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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000974-ME

VIRGIL CARTER JR. AND
BEVERLY LYNN CARTER — APPELLANTS

v.

APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE SHEILA N. FARRIS, JUDGE
ACTION NO. 16-CI-00090

JESSE ROSS HAYDEN — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

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

CLAYTON, CHIEF JUDGE: The appellants, Virgil Carter Jr. and his wife Beverly Lynn Carter, share joint custody of their grandson with Jesse Ross Hayden, the child's father. The Carters bring this appeal from a Henderson Family Court order denying their motion to modify custody and restrict Hayden's

visitation with the child. Having reviewed the record and applicable law, we affirm.

The Carters are the maternal grandparents of J.E.H., who was born in 2012. J.E.H.'s mother has supervised visitation with the child. On August 15, 2016, the family court entered an agreed order granting joint custody to the Carters and Hayden. The order designated Hayden as the primary residential custodian and provided the Carters with visitation during the day while Hayden is at work, for one weekend per month, and during specified periods of the summer and holidays. Mrs. Carter, who was previously employed as a nurse, does not work outside the home; Mr. Carter has been employed at Kimberly Clark for several years. Hayden is employed at a manufacturing company and must report for his shift very early in the morning. He takes J.E.H. to his mother's house on his way to work. One of the Carters then picks up the child from the paternal grandmother's house and takes him to preschool or to their home.

On December 13, 2016, about four months after the entry of the agreed joint custody order, the Carters filed a motion to modify parenting times and/or seeking sole custody and supervised visitation only with the father on the grounds the child suffered multiple injuries at his father's home. The family court held a hearing on the motion at which it heard extensive testimony from the Carters, Hayden, the child's preschool teacher, and a woman who used to date

Hayden. The child was represented by a guardian ad litem. Further facts about the evidence elicited at the hearing will be provided later in this opinion.

The family court entered an order which denied the Carters' motion. It also ordered Hayden to participate in Building Stronger Families, an in-home service program which would provide him with additional parenting skills, and to attend parent-teacher conferences and J.E.H.'s school programs to the extent they did not conflict with his work schedule. This appeal by the Carters followed.

The Carters' first argument concerns the legal standard applied by the family court in addressing their motion to modify joint custody. The family court applied the standard for modification of a custody decree found in Kentucky Revised Statutes (KRS) 403.340, which provides in pertinent part as follows:

> (1) As used in this section, "custody" means sole or joint custody, whether ordered by a court or agreed to by the parties.
>
> (2) No motion to modify a custody decree shall be made earlier than two (2) years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe that:
>
> > (a) The child's present environment may endanger seriously his physical, mental, moral, or emotional health[.]

KRS 403.340 (1) and (2)(a).

The Carters argue that our case law holds that the KRS 403.340 "endangerment" standard does not apply when a party seeks to modify a joint

custody order, and that the family court should have applied the less stringent "best interest of the child" standard. We disagree. The courts have held that the modification statute applies to joint custody arrangements. Indeed, the opinion cited by the Carters, *Scheer v. Zeigler*, 21 S.W.3d 807 (Ky. App. 2000), plainly states: "We hold that joint custody is an award of custody which is subject to the custody modification statutes set forth in KRS 403.340 and KRS 403.350 and that there is no threshold requirement for modifying joint custody other than such requirements as may be imposed by the statutes." 21 S.W.3d at 814.

In reviewing the motion to modify visitation,[1] the family court applied KRS 403.320, which provides in pertinent part that the court "may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health." KRS 403.320(3). The court found that the Carters had failed to prove the statutory factors to justify a change in visitation.

The Carters again argue that the family court should have applied only the "best interest of the child" standard, and remind us that they, as de facto

[1] "Visitation" is technically a term that applies only in the context of sole custody, whereas "timesharing" is the term more properly used in the context of joint or shared custody. The modification language of KRS 403.320 applies in either situation. *See Pennington v. Marcum*, 266 S.W.3d 759, 765 (Ky. 2008).

custodians, have the same standing as a parent. *See* KRS 403.270. But Hayden did not seek to limit the Carters' visitation with the child. The family court properly applied the statute to the Carters' motion, as they were the parties who sought to restrict the rights of a parent.

The decision of a family court regarding visitation or custody shall not be disturbed absent an abuse of discretion. "Every case will present its own unique facts, and the change of custody motion or modification of visitation/timesharing must be decided in the sound discretion of the trial court." *Pennington v. Marcum*, 266 S.W.3d 759, 769 (Ky. 2008). "An abuse of discretion will only be found when a trial court's decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Bell v. Bell*, 423 S.W.3d 219, 222 (Ky. 2014) (citation omitted). The family court's findings of fact shall not be set aside unless they are clearly erroneous, and due regard shall be given to the opportunity of the court to judge the credibility of the witnesses. Kentucky Rules of Civil Procedure (CR) 52.01. "[F]indings of fact are clearly erroneous only if they are manifestly against the weight of the evidence." *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008).

The Carters argue that the family court's denial of their motion was unsupported by the evidence, which they claim proves that J.E.H. suffered a series of injuries resulting from Hayden's intentional abuse or, at best, neglectful care. They also claim that the family court gave insufficient weight to evidence that

Hayden made highly-inappropriate remarks to J.E.H., took no interest in his school work and never took him to medical appointments.

The most serious of J.E.H.'s injuries was a broken arm which was first detected by his preschool teacher who noticed he was not able to use the arm normally. She informed the Carters, who took him to the pediatrician. According to Mrs. Carter, the injury had occurred several days before. Hayden testified that J.E.H. broke his arm when he was playing and jumped off the sofa. Hayden knew at the time the child had hurt his arm but did not realize it was broken.

The Carters also allege that the child's penis was injured on two occasions when his father punched him. According to Hayden, the child's penis was only injured on one occasion and it was an accidental injury caused by the toilet seat when the child was using the bathroom. Patricia Carino, the child's guardian ad litem, testified that the child told her that his father punches him in the penis. Carino also expressed doubts that the injury could have been caused by the toilet seat.

The Carters and Hayden agree that two of the child's fingers were slammed in a door at his father's house. Hayden testified that this happened accidentally. The Carters also claim J.E.H.'s knee was hurt when his father struck him, but Hayden testified that this did not happen.

Evidence was also elicited at the hearing regarding disturbing remarks made by J.E.H. at his preschool. His teacher reported that he said he "didn't like his daddy and he did bad things to him." He told his grandparents that his father punched him in the groin, told him he was going to knock it off and called him a pussy.

Hayden admitted that he does not take his child to the doctor and did attend events at the child's school. He also acknowledged that the broken arm, the penis injury, and the fingers caught in the door occurred at his house and testified, "I understand he's a boy, I understand he runs, with his head backwards, he runs into stuff . . . I understand he's a boy; he's going to get hurt." He also testified that there was nothing he could have done to prevent the injuries. The Carters argue that this testimony proves that the father expects the injuries to continue and claim that the family court failed to address what they characterize as the "white elephant" in the room – that Hayden admitted he could not co-parent with the Carters.

The family court found that J.E.H. had suffered a broken arm and injury to his penis but noted that his case was never referred to the Cabinet for Health and Family Services or to the Department of Community Based Services. At the hearing, the family court expressed concern that the Carters thought the child was being injured but did not immediately call the police or social services.

Additionally, the Court noted that the child had been in the Carters' care each day after he broke his arm but no treatment was sought until the teacher reported a problem. The court expressed concern about the Carters' repeated criticism of Hayden's care for the child and warned that the potential for protracted litigation over the next fourteen years would not be in the best interest of any child.

"A family court operating as finder of fact has extremely broad discretion with respect to testimony presented, and may choose to believe or disbelieve any part of it. A family court is entitled to make its own decisions regarding the demeanor and truthfulness of witnesses, and a reviewing court is not permitted to substitute its judgment for that of the family court, unless its findings are clearly erroneous." *Bailey v. Bailey*, 231 S.W.3d 793, 796 (Ky. App. 2007). It was well within the family court's discretion to evaluate Hayden's credibility and to believe his testimony that the child's injuries were accidental. Hayden's former girlfriend, who dated him for about one year, testified that his demeanor with the child was always fine and that he never disciplined him inappropriately. The family court also acted within its discretion in giving weight to the fact that despite their concerns that the child was in danger, the Carters never contacted the police, nor did the child's physicians and other medical personnel ever refer the child's case to the police or to social services. The family court recognized and addressed the Carters' concerns about Hayden's parenting style in its order directing Hayden

to complete a parenting program and to attend parent-teacher conferences and programs offered at J.E.H.'s school.

The Carters further argue that the judge was unable to act as an impartial fact finder because she became an advocate for Hayden, who was appearing pro se. They contend that the judge attacked and chastised them while continuously interrupting the proceedings with her own objections on Hayden's behalf. As evidence for this, they point to a moment in the proceedings when the judge refers to Hayden as "sweetheart."

"As a principle, it is fundamental that a judge may not act in the dual capacity of judge and advocate." *Transit Auth. of River City (TARC) v. Montgomery*, 836 S.W.2d 413, 416 (Ky. 1992) (internal citations omitted). In the criminal context, "our case law has tended to lend a wary eye and a cautious approach to judicial involvement in the interrogation of witnesses." *Couch v. Commonwealth*, 256 S.W.3d 7, 13 (Ky. 2008). A significant reason for this caution is "our abundant sensitivity to what effect, if any, such involvement may or may not have upon a jury[.]" *Id.* "Because of the risk that judicial participation in the production of evidence might unduly influence the triers of fact, it is expected that courts will use this power sparingly." *Id*. (parenthetical citing Kentucky Rules of Evidence KRE 614(b), Drafters' Commentary (1989)). In proceedings before the trial court alone, however, there is no concern about inappropriately

influencing a jury. "[W]hen such risk of prejudice to the *jury* is missing, the risk of judicial involvement in interrogation is likewise substantially lessened." *Id.* As the Carters' own attorney stated when cautioned by the court about hearsay, "You're the fact finder, you're going give it the weight it needs. You don't have a jury to worry about prejudicing but we do have a child to worry about."

Our review of the hearing shows the family court expressing concern that Hayden was not represented by counsel, and occasionally intervening to ensure that the proceedings were conducted in a fair and orderly manner. Her reference to Hayden as "sweetheart" was not a term of endearment but rather an attempt to explain to him that he was being provided with some time to review his materials and decide if there is anything he wished to testify about at the hearing. The judge did not act as Hayden's advocate nor did she intervene inappropriately in the proceedings.

For the foregoing reasons, the order denying the motion to modify custody and restrict visitation is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Amealia R. Zachary
Dixon, Kentucky

NO BRIEF FILED FOR APPELLEE