

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-000068-ME

LINDSAY JACKSON

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE RICHARD A. WOESTE, JUDGE
ACTION NO. 07-CI-00169

WILLIAM VERST

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, J. LAMBERT AND VANMETER, JUDGES.

COMBS, JUDGE: Appellant, Lindsay Jackson (Mother) seeks review of an Order of the Campbell Circuit Court determining that the parties' child should primarily reside with Appellee, William Verst (Father). Finding no error, we affirm.

The parties were married on June 6, 2006. They are the parents of one minor child (Daughter) born on August 9, 2006. On February 2, 2007, Father filed

a Petition for Dissolution. The Decree of Dissolution was entered February 12, 2009, *nunc pro tunc*, to July 21, 2008. Father resides in Northern Kentucky.

Mother lives in Tennessee and has a younger son by Brad Uphoff.

As Father notes, the case has a long and turbulent background. Both parties have a history of alcohol-related issues. On or about October 29, 2013, Daughter was found wandering unsupervised at night while Mother was intoxicated. Mother was subsequently arrested and charged with several offenses. As a result, the Department of Children's Services filed an action in Wilson County, Tennessee, alleging that Daughter and her half-brother were dependent and neglected. Ultimately, Mother pled guilty to Driving Under the Influence of Alcohol on January 13, 2015.

Dr. Jean Deters, to whom the trial court had initially referred the parties for evaluation in 2012, provided an updated report dated April 15, 2014. Dr. Deters recommended that Daughter remain with Mother; however, Dr. Deters had serious reservations in light of the unresolved proceedings in Tennessee.

By Agreed Order signed by the parties on May 13, 2014, and entered June 13, 2014, the parties agreed to continue to follow the court's November 9, 2012, Order and remain joint custodians -- with Daughter to remain in school in Tennessee with Mother.

On or about June 9, 2014, Brad Uphoff contacted the police in Tennessee after he went to pick up his son at Mother's home and found the child unsupervised

or improperly supervised due to Mother's intoxication. Daughter was in Northern Kentucky with Father at the time.

On June 19, 2014, the trial court entered an Emergency Order *ex parte* and awarded Father exclusive physical custody of Daughter until further orders of the court. It set the matter for hearing on June 23, 2014.

The trial court's June 23, 2014, Order reflects that the parties stipulated that the Tennessee Juvenile Court had entered an emergency review hearing order removing Daughter from Mother's custody after a hearing on June 20, 2014. The trial court awarded Father and paternal grandmother joint custody of Daughter effective immediately until further orders of the court. The trial court permitted Mother to take Daughter to Disney World as previously planned -- provided that she wear a SCRAM bracelet and that Mother's parents supervise the event. After that vacation, the trial court ordered that Daughter remain in the exclusive custody of Father and her paternal grandmother.

Mother filed a Motion to Alter, Amend, or Vacate, which the trial court granted in part by Order of September 15, 2014, to reflect that the parties are still joint custodians, along with the paternal grandmother, who is also a joint custodian, and that Father is temporary physical custodian.

By Order of February 27, 2015, the Juvenile Court for Wilson County, Tennessee, declared that Daughter and her half-brother were dependent and neglected based upon Mother's excessive use of alcohol and lack of supervision involving the incidents on October 29, 2013, and June 9, 2014. The Tennessee

Juvenile Court ordered jurisdiction over Daughter restored to the Commonwealth of Kentucky, Campbell Circuit Court, and placed full legal and physical custody of Daughter with Father pending further determination by the Campbell Circuit Court.

The matter came before the trial court on October 31, 2014, and June 12, 2015. By Order of August 13, 2005, the trial court found that both parents love Daughter, that each wants to be primary residential parent, and that each can physically provide Daughter with a home. The trial court considered Daughter's request presented through her Guardian Ad Litem that Daughter wants to reside with Mother and go to school in Tennessee. The judge met with Daughter in chambers.

The trial court found that the parties have been sharing joint custody with Daughter's paternal grandmother and that Daughter has been residing with Father and his fiancée in Northern Kentucky, where she attends St. Joseph School. The trial court found that Daughter has performed well academically, made friends, participated in at least one extracurricular activity, and spent time with her family. After school, Daughter is cared for by her paternal grandmother until Father or his fiancée is available.

The trial court concluded that it was in Daughter's best interest to reside primarily with Father in Northern Kentucky. The trial court noted Father's substance abuse in the past, but it also observed that he had no recent violations

and that his random drug screens were consistently negative. The trial court concluded that Mother's instability over the last 18 months and the risk of harm that she represented for her children were inexcusable. The court did not feel it was in Daughter's best interest to award sole custody to either party since the parties had initially agreed to joint custody and Daughter is bonded with both of them.

Mother filed a Motion to Alter, Amend, or Vacate the August 13, 2015, Order. After clarifying two points regarding parenting time, the court otherwise denied the Motion.

On appeal, Mother contends that her testimony was more credible than that of Father regarding alcohol issues, arguing that the trial court erred or abused its discretion because it was "clear by a preponderance of the evidence" and in Daughter's best interest to primarily live with Mother in Tennessee and attend school there. "[J]udging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court." *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). In her Reply Brief, Mother refers to matters which she contends occurred since the appeal was filed. We cannot consider matters outside the record. *Odley v. Wilson*, 218 S.W.2d 17 (Ky. 1949). On appeal, our task is to determine whether the trial court's findings are clearly erroneous, whether it applied the correct law, or whether it abused its discretion. *Humphrey v. Humphrey*, 326 S.W.3d 460 (Ky. App. 2010).

As Mother notes, the issue is modification of parenting time, and the pertinent standard is the best interest of the child. *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008). The trial court correctly applied the best interest standard pursuant to KRS¹ 403.320(3) and considered the factors set forth in KRS 403.270(2). We agree with Father that there was more than sufficient evidence to support the trial court's findings. Accordingly, we find no abuse of discretion.

We affirm the order of the Campbell Circuit Court.

ALL CONCUR

BRIEF FOR APPELLANT:

Brenda Bonecutter
Newport, Kentucky

BRIEF FOR APPELLEE:

Patrick Walsh
Newport, Kentucky

¹ Kentucky Revised Statutes.