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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000174-ME

TIMOTHY JUSTIN NICKELL — APPELLANT

v.

APPEAL FROM MAGOFFIN CIRCUIT COURT
HONORABLE DWIGHT S. MARSHALL, JUDGE
ACTION NO. 15-CI-00165

MIKA NICKELL, NOW KNOWN AS
MIKA REED — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MAZE, AND SPALDING, JUDGES.

DIXON, JUDGE: Timothy (T.J.) Nickell appeals from the order denying his motion to modify custody of the parties' minor child entered on January 3, 2019, by the Magoffin Family Court. Following review of the record, briefs, and law, we affirm.

The parties have one minor child in common from their marriage. Pursuant to their separation agreement, entered on November 10, 2010, T.J. and Mika had joint custody of the child with Mika designated as the primary custodian and time sharing for T.J. "in accordance to the standard visitation guidelines of the 37th Judicial Circuit and at any and all other times agreed upon between the parties."

Both parties remarried. Mika had another child. On April 16, 2018, after she became widowed, Mika was in poor mental health and took prescription and other medications and wrecked her vehicle while her two children were passengers. As a result of this accident, Mika was charged with multiple offenses, all of which were dismissed, except those relating to Driving Under the Influence (DUI) and wanton endangerment, to which she pled guilty. Subsequently, on May 9, 2018, the Commonwealth opened dependency, neglect, and abuse (DNA) cases on behalf of the minor children. The Cabinet for Health and Family Services (CHFS) was appointed to investigate the charges of abuse and neglect, and both parties submitted case plans. As part of the case plans, temporary sole custody of T.J. and Mika's child was given to T.J., with care also to be provided by T.J.'s mother (Bretta Adams) and grandparents (Dorothy and Ernie Adams) since T.J. often traveled for work. Mika was allowed visitation under the supervision of her parent(s) (Gina and Mike Reed). Mika completed the case plan and attended a

thirty-day drug rehabilitation program. The DNA action was dismissed on August 23, 2018.

Also in response to the wreck, on May 11, 2018, T.J. moved the trial court in the instant action to modify custody to award him temporary and permanent sole custody of the parties' child pursuant to KRS[1] 403.340. Consequently, on July 19, 2018, the trial court appointed attorney Joshua Puckett as Guardian Ad Litem (GAL) for the minor child.

The first hearing concerning custody modification was held August 23, 2018. T.J. and his direct witnesses testified at this hearing. T.J. testified that both parties had drug abuse issues during their marriage. He further testified that he spent nearly a year in a residential drug treatment program and has had no problems with drug use or addiction since that time. T.J. testified that he believed Mika persisted in her drug problems and addiction since she pled guilty to trafficking in a controlled substance in 2016 and had the subject wreck in 2018. He further testified that he believed Mika had put their child in danger and would do so again. T.J. testified that he believed it was in the child's best interest to be in his sole custody. T.J.'s mother and grandmother—Bretta Adams and Dorothy Adams, respectively—also testified that they believed Mika had placed the child in danger and would do so again, and that it was in the child's best interest for T.J. to

[1] Kentucky Revised Statutes.

have sole custody. Gina Reed, Mika's mother, also testified. Gina testified that Mika previously had a drug problem, but she believed Mika posed no danger to the child. Because additional evidence was to be offered by the parties, the hearing was continued until November 1, 2018.

At the November hearing, T.J. recalled Bretta in an attempt to admit text messages from Gina to her, Mika and her witness Jill Howard testified, and rebuttal witnesses were proffered. Mika did not deny any of her criminal past but testified that she believed completion of the drug rehabilitation program had helped her and that she would not endanger her child. Mika testified that it was in the child's best interest to remain in her care, live with her half-brother, and continue attending the same school. Mika testified that prior to the accident, T.J. did not regularly exercise his visitation rights with the child; rather, his parents and grandparents visited with the child during his allotted time. Mika further testified that T.J. did not regularly make child support payments, but such payments were made by his family members. Jill Howard, the former principal of the child's school, testified that she had observed Mika's relationship with the child, but had never seen T.J. prior to these proceedings. Jill testified that she believed it would be in the child's best interest to return to Mika's care. Mika called T.J. as a rebuttal witness, and he admitted that he had recently obtained a job in Ohio. T.J. testified that his new wife would take care of the child while he was away working.

The Commonwealth of Kentucky informed the court of its intent to request return of the child to Mika. The GAL delivered a closing argument which included his recommendation for custody to return to the parties' prior joint custody order.

On January 3, 2019, the trial court entered its detailed order denying T.J.'s motion to modify custody. This appeal followed.

On appeal, T.J. raises four arguments: (1) the trial court violated due process by relying heavily upon the recommendation and report of the GAL; (2) the trial court's decision to return the child to Mika was an abuse of discretion because there was overwhelming substantial evidence that Mika exhibited behavior that seriously endangered the physical, mental, emotional, and moral health of the child; (3) the trial court erred in denying admission of the certified records from the Kentucky Board of Nursing concerning the revocation of the nursing license of Gina Reed; and (4) the trial court erred in finding that certain text messages between two witnesses on the same day were not properly authenticated pursuant to KRE[2] 901, while others were. We will address each, in turn.

On review, "we defer to the trial court's factual findings, upsetting them only if clearly erroneous or if unsupported by substantial evidence, but we review without deference the trial court's identification and application of legal principles." *Conseco Finance Servicing Corp. v. Wilder*, 47 S.W.3d 335, 340 (Ky.

[2] Kentucky Rules of Evidence.

App. 2001). "Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person." *Bowling v. Natural Resources & Envtl. Protection Cabinet*, 891 S.W.2d 406, 409 (Ky. App. 1994).

First, T.J. claims that the trial court violated due process by relying heavily upon the recommendation and report of the GAL. However, it is clear from the order that the trial court did not solely or impermissibly base its findings of fact and conclusions of law on the recommendation of the GAL.

> [T]he distinct roles of the GAL and the friend of the court were examined by our Supreme Court in *Morgan v. Getter*, 441 S.W.3d 94 (Ky. 2014). A friend of the court is "a child's representative appointed as an officer of the court to investigate the child's and the parents' situations, to file a report summarizing his or her findings, and to make recommendations as to the outcome of the proceeding." *Id*. at 111. In contrast, a GAL is "a child's representative appointed to participate actively as legal counsel for the child, to make opening and closing statements, to call and to cross-examine witnesses, to make evidentiary objections and other motions, and to further the child's interest in expeditious, non-acrimonious proceedings. . . ." *Id*. Unlike the friend of the court, "[t]he GAL should not file reports, testify, make recommendations, or otherwise put his own or her own credibility at issue." *Id*. at 114.

Nein v. Columbia, 517 S.W.3d 492, 499 (Ky. App. 2017).

T.J. contends that the GAL's recommendations made in closing argument constitute evidence which he was unable to cross-examine or refute on behalf of the child. T.J. claims that the GAL was appointed merely as counsel to the child and not as a fact-finder with power to make recommendations to the trial court. However, the GAL was in the courtroom for the entirety of the hearing and was ordered to interview the child.

> [W]hile a GAL investigating on *behalf of the court* would violate *Morgan*, there is no rule barring a GAL from speaking with the child or any party as part of his representation of the child. In fact, we believe than [sic] it is incumbent that the GAL interview the child, his client, before questioning him in court. Without doing do [sic], it would be virtually impossible for the GAL to zealously represent his client as our ethical rules require him to do.

Id. (emphasis original).

The "recommendation" to which the trial court refers in its order is the GAL's closing argument rather than a written document, such as a formal report or recommendation. In his closing argument, the GAL "reported to the court, after reviewing all the reports of record and being present for all testimony of record, that his recommendation would be for custody to return to the parties' prior joint custody order with [Mika] being primary residential custodian." While this argument was not what T.J. desired, it is clearly distinguishable from the recommendation tendered to the court in *Morgan*, which was largely based on the

GAL's interviews with the parties and children and his visit to Morgan's residence. *Morgan*, 441 S.W.3d at 97. The GAL in *Morgan* clearly performed an independent investigation for the benefit of the court, outside the normal role of an attorney for the benefit of his client. By contrast, in the instant case, the GAL was appointed to represent the child's best interest. There is nothing in the record indicating that the GAL had the additional role of investigating matters on behalf of the court. The GAL did not file a written recommendation or report with the court. The GAL simply acted as the child's advocate and made a closing argument in which he advocated for what he believed was in the child's best interest. Nothing in the record indicates that the GAL was acting outside the confines of *Morgan*. Accordingly, we find nothing about the GAL's role—nor the reliance of the trial court thereon—in this case that constitutes reversible error.

Second, T.J. contends that the trial court's decision to return the child to Mika was an abuse of discretion because there was overwhelming substantial evidence that Mika exhibited behavior that seriously endangered the physical, mental, emotional, and moral health of the child. In the instant case, while substantial evidence certainly supports T.J.'s request for modification, substantial evidence also supports the trial court's determination.

> Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility

> of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence.

Moore v. Asente, 110 S.W.3d 336, 354 (Ky. 2003) (footnotes omitted). The evidence in support of T.J.'s request is not so overwhelming as to absolutely compel granting same. Therefore, we cannot say it was an abuse of the trial court's discretion to deny T.J.'s motion to modify custody.

T.J.'s third argument is that the trial court erred in denying admission of the certified records from the Kentucky Board of Nursing concerning the revocation of the nursing license of Gina Reed. The standard of review concerning a trial court's evidentiary rulings is abuse of discretion. *Tumey v. Richardson*, 437 S.W.2d 201, 205 (Ky. 1969). "The test for an abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound reasonable principles." *Penner v. Penner*, 411 S.W.3d 775, 779-80 (Ky. App. 2013) (citation omitted). T.J. claims that this evidence is relevant under the KRS 403.270 analysis because it is evidence concerning the mental health of all individuals involved. However, Gina is a non-party, and such information is not relevant to the custody determination at issue in the case at hand. Therefore, the trial court did not commit reversible error in its denial to admit this evidence.

Finally, T.J. claims the trial court erred in finding that certain text messages between two witnesses on the same day were, and others were not, properly authenticated pursuant to KRE 901. Once again, the standard of review concerning a trial court's evidentiary rulings is for an abuse of discretion. *Tumey*, 437 S.W.2d at 205. The burden under KRE 901 to authenticate a writing is "slight," requiring only a "prima facie showing." *Ordway v. Commonwealth*, 352 S.W.3d 584, 593 (Ky. 2011) (citing *Sanders v. Commonwealth*, 301 S.W.3d 497, 501 (Ky. 2010)). A trial court *may* admit an item so long as it finds sufficient proof has been presented from which a jury may reasonably deem an item to be what it is proclaimed to be. Robert G. Lawson, The Kentucky Evidence Law Handbook, § 7.05[2] at 576 (2019 ed.) (citing *Bell v. Commonwealth*, 875 S.W.2d 882, 886-87 (Ky. 1994)). However, such admittance is permissive rather than mandatory. Exercising its considerable discretion, a trial court may admit a piece of evidence solely on the basis of testimony from a knowledgeable person that the item is what it purports to be and that its condition is substantially unchanged. *Grundy v. Commonwealth*, 25 S.W.3d 76, 80 (Ky. 2000). Herein, because the judge also acted as the fact-finder, he alone had the authority to determine whether such texts should be admitted and, if so, what probative weight to assign to them. The trial court also had the authority to deny admittance of the texts on other grounds, such as lack of relevance. In light of the witnesses' testimony, especially

Bretta's testimony through which these pieces of electronic evidence were admitted and denied, we discern no abuse of discretion.

Therefore, and for the foregoing reasons, the order entered by the Magoffin Family Court is AFFIRMED.

MAZE, JUDGE, CONCURS.

SPALDING, JUDGE, CONCURS IN RESULT AND FILES A SEPARATE CONCURRING OPINION.

SPALDING, JUDGE, CONCURRING: I concur in the result reached by the majority. However, I do want to address the issue of the Guardian Ad Litem's recommendation in a KRS[3] Chapter 403 custody proceeding.

Before discussing this, I first note the parties' noncompliance with the applicable rules of appellate procedure with regard to briefs. Civil Rule[4] 76.12(4)(c)(vii) provides, in pertinent part, that an "appellant shall place the judgment, opinion, or order under review immediately after the appendix list so that it is most readily available to the court." The same rule provides that "materials and documents not included in the record shall not be introduced or used as exhibits in support of briefs," with the exception of "matters of which the appellate court may take judicial notice." Additionally, CR 76.12(4)(a)(ii)

[3]Kentucky Revised Statutes.

[4]Kentucky Rules of Civil Procedure.

provides that briefs shall be "double spaced and clearly readable." The Appellee's brief was single-spaced. The Appellant's brief placed the order being appealed third in its appendix. Both parties included a plethora of irrelevant extraneous material in their respective appendices that was neither germane, nor helpful, to analysis on appeal.

Turning to the lower court's decisions, I believe that the family court erred in relying on the recommendation of the Guardian Ad Litem ("GAL") as any basis for its decision. In *Morgan v. Getter*, 441 S.W.3d 94 (Ky. 2014), the Kentucky Supreme Court held that a "hybrid GAL/FOC raises ethical dilemmas for the appointee – potentially conflicting duties of loyalty and confidentiality for example." *Id.* at 111. The Court went on to state that such a hybrid role "creates a conflict between, on the one hand, a party's due process right to confront the evidence against him or her – an adverse GAL's factual report and recommendations – and on the other hand, counsel's duty under SCR 3.130-3.7 not to act as advocate at a proceeding in which he or she is likely to be a necessary witness." *Id.*

The ultimate determination of what is in the child's best interest is a question reserved for the trial judge. If a court desires to be informed of a child's wishes, the court, in a custody matter such as this, has the authority to interview said child and receive it without any filter by counsel. KRS 403.290. This is a

very important point since a GAL may not act as a witness and, therefore, may not be examined with regard to what the child told the GAL or what is the factual basis for a recommendation of the GAL. When a GAL gives an opinion, that raises confrontation issues for the party for whom it does not benefit. If *Morgan* is to be followed, GALs should not give recommendations as to what is in a child's best interest in custody cases.

To do so allows an unquestionable voice to give as quasi evidence what is an opinion. That is not fair to the parties nor, in the final analysis, the child. In a best interest custody dispute between two fit and able parents, each has an equal claim to custody. Both parents should be attempting to act in the child's best interest. In such circumstances, the appointment of a friend of the court would seem to be a greater aid to the court than a GAL.

That being said, I do not believe that the GAL's recommendation or any content of the disputed texts requires the judgment to be reversed. I believe that, pursuant to CR 61.01, any error in this matter is harmless as the substantial rights of the parties were not affected. The trial court's decision was based upon substantial evidence and its decision logical based upon its findings. As the findings and conclusions make clear, the trial court anchored its decision on objective evidence and not primarily on the recommendation of the GAL. Therefore, any error of the court below was harmless.

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