical to our review of the family court's decision:

9. In light of the multiple times that the mother has been a victim of domestic violence by the father and his out of control and aggressive behaviors it is unreasonable to expect that they can work together. One person therefore must be in charge of these children and it needs to be the mother.

10. Any contact the father is going to have with the children needs to be in a way in which he has no contact with the mother. This will have to include a third party exchanges [sic] or exchanges via school or activities. At this point, this court is reluctant to give the father any overnight parenting time or any unsupervised time until this court is assured that his substance abuse problems are under control.

11. This court will again order that the father is not to utilize alcohol at anytime. He will now be subject to ETG alcohol testing under the color blue and he will execute an alcohol testing order with this court. . . . The test will be done at his cost. If he tests positive, he will have no contact with his children until he has three consecutive negative tests. Arrangements will have to be made through the Guardian to provide for the supervised

³ Heather failed to disclose her witnesses and exhibits in compliance with the family court's trial order. As a sanction for this deficiency, the family court excluded Heather's witnesses and exhibits from trial.

visits. These visits can take place one evening after school and one day, be it Saturday or Sunday.

12. The father will be required to attend AA no less than three times per week and obtain a sponsor. He shall provide slips [as proof of attendance] . . . to the Guardian on a monthly basis.

13. The father shall submit himself to a substance abuse assessment. This can be done at St. Elizabeth, North Key, or other providers. The results of that assessment shall be provided to the Guardian and mother's counsel. This court will not consider extending his parenting time until all of these provisions are complied with and he can demonstrate an extended period of sobriety.

(R. at 334-35).

The family court further ordered: that Jake not be around the children except on a supervised basis;⁴ that the parties utilize the standard holiday visitation schedule absent overnight visitation with Gino; and that Gino pay Heather child support. Gino appealed. Additional facts will be discussed as necessary.

STANDARD OF REVIEW

The standard of review regarding child custody issues is whether the family court's decision was clearly erroneous and constituted an abuse of discretion. *Eviston v. Eviston*, 507 S.W.2d 153, 153 (Ky. 1974). We will only reverse a family court's decision in a child custody case if the findings of fact are clearly erroneous or the decision reflects a clear abuse of the considerable discretion granted to family courts in custody matters. CR⁵ 52.01; *Reichle v.*

⁴ The evidence at trial revealed the children are afraid of Jake. This troubled the family court. It recommended the children and Jake engage in reconciliation therapy.

⁵ Kentucky Rules of Civil Procedure.

Reichle, 719 S.W.2d 442, 444 (Ky. 1986). A factual finding supported by substantial evidence is not clearly erroneous. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (footnote omitted). Substantial evidence is “evidence that a reasonable mind would accept as adequate to support a conclusion[.]” *Id.* In that regard, “[m]ere doubt as to the correctness of a finding will not justify its reversal[.]” *Id.*

ANALYSIS

Gino’s main argument is a simple one. He claims the family court’s findings of fact are clearly erroneous as they are unsupported by substantial evidence, thereby resulting in an erroneous and abusive award of sole custody to Heather. He focuses on three categories of factual findings, those related to: (i) domestic violence; (ii) his alcohol use; and (iii) his influence on the children. Gino further contends the family court overly restricted his visitation rights and the family court’s use of the guardian ad litem was erroneous.

A. Custody

KRS⁶ 403.270 is the controlling statute. *Frances v. Frances*, 266 S.W.3d 754, 576 (Ky. 2008). When determining an award of child custody, KRS 403.270(2) instructs the circuit court to give equal consideration to both parents and to award custody in accordance with the best interests of the children involved. KRS 403.270(2). The statute further permits an award of joint custody if it is in

⁶ Kentucky Revised Statute.

the children's best interests. KRS 403.270(5). However, there is no statutory preference for an award of joint custody, an arrangement which entails joint decision-making and significant participation by both parents in the upbringing of their children. *Squires v. Squires*, 854 S.W.2d 765, 769 (Ky. 1993).

KRS 403.270 does "not include a definition of the best interest of the child standard." *Frances*, 266 S.W.3d at 576. Instead, the statute denotes a non-exclusive list of factors to be considered when making a best-interest determination. The factors relevant to this matter include:

- (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[.]

KRS 403.270(2).

We are mindful that the family court, in its capacity as the finder of fact, "is entitled to make its own decisions regarding the demeanor and truthfulness of witnesses" and, in its discretion, "may choose to believe or disbelieve any part of" the testimony presented. *Bailey v. Bailey*, 231 S.W.3d 793, 796 (Ky. App.

2007). The family court's credibility assessments are significant to our review and remain undisturbed.

Gino first contends the family court abused its discretion when it made several erroneous findings of fact and conclusions regarding him and his history of domestic violence. The family court's findings and conclusions related to this argument include:

[Finding] 6. There was repeated domestic violence [between the parties] including a time in which the father strangled the mother in Damien's presence.

[Finding] 9. Petitioner/Father's criminal record in engaging in substance abuse and violence is quite troubling. These include the following incidences:

2002 EPO issued

10/03/03 involved in a fight at the Yucatan
Liquor Store

02/18/01 Public intoxication

09/04/02 Charged with assault, reduced to
disorderly conduct

02/20/04 Choked Heather

11/29/04 involved in a fight

12/05/05 Assault, choking Heather

12/07/05 Possession of Marijuana

12/06/06 Alcohol intoxication arising out of
a fight at a bar.

2/08/10 Assault choking his girlfriend
Nicole

08/02/12 Alcohol intoxication

02/23/14 domestic battery, his girlfriend Nicole was the victim. Mr. Laney was drunk. [According to Gino's trial testimony, the incident occurred at a casino in Lawrenceburg, Indiana].

06/20/14 Fight

[Finding] 10. When the hearing began in August 2014, this Court discovered that the Father had a failure to appear charge in Lawrenceburg, Indiana, over a domestic battery charge arising out of his conduct at the Casino there. He was ordered to clear that matter up. He advised the Court that he had plead guilty to domestic assault. The mother's testimony is that there were numerous other times when the father assaulted her, at times in the presence of the children. Police were also called innumerable times to the house. Mother recalls a time when her oldest son, Brady had to run next door to the neighbors to have them call the police because of the father's violent conduct. Mother also describes the father as striking Damien and also striking her son Brady who was living with them. This court finds that the father on multiple occasions has been the perpetrator of domestic violence and the mother has been the victim. This Court finds that on multiple occasions the children were present and witnessed the father's behavior.

[Finding] 11. This Court also finds that the father's conduct continues to this day with the most recent incident being his assault on his current domestic partner, Nicole, in a public place, the casino in Lawrenceburg.

[Finding] 12. This Court now understands that the mother is truly frightened of the father and has good cause to be so afraid. This Court believes that the father's conduct is aggressive and intimidating.

[Conclusion] 6: It is clear that the father is a serial domestic violence perpetrator who has no regard for the

rights of his domestic partners and uses sheer physical force to obtain his way, whether it is physical force applied to the mother or physical force by grabbing his children and holding him. This conduct goes on unabated, including the incident in Lawrenceburg.

(R. at 329-330, 334).

The family court's factual findings are overwhelmingly supported by the record. Heather described in detail the prior incidents of abuse against both her and the children. The family court had a right to believe Heather's testimony, despite opposing testimony offered by Gino. Further, Gino admitted to assaulting Nicole in Lawrenceburg, Indiana, and even pleaded guilty to the domestic assault charge. Gino's criminal record speaks for itself.

Gino contends much of his criminal record and the testimony of old events of domestic violence should have been deemed irrelevant to the current custody matter. He argues the family court was obligated to limit its review to events that occurred from the date of the last custody order entered in Campbell County on July 16, 2010, to the present. We disagree. To cripple a family court in such a manner could prove disastrous. Children's lives hang in the balance. Family courts need to be fully informed when making custody determinations. The family court in this case made this insightful observation: all evidence of prior domestic violence and abuse – particularly acts of abuse against children – are relevant, but may be weighed differently depending upon its temporal proximity to the current custody action. We agree with the family court's view.

Gino also claims it was error for the family court to weigh past domestic violence between the parties so heavily in the award of sole custody to Heather. Gino points out that the last act of domestic violence between these parties occurred in 2005. Gino misses the bigger picture.

Domestic violence was only one factor considered by the family court. It was not the *fact* of domestic violence alone that spurred the family court's decision; Gino's underlying conduct – aggressive and intimidating behavior – played an even bigger role. Heather testified that Gino continues to display aggressive behavior and intimidate her at exchanges. Gino's recent aggressive behavior toward his current domestic partner supports Heather's testimony. Significantly, this evidence explains why, in part, the family court believes Gino and Heather are unable to effectively co-parent.

This leads us to Gino's remaining issues related to the family court's factual findings: alcohol abuse and his influence on the children. The family court made the following observations:

[Finding] 6. The relationship between mother and father was fueled by domestic violence and alcohol abuse by the father. While the parties were together and after the father was injured the mother was the sole support for the family. During those times she describes the father constantly getting drunk and spending all their money. One of their cars was repossessed. The mother lost her house. . . .

[Finding] 7. The father also cost the mother two jobs. . . .

[Finding] 14. [On November 14, 2014, Gino failed to appear for his scheduled parenting time because] he was

in a bar drinking after work and was involved in an incident at the bar. He denies that he was intoxicated [though he admitted to consuming alcohol] but admits he was in a fight. This all took place after this court entered an order on 8/15/2014 prohibiting the father from using alcohol at any time.

[Finding] 15. More troubling for the Court is the fact that the father has had a long history of substance abuse, mostly alcohol. At one time, he was court ordered to go to AA and be involved in the KAP program. He admitted to this court as of the time of trial that he drinks, although he describes it as socially. . . .

[Conclusion] 4. It is clear that the father has an ongoing substance abuse problem and it is not under control, as he got charged with domestic violence assault in Indiana last year. He assaulted his current paramour. He has been drinking and in a bar fight. All of this is within the last twelve months.

Gino claims there is no support for the family court's findings. He faults the family court for not considering his own testimony that he does not drink around the children; that he voluntarily attends AA two to three times per week; and that he has not consumed any alcohol since August 13, 2014. Gino also claims under KRS 403.270(3) that the family court may "not consider conduct of a proposed custodian that does not affect his relationship to the child."

The family court's concerns are justified by the record. Gino admits to having long abused alcohol. His claim that he no longer drinks alcohol rings hollow, particularly in light of the November 2014 incident in which he *admits* he consumed alcohol, despite the family court's order entered three months prior specifically ordering Gino not to drink *any* alcohol. Gino fails to appreciate the

danger his alcohol consumption presents to himself and his children. The record reflects that much of the violence perpetrated by Gino on Heather and on his children occurred while he was under the influence of alcohol. Further, Heather testified that Gino had tried on several occasions to remain sober, but ultimately failed, relapsing to his old habit.

We applaud Gino's efforts to obtain sobriety. But, for a large portion of these children's lives, Gino drank to excess. As did the family court, we too refuse to compromise the children's safety.

Gino also takes issue with the family court's conclusion that his negative influence is the direct cause of the children's unruly, undisciplined, and aggressive conduct. The family court found:

[Finding] 22. It appears to this court that the problem with the boys, to a great extent, have become much more severe once father got more involved with these children in the fall of 2013. Up until then there were no issues at school. They were good students and only on occasion spent time with their father. Before the fall of 2013 father's time with the boys was inconsistent. He would be late or be a no show for visits. He moved to Florida for an extended period and did not visit at all. Mother says on occasion, she would take the boys to father's house and find him passed out.

[Finding] 23. Two school officials testified. They indicated that in the last couple of years, things have changed; the boys seem upset at school and appear to be effected by the ongoing conflict of their parents. Sometimes they cry during class and act out. In addition, there has been at least one occasion at school where each parent showed up and demanded the children forcing school authorities to call the police. On that occasion, the mother had her water turned off for about twelve

hours over some billing confusion. Ultimately, the police followed the mother home (the children were in her car) and demanded to come into the house and assure themselves that the water was on. The father was present for all of this.

[Finding] 26. As of now, the mother describes the children as aggressive, out of control, disrespectful and cursing. She states that this behavior had begun in the fall of 2013 and has continued unabated to the present.

(R. 331-32).

Gino argues that the family court ignores the testimony of the school officials and the football coaches. We disagree. The court directly mentions some of this testimony in its findings. The school officials testified that the twins started the 2013-2014 school year fairly well, experienced a sharp decline in performance in the late fall and winter, and then finished the school year strong. Gino testified that the twins' decline resulted from issues in Heather's home, and their academic performance improved due to his increased involvement in the spring of 2014. Heather testified, and the family court found her testimony credible, that the twins' academic, emotional, and behavioral decline resulted from Gino's increased presence in their lives. It is undisputed that the twins had no academic issues until the 2013-2014 school year. It is also undisputed that Gino assumed a more involved role in the children's lives starting in 2013.

Two football coaches testified they saw Gino at the children's practices and games; never saw any violent behavior from him; and never saw him intoxicated. While certainly favorable to Gino, the family court found this testimony to be of

little value. *Bailey*, 231 S.W.3d at 796 (“A family court operating as finder of fact has extremely broad discretion with respect to testimony presented[.]”).

Weighing the evidence, the family court attributed the children’s recent behavioral issues to Gino’s increased presence in their lives. The family court’s finding is supported by the substantial evidence of Heather’s testimony. We decline to disturb the court’s findings on this issue.

Ultimately, the family court concluded Heather and Gino lacked the ability to effectively co-parent and, therefore, joint custody would be unworkable. Gino’s aggressive behavior coupled with his influence on the boys and his significant history of alcohol abuse all factored into the family court’s decision. But that is not all. The family court also found that Gino displayed a complete disregard for Heather’s decision-making authority and, even more disturbingly, Gino disregarded the orders of the court.

[Finding] 13. In the fall of 2013, the father obtained physical possession of the boys and through the month of November refused to hand them over to the mother. This included Thanksgiving. The father admitted that he engaged in that conduct and kept the children in December.

[Finding] 14. In November of 2014, the father failed to timely appear for a child exchange. Under the parties prior orders in Campbell County he forfeited his parenting time if he did not appear timely to pick up the children. The mother assumed that this carried over, and she indicated that she would not give the children to the father. The father came to the mother’s home and took the boys. As it turns out, the father did not appear for the parenting time because that morning [because of the bar fight previously described].

[Finding] 19. The father unilaterally signed the children up for wrestling in the fall of 2014. The mother objected because the children were already in basketball and football and she was concerned about injuries in wrestling.

[Finding] 20. Damien injured his shoulder in wrestling. Father did not tell mother. Father took Damien to an Orthopedic Surgeon and had an MRI done and then scheduled shoulder surgery for Damien. All was done without any information or notice to mother.

(R. 330-31). We think the family court said it best:

To schedule a child for surgery without ever telling the mother is outrageous conduct. To take the children and hold them for over a month, including through the Thanksgiving holiday is outrageous conduct. To be drinking alcohol in the early morning hours while under an order to drink no alcohol at all and to get involved in a fight and miss his parenting time is outrageous conduct. To then take the children from the mother's home the next day, is even more outrageous.

(R. 333-34). In sum, we find the family court's factual findings to be fully supported by the record and sufficient to justify granting Heather sole custody of these children. Whether we would have decided the case differently is of no consequence. *Coffman v. Rankin*, 260 S.W.3d 767, 770 (Ky. 2008). The family court's order reveals it fully considered all relevant circumstances, including the relevant factors of KRS 403.270(2), and made its decision in accordance with the best interests of these children. We affirm the family court's custody decision.

B. Visitation

Gino is also displeased with the family court's visitation decision. He disputes the need for supervised parenting time and takes issue with the family court's unwillingness to grant him overnight visitation.

“A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health.” KRS 403.320(1). The statute does not define “reasonable visitation.” In *Drury v. Drury*, 32 S.W.3d 521 (Ky. App. 2000), this Court discussed the “reasonable visitation” standard of KRS 403.320(1):

What constitutes “reasonable visitation” is a matter that must be decided based upon the circumstances of each parent and the children, rather than any set formula. When the trial court decides to award joint custody, an individualized determination of reasonable visitation is even more important. A visitation schedule should be crafted to allow both parents as much involvement in their children's lives as is possible under the circumstances.

Id. at 524 (emphasis added). To be clear, visitation refers only to a parent's “right to see the children, but not to control them legally.” *Pennington v. Marcum*, 266 S.W.3d 759, 763 (Ky. 2008).

The family court granted Gino two days of supervised visitation per week: one evening during the week, and one day during the weekend. Gino is also allowed to be present for half of the children's games and practices, and to standard holiday visitation (except for overnight visitation). In light of the facts of this case, we cannot say the family court denied Gino reasonable visitation.

Further, the family court's order reveals it is amenable to broadened visitation upon proof that Gino's alcohol issues are firmly under control.

C. Guardian Ad Litem

Gino argues the family court misused the guardian ad litem in this case. He first faults the family court for asking the guardian ad litem's position as to custody. We do not share Gino's concern.

At the conclusion of trial, the family court inquired, "I'm not clear what the Guardian wants to advocate." The guardian responded that she stood by what the children told the family court during the family judge's *in camera* interview with the children.⁷

This is precisely the role of a guardian ad litem – to advocate on behalf of the children. *Morgan v. Getter*, 441 S.W.3d 94, 119 (Ky. 2014) (“[T]he guardian ad litem is a lawyer for the child, counseling the child and representing him or her in the course of proceedings by, among other things, engaging in discovery, in motion practice, and in presentation of the case at the final hearing.”).

The family court's inquiry as to the guardian's position, on behalf of the children, was entirely proper.

Finally, Gino argues the family court misused the guardian ad litem by delegating certain “friend of the court” duties to her that should have been assigned elsewhere. Specifically, the family court requested that supervised visitations be arranged through the guardian; for Gino to supply monthly AA slips to the

⁷ This interview was neither recorded nor made part of the record.

guardian; and for the guardian to prepare a schedule for the parents to use to attend the children's activities. In *Morgan*, the Supreme Court differentiated between a guardian ad litem – the lawyer for the children who is representing the child-client's best interest and is obligated to litigate on behalf of the child – and a friend of the court. 441 S.W.3d at 118-19. The latter, the Court explained, “investigates, reports, and makes custodial recommendations on behalf of the court, and is subject to cross-examination.” *Id.* at 119.

We do not think the family court's order blurred the line between a guardian ad litem and a friend of the court. It did not ask the guardian ad litem to investigate on the court's behalf or to abandon or compromise her role as the children's attorney. Instead, the family court simply viewed the guardian ad litem as a neutral attorney through which paperwork could be filtered and arrangements made. Notably, the guardian ad litem has not taken issue with the family court's requests. We are not convinced the family court misused the guardian ad litem in any fashion.

For the foregoing reasons, we affirm the Kenton Family Court's March 12, 2015 Findings of Fact, Conclusions of Law, and Judgment awarding Heather sole custody of the parties' three minor children and awarding Gino reasonable visitation.

ALL CONCUR.

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