

Commonwealth of Kentucky
Court of Appeals

NO. 2023-CA-0791-MR

CHRISTINE MAEGLY

APPELLANT

v. APPEAL FROM MASON CIRCUIT COURT
HONORABLE JEFFERY L. SCHUMACHER, JUDGE
ACTION NO. 15-CI-00142

KEVIN MAEGLY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, LAMBERT, AND McNEILL, JUDGES.

LAMBERT, JUDGE: Christine Maegly appeals the Mason Circuit Court’s May 23, 2023, order continuing the parties’ joint custody of their son R.M. but vesting sole decision-making authority for his education and mental health with Kevin Maegly. After careful review of the briefs, record, and law, we affirm.

BACKGROUND FACTS AND PROCEDURAL HISTORY

The parties were previously married and have three children, the youngest of whom, R.M. (hereinafter “the child”), born in 2013, is the subject of

this appeal. As part of their 2016 dissolution, the parties agreed to joint custody of the children with Christine as the primary residential parent and Kevin exercising parenting time one evening a week and every other weekend. In April 2022, Kevin filed a motion to be designated as the primary residential parent. The court appointed a Friend of the Court (FOC) to conduct a timesharing/custody evaluation. After the FOC filed her report, the parties agreed to her recommendations pending a full hearing by the court. Relevant to this appeal, via an agreed order entered September 7, 2022, the court increased Kevin's parenting time and directed that each parent was to ensure that, when the child was in his or her respective care, he took, as prescribed, his medications for attention deficit hyperactivity disorder (ADHD) and obsessive-compulsive disorder (OCD).

In March 2023, Kevin filed an emergency motion for temporary sole custody of the child, alleging that Christine was failing to adequately address his ongoing behavioral problems, both at school and at home, and that she was not compliant with the portion of the agreed order requiring her to ensure that the child take the medications necessary to control his behavior. On March 14, 2023, the court granted the motion and ordered that the child be transferred from Campbell County to Mason County Schools and that he begin counseling services. In response, Christine filed a motion to reinstate the parties' 2016 custody arrangement. The court held a hearing on April 24, 2023, on the stipulated issues

of: 1) who would be the child's primary residential parent, 2) parenting time for the non-residential parent, 3) where the child would attend school, and 4) who would have decision-making authority. Kevin, Christine, the child's former vice-principal, his maternal grandmother, and the mother of one of his friends testified.

The vice-principal testified primarily regarding the child's disciplinary history while at Campbell County Schools, and the court admitted nine behavioral reports dated from February 23, 2022, to March 8, 2023, into evidence. These reports document instances of the child's being disruptive, engaging in physical altercations, bringing a toy gun to school (although the vice-principal conceded that the ban on toy guns is not communicated to parents or students), and, most recently, threatening to harm a classmate and kill his family. The reports resulted in a phone call to his parents, a loss of recess privileges four times, two in-school suspensions, and two out-of-school suspensions. Attendance records showed that the child had 11 unexcused absences or tardies during the prior school year and 10 (8 resulting from his out-of-school suspensions) during the current term.

Kevin testified that he was concerned by the child's escalating aggressive behaviors, and he did not believe that Christine was giving the child the medications or discipline he needed. Both parties addressed these concerns during their respective testimony.

Regarding the child's medications, Kevin stated that pill counts he had conducted showed that the child had not been taking his medication as prescribed, and when Kevin brought the issue up to Christine, she stopped sending the prescription bottles. He also claimed that Christine would not provide sufficient medication for his parenting time. Kevin acknowledged that Christine purportedly logs her daily administration of the child's medications by making a handwritten notation of the date and who gave him the medicine on a printed spreadsheet. But he doubted the log's veracity after multiple occasions when Christine gave him a freshly printed document that contained handwritten entries for previous dates. Kevin also stated that the child had been discharged from his therapist after he missed two appointments, and Christine had not told him whether the child was seeing a new provider.

Christine was adamant that she had personally ensured that the child took his medications as prescribed, emphasizing that it was in no one's best interest for him to go unmedicated. In support, she submitted her logs from November 29, 2022, to February 28, 2023. Christine conceded that a dose may have been missed once or twice over five years. But she denied the veracity of the FOC's report that the school would call her to come medicate the child, asserting that the FOC did not like her or the child. Christine admitted missing the appointments with the child's therapist and that, when the provider discontinued

care, she did not find him a new one. She explained that the summer holiday limited availability and that the child would resume counseling through the school in two-months' time. Christine stated that she intended to have the child treat with a psychiatrist so that his mental health, behavior problems, and medication could be addressed in a coordinated manner.

Pertaining to discipline, Kevin stated that he and Christine were unable to agree about how to handle the child's recent behaviors. Kevin wanted to impose an earlier bedtime and restrict the child from videogaming until he completed a period of good behavior, but Christine refused to enforce the punishment in her home. In another example, after the child got into a fight at school, Kevin, who was the sole custodian at the time, informed Christine that he was taking away the child's privilege to attend a monster truck rally, but she took him anyway. Kevin also testified that Christine did not respond to the child's sister's complaints that she had been hit, cursed at, and threatened by the child with bricks, stones, rocks, and a large kitchen knife. Kevin stated that the sister had been blocking her bedroom door, which would not lock, to keep the child out. Kevin admitted that he had not attempted to discuss the sister's complaints with Christine or to remove the children from her care before his emergency motion.

Christine stated that she had imposed punishments on the child for his school infractions; she just felt Kevin's open-ended approach was unreasonable.

For taking the fake gun to school and threatening his classmate, the child decided he should be denied electronics and have no dessert for a month each time, and Christine agreed. For threatening his siblings with a knife, Christine removed all of the knives from the house until the children got the message that they were useful tools to have, and she had long talks with them. Christine denied any knowledge of other threats against the child's siblings and expressed her doubts that the events Kevin testified to had actually occurred. Christine asserted that the child's sister never expressed or demonstrated any fear of him. Regarding taking the child to the monster truck rally against Kevin's instructions, Christine explained that she had only known that the child had been in a fight at school, not that he had been suspended.

Kevin believed that the child was doing great now that he was receiving needed structure. Kevin asserted that the child did well with his new counselor and that he was developing more accountability. Kevin believed that the child had adjusted well to his new school, citing his good relationships with teachers and staff, his improved grades, and his new friendships. Kevin acknowledged that the child had a rough week during which he was suspended from school for fighting. Kevin attributed this to multiple factors but primarily to the fact Christine discussed the ongoing custody matters with the child. In

response to the fight, and at the school's suggestion, the child would begin seeing an occupational therapist to assist him in developing coping skills.

Christine believed that the child's behavior problems began or escalated after Kevin's parenting time increased and requested that the child be returned to her home and that the parties resume the arrangement set out in the 2016 decree. Christine stated her intent to re-enroll the child in his former school due to its proximity to their house and the school's familiarity with him and his needs. However, if the child wanted a fresh start, she stated that he could attend a different school within the same district. Christine testified that a 504 plan, which would provide accommodations for the child, was necessary and that she had been making progress in getting the plan established before the child was removed from her care. Finally, Christine denied the veracity of the FOC's report that she had completed the child's reading work for him by answering questions on fourteen AP books in one week, explaining that she had merely helped him by reviewing the books he had already read and reading the test questions to him.

The child's grandmother testified that Christine was a wonderful mother who truly appreciated the importance of discipline to development, and she attested that Christine had been working hard with the child to resolve his problems. The grandmother observed that the child had been more withdrawn and less rambunctious and open since Kevin received increased parenting time. She

stated that the siblings had a good relationship and that the child wanted to return home. The mother of the child's friend, who lives near Christine, testified that on one occasion the child punched her son in the face causing minor injury.

On May 23, 2023, the court entered an order reinstating joint custody but designating Kevin as the primary residential parent and the sole decision maker on issues pertaining to the child's education and mental health. Therein, the court analyzed the various factors set out in Kentucky Revised Statutes (KRS) 403.340(3). Supporting its decision, the court found that the child had "improved by most metrics since the switch to Mason County[,] and Kevin's more regimented discipline and routine were "beneficial to [the child] at this point in his life and the current needs he has." The court also noted that it had "concerns that the routine and environment of [Christine's] home simply did not adequately address [the child's] mental health and behavioral needs." The court denied Christine's subsequent motion to alter, amend, or vacate the judgment, and this appeal follows.

STANDARD OF REVIEW

KRS 403.340(3) provides that a court may modify custody if, after a hearing, it finds "that a change has occurred in the circumstances of the child" since the entry of the custody decree and "that the modification is necessary to serve the best interests of the child." Our review is as follows:

Since the family court is in the best position to evaluate the testimony and to weigh the evidence, an appellate court should not substitute its own opinion for that of the family court. If the findings of fact are supported by substantial evidence and if the correct law is applied, a family court's ultimate decision regarding custody will not be disturbed, absent an abuse of discretion. Abuse of discretion implies that the family court's decision is unreasonable or unfair. Thus, in reviewing the decision of the family court, the test is not whether the appellate court would have decided it differently, but whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion.

Coffman v. Rankin, 260 S.W.3d 767, 770 (Ky. 2008) (quoting *B.C. v. B.T.*, 182 S.W.3d 213, 219-20 (Ky. App. 2005)).

LEGAL ANALYSIS

Christine first asserts that the court's order purporting to award joint custody yet reserving key decision-making authority to Kevin should be reversed because it does not meet any rational definition of joint custody. Christine notes that, although the term "joint custody" is not defined by statute, the Supreme Court of Kentucky has stated that "[a] significant and unique aspect of full joint custody is that both parents possess the rights, privileges, and responsibilities associated with parenting and are to consult and participate equally in the child's upbringing." *Pennington v. Marcum*, 266 S.W.3d 759, 764 (Ky. 2008).

Christine acknowledges that joint custody does not necessarily mean equal authority, but she contends this is limited to situations in which the

custodians are deadlocked on a specific decision. In support, she cites to *Burch v. Lipscomb*, 638 S.W.3d 460 (Ky. App. 2021) (affirming an order permitting the joint custodian mother, alone, to decide vaccination issues). She maintains that judgments, such as the one at issue herein, purporting to grant joint custody yet designating broad decision-making authority to one custodian, violate the inherent nature of joint custody and are legally inappropriate.¹

If, as Christine contends, the court granted both *full* joint custody and delegated decision-making authority unequally, we would have to agree that reversible error occurred. However, as Kevin notes in his brief, Kentucky law has recognized that custody arrangements are more fluid than the stark dichotomy of joint or sole custody. As the *Pennington* Court explained,

Better technical ability to communicate, employment mobility, a given parent’s ability to meet certain obligations and other such factors lead to a need for an approach to parenting after divorce that is flexible and can be customized to the needs of each family involved with the children. These broad approaches recognize that every family is unique, and that it is generally in the best interests of the child and parents to maximize contact with both parents. The “designer” approach of these concepts asks the question, “What is best for this *family*?”

¹ Christine cites *Parker v. Parker*, Nos. 2001-CA-000453-MR and 2001-CA-000481, 2002 WL 1040305 (Ky. App. May 24, 2002), in support of this argument. However, per Kentucky Rules of Appellate Procedure 41, a party may cite and rely on unpublished opinions *if*, among other criteria, it was rendered after January 1, 2003, and *Parker* predates this cutoff. Therefore, we decline to consider this citation.

266 S.W.3d at 765.

The *Pennington* Court also recognized that shared custody is a subset of joint custody in which “both parents have legal custody that is subject to some limitations delineated by agreement or court order.” *Id.* at 765. That is what the family court did here. Christine argues that this Court’s discussion of the possible custody types in *Carver v. Carver*, 611 S.W.3d 750, 754 (Ky. App. 2020), somehow undermines *Pennington*; however, *Carver* cites exclusively to, and quotes extensively from, *Pennington*. The case does not redefine the concept of joint custody. Accordingly, Christine’s argument that it is an inherent abuse of discretion for the circuit court to grant less than full joint custody is without merit.

Next, Christine argues that the court abused its discretion because its order designating decision-making power exceeded the scope of the hearing to determine mainly where the child would attend school and who would be primarily “responsible for ensuring that [the child] see his doctors in a timely manner[.]” This claim is refuted by the parties’ Joint Agreement of Issues to be Decided During Hearing that included “(c) which party should have decision-making authority over [the child].” Therefore, the court did not exceed the scope of the proceedings.

We turn now to whether the court abused its discretion in vesting educational and mental health decisions solely with Kevin. Christine essentially

argues that the court's decision was arbitrary because, although the child had four school disciplinary events resulting in suspension during the four years he lived with her in Campbell County, he had already had another in only the month he resided with Kevin. The evidence was that, when the child was in Campbell County Schools, he had nine disciplinary events in just over a year, and the final three, which all resulted in some form of suspension, occurred within just 33 days. Conversely, during the approximately 45 days the child resided with Kevin in Mason County, he had just one disciplinary action. Given that the evidence supports the finding that the child's school behaviors showed improvement, we cannot agree that the court abused its discretion.

Finally, Christine contends a palpable error occurred when the court permitted Kevin to testify about statements made by the child's sister, and that this improper hearsay evidence prejudiced her position. Kentucky Rules of Civil Procedure (CR) 61.02 provides that "[a] palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." For an error to be palpable, the error "must be easily perceptible, plain, obvious, and readily noticeable." *Nami Res. Co., L.L.C. v. Asher Land & Mineral*,

Ltd., 554 S.W.3d 323, 339 (Ky. 2018) (quoting *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006)).

Kevin denies that a palpable error occurred because the evidence was relevant pursuant to KRS 403.270(2)(c)² and Christine had opposed permitting the children to testify. We cannot agree. It is true that, generally, all relevant evidence is admissible; however, hearsay, a statement made by someone other than the declarant to prove the truth of the matter asserted, is not admissible unless a recognized exception applies. *See* Kentucky Rules of Evidence (KRE) 402, KRE 801, and KRE 802. And, although Kevin seemingly argues an exception for unavailability exists pursuant to KRE 804, Christine's opposition to the children's testifying does not satisfy that Rule. As the testimony was clearly hearsay and no exception has been established,³ we agree with Christine that the court erred, but we must still determine whether this resulted in manifest injustice.

We note that Christine admitted in her response to Kevin's emergency motion that the child had threatened his siblings with a knife; therefore, this fact was properly before the court. *See Center v. Stamper*, 318 S.W.2d 853, 855 (Ky. 1958) (a party is relieved of the obligation to produce evidence of facts conceded

² KRS 403.270(2)(c) identifies the interaction and interrelationships of a child with their siblings as a factor relevant to determining a child's best interest during custody actions.

³ Although KRE 803 exceptions for a present sense impression or a then existing emotional condition may be viable, these were not raised. Our conclusion that the court did not commit reversible error would stand regardless.

or voluntarily acknowledged to be true). The issue, then, is whether “there is a ‘substantial possibility’ that the result would have been different” but for the improper hearsay evidence that the child hit, cursed at, and threatened his sister with various objects and that the sister feared the child to the point of trying to barricade her room against him. *Hibdon v. Hibdon*, 247 S.W.3d 915, 918 (Ky. App. 2007) (quoting *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006)).

Christine argues that the court’s repeated reference to the siblings’ living in fear of the child demonstrates the significance of the error. True, the court did reference the siblings’ fear and expressed a general concern for their welfare in its review of the child’s interactions and interrelationships with the family members and the family’s mental and physical health pursuant to KRS 403.270(2)(c) and (e) and KRS 403.340(3)(d). However, given the undisputed facts that the child threatened his sibling with a kitchen knife and that he had five disciplinary reports in thirteen months involving physical aggression, we cannot say that the hearsay testimony changed the results of the proceedings. Moreover, from our review of the judgment, the court’s custody determination rested primarily on its conclusion “that the routine and environment of [Christine’s] home simply did not adequately address [the child’s] mental health and behavioral needs[,]” and not the dynamic between the siblings. Indeed, no provisions were made to restrict the child’s contact with his siblings or for increased supervision

during his parenting time with Christine every other weekend. Accordingly, Christine has failed to demonstrate that the erroneous admission of hearsay evidence resulted in reversible error.

CONCLUSION

Therefore, and for the foregoing reasons, the judgment of the Mason Circuit Court is affirmed.

ALL CONCUR.

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