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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001492-MR
AND
NO. 2016-CA-000479-MR

KIMBERLY MCELWAIN

APPELLANT

v. APPEALS FROM WARREN CIRCUIT COURT
HONORABLE CATHERINE R. HOLDERFIELD, JUDGE
ACTION NO. 14-CI-01053

CHRISTOPHER MCELWAIN

APPELLEE

OPINION REVERSING AND VACATING

** ** * * * * *

BEFORE: KRAMER, CHIEF JUDGE; CLAYTON, AND TAYLOR, JUDGES.

CLAYTON, JUDGE: These consolidated appeals are from an order of the Warren Family Court entered on August 31, 2015, and another order entered on March 11, 2016. The first order addressed a post-dissolution matter concerning the parties' son, and the second order held Kimberly McElwain in contempt for violation of the order in the original appeal.

After careful consideration, we reverse the order concerning the post-dissolution matter and vacate the order of contempt.

BACKGROUND

Kimberly McElwain (Kim) and Christopher McElwain (Chris) were married on October 17, 1997, and separated on July 4, 2014. They entered into a separation agreement, which was filed with the family court, on August 29, 2014. The separation agreement was adopted and incorporated into the decree of dissolution entered on November 14, 2014.

The separation agreement named Kim and Chris joint custodians of their son (A.C.M.) with Kim designated as primary residential parent. Additionally, Kim was awarded the marital residence including the sole responsibility for the mortgage and the expenses. The parties agreed that Kim and the son would live there until his high school graduation, and Kim would then sell the residence. But the separation agreement had no restrictions as to who lived in the marital residence.

Following the entry of the decree, Kim began dating Craig Douglas and is now engaged to him. Craig sold his home in Tennessee and moved into Kim's home. While repairs were made to the home purchased by Kim and Craig, he lived in the former marital residence with Kim and the parties' son. Meanwhile, with the approval of Chris, Kim put the marital residence up for sale and received

an acceptable offer in August 2015. The home sold about a year before A.C.M.'s graduation from high school.

On July 10, 2015, Chris filed a motion that, in part, requested that Kim's fiancé be prohibited from living in the marital residence. In the motion, Chris perfunctorily objected to a third party living in the home explaining that he did not approve, had not consented, and believed such an arrangement was not in the best interests of the son. On August 20, 2015, the family court held a hearing on the motion. During the hearing, no evidence was provided that this cohabitation negatively impacted the son. In fact, Chris conceded that no issue existed that would make Kim's fiancé unfit to be around the parties' son.

On August 31, 2015, the family court entered an order granting Chris's motion to remove Craig from the residence. In the order, the family court acknowledged that even though Chris provided no evidence that the 17-year-old son was negatively impacted by Craig living in the home, it "must uphold and not devalue the sanctity of marriage and must require both parents no overnight guests of the opposite sex who are not related to that parent by blood or marriage, so long as the parties' minor child stays overnight or resides in such home when either parent requests same."

Next, Kim filed a motion to alter, amend, or vacate the order. By this time, Kim and her fiancé were moving into the home that they had purchased

together. Because of the family court's order, they were forced to make alternative arrangements for Craig. The family court denied the motion. Kim then appealed the order.

On December 11, 2015, two days after the son's 18th birthday, Chris filed a motion for a rule of contempt and motion for attorney's fees. He maintains that Kim and her fiancé violated the family court's order by continuing to cohabitate while the parties' son lived with them. Given the pendency of the first appeal, Kim responded that the motion should be denied based on both the family court's lack of jurisdiction and also the son having turned 18, which rendered the issue moot.

The family court held a show cause hearing. After the hearing, Kim made a motion to vacate the show cause hearing because she had been subjected to a criminal contempt hearing without being afforded due process. The family court denied this motion and entered its order on March 11, 2016, holding Kim in contempt and granting attorney's fees. The family court reasoned that because 77 days had elapsed between the September 23, 2015, judgment and son's December 9, 2015, 18th birthday, the original order was violated on 77 distinct occasions with each day constituting a separate violation. The order sentenced Kim to 30 days incarceration, held in abeyance, if she complied with all court orders. Moreover, the family court ruled that Kim was to pay Chris's attorney \$4,500 in fees and to

pay, within 90 days, \$5,520 into an escrow account, supervised by one of the attorneys, to be used for the son's college educational expenses but not to include living expenses.

Kim appealed this order. Our Court consolidated the two appeals.

STANDARD OF REVIEW

Factual findings of the trial court are reviewed under the “clearly erroneous” standard of Kentucky Rule of Civil Procedure (CR) 52.01. *Smith v. Smith*, 235 S.W.3d 1, 6-7 (Ky. App. 2006). A factual finding is not clearly erroneous if it is supported by substantial evidence. *Owens–Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). After a trial court makes the required findings of fact, it must then apply the law to those facts. The resulting order of the trial court will not be disturbed unless it constitutes an abuse of discretion. *Allen v. Devine*, 178 S.W.3d 517, 524 (Ky. App. 2005).

“The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). Finally, the trial court’s legal conclusions are reviewed *de novo* as an issue of law. *Smith*, 235 S.W.3d at 6-7 (Ky. App. 2006).

With these standards in mind, we now turn to the case at hand.

ANALYSIS

The first issue is whether the family court erred by entering an order prohibiting Kim's fiancé from staying at the residence while the parties' son was present. Kim maintains that the family court committed reversible error by prohibiting the fiancé from living in the residence. To recap, the family court in its order observed that the parties' separation agreement provided them with joint custody and designated Kim as the primary residential custodian. Without making any findings about the impact on the 17-year-old son, the family court opined that it must not devalue the sanctity of marriage by permitting either parent to have overnight guests of the opposite sex who are unrelated. In doing so, the family court specifically noted that no inappropriateness by Kim had been alleged or proven.

Chris's motion to remove Craig from the marital residence was referenced in relation to the separation agreement. While the separation agreement elucidates the 17-year-old son's custody arrangement and the plans for handling the marital residence, no provisions or limitations addressed who could reside in the home besides mom and son.

The terms of a settlement agreement incorporated into a decree of dissolution are enforceable as contract terms. Kentucky Revised Statutes (KRS) 403.180(5). A contract's meaning is discerned from the four corners of the

instrument. *Baker v. Coombs*, 219 S.W.3d 204, 207 (Ky. App. 2007). Therefore, as acknowledged in the family court's order, no language in the separation agreement prevented Kim from allowing other people to stay or live in the home. In addition, during the pendency of the action, Kim and Craig moved into a different home, which certainly nullified the effect of the separation agreement.

Although the motion does not implicate the child custody or parenting statutes, Chris obliquely mentions in the motion that the presence of the fiancé in the residence was not in the best interests of the parties' son. Here, the mother has already been granted joint custody and designated residential custodian of the son. Thus, Chris implicates indirectly the modification of child custody statutes in stating that the child's best interests are not being met. But he provides no reasoning or evidence showing the negative impact of the fiancé living in the residence. KRS 403.270(3) states that "[t]he court shall not consider conduct of a proposed custodian that does not affect his relationship to the child." Therefore, any actions that do not affect a child are not relevant. As already noted, the family court made no findings that the living arrangement negatively impacts the son.

Certainly, if a parent is promiscuous and that promiscuity has a negative impact on a child, a family court has the authority to protect the child. *See Krug v. Krug*, 647 S.W.2d 790 (Ky. 1983). But an adult relationship is a concern only if there is proof that it has a direct, negative impact on the child.

Similarly, our Court held that a parent's involvement in a committed same-sex relationship does not meet the criterion for sexual misconduct. *Maxwell v. Maxwell*, 382 S.W.3d 892, 898 (Ky. App. 2012). The Court explained that a family court must ascertain whether a parent's actions were harmful to a child before making decisions about the child's custody. It stated that "[h]arm to these children must have an evidentiary basis and cannot be assumed." *Id.* at 899.

While as pointed out by the family court, the relationship involved the cohabitation of a same-sex couple, contrary to the family court's assertion that it was limited to same-sex couples, the Court did not limit its holding to same-sex couples. Instead, it clarified that consideration of a parent's behavior must include the determination that the parent's behavior had a negative effect on the child. Here, the family court made no evaluation of the parties' cohabitation on the 17-year-old son.

The family court, in its September 23, 2015 order reasoned that KRS 403.110(1) supports its decision. It cited the following statutory language:

This chapter shall be liberally construed and applied to promote its underlying purposes, which are to:
(1) Strengthen and preserve the integrity of marriage and safeguard family relationships[.]

KRS 403.110(1). We disagree with family court that that this general statement abrogates the statutory and case law directives in custody matters, which require that parental behavior must be shown to harm the child before custodial decisions are made or modified. It is not the role of the judiciary to act as a moral arbiter,

but instead its role is to interpret the law as written. And a review of Kentucky law shows no law prohibiting cohabitation. Finally, we conclude that Kim's constitutional arguments are not pertinent to the resolution of this matter.

Consequently, we hold that the family court abused its discretion and acted in a manner that was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles" when it ordered that Kim's fiancé could not live in the residence. The family court made no factual findings that this behavior had a deleterious impact on the son. Indeed, the order stated "[n]o inappropriateness by the Petitioner has been alleged or proven other than allowing a member of the opposite sex . . . to stay overnight . . . while the minor child is also in the home overnight." Further, since the son's birthday was December 9, 2015, and he is now legally considered an adult, another hearing on the matter would be moot.

Because we have reversed the family court's order concerning the marital residence, the second issue on appeal, the efficacy of the order of contempt, is no longer viable. In the instant case, the family court abused its discretion in its underlying order, and thus, the contempt order is void and vacated.

CONCLUSION

We reverse the Warren Circuit Court's order granting the motion to remove a third party from the marital residence and vacate its order holding appellant in contempt and to pay the attorney's fees of appellee.

ALL CONCUR.

BRIEF FOR APPELLANT:

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