

Commonwealth of Kentucky
Court of Appeals

NO. 2023-CA-0940-MR

EVANGELINE NEWTON

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE A. CHRISTINE WARD, JUDGE
ACTION NO. 21-CI-503464

BYRON NEWTON

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: THOMPSON, CHIEF JUDGE; COMBS AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Evangeline Newton, *pro se*, appeals the Jefferson Family Court's July 20, 2023, order finding in her contempt for violating the parties' agreed parenting time order, arguing judicial bias. Having reviewed her brief, the record, and the law, we affirm.

BACKGROUND FACTS AND PROCEDURAL HISTORY

In November 2021, Evangeline filed a petition to dissolve her marriage to Byron Newton, and she requested sole custody of their minor son, who

was then six years old. The court entered a limited decree of dissolution in April 2022 that reserved on all other issues.

That same month, Evangeline filed a petition for a domestic violence protection order (DVO)¹ for herself and the child against Byron, alleging that he had grabbed her by the neck and pushed her into furniture in front of their son and that he had struck the child with a ruler leaving a mark.² That case, and its subsequent trailers, were heard by the same judge as the underlying case.

Testimony from the hearing established that around 2020, Byron struck the child with an implement, but Byron stated that, after a discussion with Evangeline, he stopped using corporal punishment. Byron denied grabbing Evangeline, but he admitted to defending himself from her attack. Evangeline's daughter testified that she heard the parties arguing and her mother say, "don't put your hands on me," and that she observed Evangeline push Byron off her. Afterwards, Evangeline had red marks on her skin, and Byron had a scratch on his face. The court dismissed the petition, and Evangeline did not appeal that decision.

On June 20, 2022, Byron filed a motion for temporary joint legal custody and equal parenting time pending final resolution of those issues. The

¹ Jefferson Family Court Action Number 22-D-501227-001.

² To clarify, the domestic violence cases referenced herein are not before this Court on appeal, but we have mentioned them in this Opinion because they are relevant to the facts of this case, and the video proceedings were certified as part of the appellate record.

certificate of service listed Evangeline's address of record; however, in his supporting affidavit Byron stated that Evangeline no longer resided there and that he did not know her current address. After receiving no response from Evangeline, the court entered Byron's tendered temporary order granting the requested relief on July 20, 2022.

In December 2022, Evangeline filed a second DVO petition against Byron,³ but the action was later dismissed by agreement. Instead, an agreed order for no contact or communication between the parties was entered into the dissolution case on February 21, 2023. The parties then attended mediation along with their respective counsel. As a result, on February 28, 2023, the court entered a mediated agreed order continuing joint custody and setting parenting time. Per the terms of the agreement, beginning March 4, 2023, Byron would have parenting time for five hours every Saturday for six weeks, then from Saturday to Sunday for the next six weeks, and thereafter from Wednesday to Thursday every week and Friday to Sunday every other weekend. "Exchanges [could], but not necessarily w[ould], utilize neutral third parties." On March 9, 2023, Byron filed a motion to hold Evangeline in contempt for denying him his parenting time.

Without responding to the contempt motion, Evangeline filed motions to vacate the July temporary custody and parenting time order and the February

³ Jefferson Family Court Action Number 22-D-501227-002.

agreed order. Regarding the temporary order, Evangeline asserted that Byron had lied in his motion about not knowing her current address and that he served her at an admittedly incorrect address in order to deny her notice of his custody claim. As proof, Evangeline submitted emails she received in May 2022 from the United States Postal Service documenting her upcoming deliveries that she claimed included mail for Byron at her new address. The court, without a hearing, denied the motion as moot because the agreed order superseded the prior temporary order. Evangeline did not appeal from that order.

On May 12, 2023, the court heard arguments and testimony from Evangeline regarding her motion to vacate the February 2023 mediated agreed order. Evangeline testified that both the mediator and her attorney told her that custody would be 50/50 if she did not sign the agreement and that the judge may be mad at her for withholding the child from Byron for a year. She denied knowing that, as a victim of domestic violence, she could refuse to mediate. She also complained that the agreed order did not detail or account for the child's autism diagnosis (though she admits this was discussed at mediation), Byron's disability (which existed during their marriage), an unresolved Child Protective Services (CPS) investigation into Byron's abuse or neglect of the child (Evangeline made the complaint on April 29, 2023), or her claims of domestic violence. In its subsequent order denying the motion, the court concluded that Evangeline had

failed to establish that her agreement was the result of duress or coercion, as defined in *Mays v. Mays*, 541 S.W.3d 516, 524 (Ky. App. 2018),⁴ or that a “reason of an extraordinary nature justif[ied] relief” pursuant to Kentucky Rules of Civil Procedure (CR) 60.02(f). Evangeline, again, did not appeal from this decision.

The court then took up the issue of contempt on May 31, 2023, and both Byron and Evangeline testified regarding her compliance with the February 28, 2023, mediated agreed order. Per the testimony, Byron received his scheduled parenting time on at least two Saturdays (the parties disagreed about Evangeline’s compliance on two other occasions), and he had make-up time with the child on one Sunday. Evangeline admitted, however, that she did not comply with the order on March 4th or 18th or any time after April 1st, which was Byron’s last contact with the child. Evangeline explained that she missed the first of these exchanges because she was in the emergency room and the second because no one was able to accompany her and she did not feel safe going alone. Evangeline cited car trouble for the missed exchange on Saturday, April 15th, but she attempted to reschedule it to Sunday and Byron did not respond (Byron noted that he was entitled to both days under the agreed order).

⁴ “To establish duress, there must be an actual or threatened violation or restraint on a man’s person, contrary to law, to compel him to enter into a contract Fraud consists in successful deception intentionally practiced to induce another to part with . . . some legal right.” *Mays*, 541 S.W.3d at 524 (internal quotation marks and citations omitted).

Finally, Evangeline asserted that after April 21, 2023, she did not comply with the ordered exchanges because she had concerns for the child's safety with Byron, which resulted in her filing a third petition for a DVO on his behalf.⁵ Evangeline explained that the child returned from Byron's care starving and thirsty with the provisions she had packed for his five hour visits unused (she admitted that the child said he was fed but that it "was nothing much"). She also complained that the child was agitated after being with Byron. Evangeline informed the court that, at the recommendation of his doctors, the child would be starting counseling because he had witnessed domestic violence and was himself a victim of abuse.

Evangeline's counsel acknowledged to the court that the alleged abuse, Byron's striking the child with a ruler or belt, predated the agreement, but Evangeline feared the child would be triggered by his increased contact with Byron. Her counsel also admitted that CPS had investigated Evangeline's concerns, but the claims were unsubstantiated.

Finding that Evangeline's claims were not credible, the court concluded that she had violated the agreed order without good cause and granted

⁵ Jefferson Family Court Action Number 22-D-501227-003. The petition, as it related to the child, was orally dismissed on his guardian *ad litem*'s (GAL) motion at the hearing on May 12, 2023; the record is unclear when, or if, a written order was entered reflecting this ruling. Evangeline's petition on her own behalf was dismissed without prejudice on July 13, 2023, after she failed to appear for the hearing.

the motion to find her in contempt. Evangeline was ordered to comply with the parenting time schedule and to pay Byron's attorney fees for bringing the motion. This appeal timely followed.

ANALYSIS

As an initial matter, we must address two overarching issues. The first is the impact of Byron's failure to file an appellee brief. Kentucky Rules of Appellate Procedure (RAP) 31(H)(3) provides that, under such circumstances, we "may: (a) accept the appellant's statement of the facts and issues as correct; (b) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (c) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case." We have elected not to impose a penalty in this matter. The second issue is Evangeline's citation to evidence that was not presented to the family court⁶ prior to its entry of the contempt order. As a court of review, we are not permitted to consider evidence offered for the first time on appeal. *See Naramore v. Naramore*, 611 S.W.3d 281, 289 (Ky. App. 2020); *Oakley v. Oakley*, 391 S.W.3d 377, 380 (Ky. App. 2012).

⁶ Evangeline's brief is replete with references to various exhibits; however, these exhibits were only filed with the clerk of the family court on August 30, 2023, after the order on appeal was entered, as part of her designation of record. Evangeline also raises claims regarding events that are not directly related to the order at issue and that occurred subsequent to this appeal.

Accordingly, while we will address the merits of this action, we will disregard any improper evidence or claims derived solely therefrom.

On appeal, Evangeline argues that the court was biased against her, and she requests that we reverse the order on appeal and order the judge to recuse herself on remand.⁷ We note that Evangeline did not file a motion to recuse in the proceedings below; however, the Supreme Court of Kentucky has held that, with an exception not applicable⁸ herein, preservation of this claim is not required for appellate review. *See Nichols v. Commonwealth*, 839 S.W.2d 263, 266 (Ky. 1992), and *Commonwealth v. Carter*, 701 S.W.2d 409 (Ky. 1985).

Kentucky Revised Statutes (KRS) 26A.015(2)(a) states, in relevant part, that a judge “shall disqualify himself in any proceeding: . . . Where he has a personal bias or prejudice concerning a party[.]” “The burden of proof required for recusal of a trial judge is an onerous one. There must be a showing of facts of a character calculated seriously to impair the judge’s impartiality and sway his judgment.” *Stopher v. Commonwealth*, 57 S.W.3d 787, 794 (Ky. 2001) (internal

⁷ We do not reach Evangeline’s claim that the GAL should be removed for bias because it was not preserved below. *See Fischer v. Fischer*, 348 S.W.3d 582 (Ky. 2011), *abrogated on other grounds by Nami Res. Co., LLC v. Asher Land & Mineral, Ltd.*, 554 S.W.3d 323 (Ky. 2018).

⁸ “[I]n those cases in which the party relies upon the failure of any justice or judge of the Court of Justice to disqualify himself under the provisions of [Kentucky Revised Statute (KRS)] 26A.015(2)(b), [which pertains to a judge’s prior involvement with the matter in controversy,] it must appear from the record, either by motion or otherwise, that he was apprised of his connection[.]” *Commonwealth v. Carter*, 701 S.W.2d 409, 411 (Ky. 1985). Evangeline’s claims do not implicate this statute.

quotation marks omitted). With these standards in mind, we turn to the specifics of Evangeline's argument.

In support of her claim, Evangeline cites to the denial of her motions to vacate the court's custody orders despite what she describes as overwhelming proof that such relief was warranted. She further argues that the court's bias was shown by its disregard for the domestic violence that she and the child experienced, the child's mental and physical health (especially his autism), and the investigation by CPS.

To be clear, the only judgment before this Court for review is the July 20, 2023, order finding Evangeline in contempt, and we will not entertain an untimely challenge to the propriety of the court's prior rulings in the guise of a claim of bias. We have thoroughly reviewed the record and considered Evangeline's claims, which in essence amount to her disagreement with the rulings of the court, and we conclude that she has failed to meet her heavy burden of demonstrating that the family judge's impartiality was impaired. We note that, although Evangeline was afforded multiple opportunities to present her concerns, she did not introduce the allegedly supporting evidence that she now attempts to have this Court consider. Further, she has not directed this Court to any specific conduct by the judge that would support a claim of bias, and the court's finding of

contempt is supported by her admission that she did not comply with the agreed order.

CONCLUSION

Therefore, and for the foregoing reasons, the judgment of the Jefferson Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE.

Evangeline Newton, *pro se*
Louisville, Kentucky