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Commonwealth of Kentucky

Court of Appeals

NO. 2024-CA-0330-MR

ANDREW TIMBERLAKE APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE MONICA K. MEREDITH, JUDGE
ACTION NO. 23-CI-00332

MINDY NATONA WILSON APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CALDWELL, AND LAMBERT, JUDGES.

ACREE, JUDGE: Andrew Timberlake appeals the Bullitt Circuit Court's order granting Mindy Wilson sole custody of their 3-year-old child, J.T. We affirm.

BACKGROUND

Andrew and Mindy were never married but cohabitated in Mindy's home for several years. In April 2023, Mindy decided the cohabitation should end.

After Mindy gave Andrew notice to vacate, he engaged in an act of domestic violence against her while J.T. was in the home.

An Emergency Protective Order was entered against Andrew on April 18, 2023. Following a hearing, the court entered a Domestic Violence Order (DVO) against Andrew on April 28, 2023, with a duration of three years.[1]

Among other things, the order required Andrew's visitation with J.T. to be supervised. A visitation exchange on June 17, 2023, prompted Mindy to seek assistance of law enforcement to retake physical possession of J.T. As a result, Andrew was found in contempt of the court's order regarding visitation.

Trial in the custody action was held in October 2023. After hearing testimony from both parties, the court entered an order on January 2, 2024 awarding Mindy sole custody. Andrew asked the court for relief pursuant to CR[2] 59, which was denied. Andrew now appeals the court's order.

ANALYSIS

1. Entry of the DVO was proper.

Although Andrew explicitly appeals only the custody determination, his brief raises various arguments regarding the issuance of the DVO. Andrew

[1] Many of the salient facts of this action were brought to light in the DVO case. The record in the DVO case supplements the record in this appeal. (Record (R.) at 493).

[2] Kentucky Rules of Civil Procedure.

contends the DVO is based on "unsubstantiated claims" and much of his brief is spent refuting the validity of the underlying circumstances giving rise to the DVO. (Appellant's Brief at 15).

However, to the extent Andrew challenges entry of the DVO, no relief is available; this Court does not have jurisdiction to review the DVO action. "All appeals shall be taken by filing a notice of appeal in the court from which the appeal is taken within the time allowed by RAP 3." RAP[3] 2(A)(1). Andrew filed his notice of appeal in Bullitt Circuit Court No. 23-CI-00332. The DVO action was docketed as No. 23-D-00117, a separate action in Bullitt Circuit Court. The trial court in the current action, the same court that adjudicated the DVO action, took judicial notice of all prior orders entered in both cases and reviewed the record in both cases. While the trial court took the granting of the DVO into consideration for its custody order, we decline to address any of the testimony and evidence presented at the DVO hearing because that case is final and unappealable and, therefore, not properly before us.

2. <u>The family court properly awarded sole custody to Mindy.</u>

In reviewing a family court's custody determination, the test is not whether the appellate court would have come to a different conclusion, but whether the findings of the family court are clearly erroneous, whether it applied the correct

[3] Kentucky Rules of Appellate Procedure.

law, or whether it abused its discretion. *Coffman v. Rankin*, 260 S.W.3d 767, 770 (Ky. 2008). If the factual findings are supported by substantial evidence and the correct law is applied, an appellate court will not disturb the family court's ultimate decision of custody, absent an abuse of discretion. *B.C. v. B.T.*, 182 S.W.3d 213, 219 (Ky. App. 2005).

KRS[4] 403.270 outlines the factors a trial court is to consider when determining custody. The overarching consideration in custody determinations is "the best interests of the child[.]" KRS 403.270(2). Joint custody and equally shared parenting time is presumptively in the best interest of the child. *Id*. However, this presumption is subject to the exception in KRS 403.315:

> If a domestic violence order is being or has been entered against a party by another party or on behalf of a child at issue in the custody hearing, the presumption that joint custody and equally shared parenting time is in the best interest of the child shall not apply as to the party against whom the domestic violence order is being or has been entered.

KRS 403.315. Because there was a finding of domestic violence entered against Andrew, the presumption for joint custody is inapplicable, and the family court was instead guided by the factors of KRS 403.270. We find the following factors to be relevant here:

> (c) The interaction and interrelationship of the child with his or her parent or parents, his or her siblings, and

[4] Kentucky Revised Statutes.

> any other person who may significantly affect the child's best interests;
>
> . . . .
>
> (g) A finding by the court that domestic violence and abuse, as defined in KRS 403.720, has been committed by one (1) of the parties against a child of the parties or against another party. The court shall determine the extent to which the domestic violence and abuse has affected the child and the child's relationship to each party, with due consideration given to efforts made by a party toward the completion of any domestic violence treatment, counseling, or program;
>
> . . . .
>
> (k) The likelihood a party will allow the child frequent, meaningful, and continuing contact with the other parent or de facto custodian, except that the court shall not consider this likelihood if there is a finding that the other parent or de facto custodian engaged in domestic violence and abuse, as defined in KRS 403.720, against the party or a child and that a continuing relationship with the other parent will endanger the health or safety of either that party or the child.

KRS 403.270(2).

First, the family court considered the interactions and interrelationships among the parties under factor (c). Because there is a DVO prohibiting Andrew from contacting Mindy, there is no ability for the parties to communicate. The "near insurmountable barrier for communication between the parties" makes meaningful facilitation of exchanges and maintenance of J.T.'s day-to-day needs difficult if not impossible. (R. at 375).

The court also considered the interrelationship between J.T. and his half-siblings, children previously born to Andrew who reside in California and receive monthly financial support from him. The court found Andrew "is in [no] other way active in the day to [day] lives of those children" and, therefore, there is "no basis to consider that . . . a relationship (in anything except the biological sense) exists" between those children and J.T.

Andrew's response is that he goes on "bi-annual visits to San Diego" to visit the older children, and claims J.T.'s "relationship with his half-siblings [is] in the beginning of being established." (Appellant's Br. at 9-10). He presented no evidence that J.T. and his half-siblings had ever had any type of relationship or communication until the parties' litigation commenced, at which point his half-siblings "were able to communicate with him during [Andrew's] supervised time when time allowed." (Appellant's Br. at 10). This alone does not a meaningful relationship make. Based on this, the court properly found no basis to consider a relationship between Andrew's other children and J.T.

Most notably, and as already noted, the court found the DVO "creates a near insurmountable barrier for communication between the parties." (R. at 375). The domestic violence history between the parties, factor (f), eliminates the requirement that a family court favor joint custody.

It is consequently left to the sound discretion of the trial court to determine the best interests of J.T. *Pennington v. Marcum*, 266 S.W.3d 759, 769 (Ky. 2008). The family court heard testimony from both parties, interacted with both parties, observed the parties interact with one another in court, and took into account the DVO. We find the family court had substantial evidence to make its findings and applied the correct law in its custody determination.

As an aside, Andrew argues the family court unfairly discounted the report resulting from a court-ordered Cabinet for Health and Family Services (CHFS) investigation, which "did not indicate any significant concerns about the Appellant's ability to parent, nor did they [sic] support the allegations of abuse or neglect presented by the Appellee." (Appellant's Reply Br. at 4).

The CHFS plan and report was ordered by the court in the DVO case. It was not ordered for the purpose of confirming nor denying any previous allegations, nor was it ordered to assist the court in determining custody. Instead, the investigation was ordered to create a Prevention Plan that would "reduce identified risks" for all involved parties in the DVO case. (R. at 235). Simply because the report highlighted no concerns beyond those outlined in Mindy's petition does not compel the court to overlook the substantial evidence against Andrew. As evidence, the report was not conclusive of the custody issue. It was

therefore within the court's discretion to allow it whatever weight it deemed appropriate. We find no error.

3. <u>Andrew has not yet complied with prerequisites to reconsider visitation.</u>

When determining visitation, "[i]f domestic violence and abuse, as defined in KRS 403.720, has been alleged, the court shall, after a hearing, determine the visitation arrangement, if any, which would not endanger seriously the child's or the custodial parent's physical, mental, or emotional health." KRS 403.320(2). Evidence of misconduct may be considered if the court concludes the misconduct "has affected, or is likely to affect, the child adversely." *Krug v. Krug*, 647 S.W.2d 790, 793 (Ky. 1983). A court is not required to wait until a child has already been harmed before it considers the conduct causing the harm. *Id.*

The family court observed that Andrew could not participate in supervised visits without the involvement of law enforcement officers, who were contacted to facilitate the exchange of the child. Andrew was thereafter held in contempt of court, and the court-approved visitation supervisor (Andrew's mother) was removed from that role. Following her removal, Andrew failed to identify an appropriate alternative supervisor despite the court's direction to do so. It was proper to consider this misconduct in light of its direct impact on J.T.

As a result, the court declined to set a visitation schedule but ordered the following:

> When [Andrew] has completed the protective parenting course [he] may submit proof of the completion of the course and include with that proof the credentials of the provider and syllabus or similar document detailing the content of the course. Upon submission of that information [he] may file a Motion for the Court to reconsider a visitation schedule.

(R. at 375). Andrew requested "clarification on what specific parenting classes . . . adequately satisfy the court's objectives . . ." (R. at 455). The court responded that while it had initially left the determination to Andrew, it thereby amended the prior order to select Court Ordered Programs, Inc., as the provider, and ordered Andrew to comply with any recommendations for further treatment made by the program counselor. *Id*. In addition, the court ordered Andrew to complete two additional courses with Court Ordered Programs, Inc.: High-Conflict Parenting/Divorce Program and Parenting/Co-Parenting Program. (R. at 456).

Andrew claims he has "complied with all court-ordered requirements, including enrollment in the required classes." (Appellant's Reply Br. at 4). He states he has "completed these classes and is merely awaiting official certification from the instructor[,]" the delay of which is "administrative in nature." *Id*.

This claim is unsupported. No proof of *enrollment*, much less *completion*, has been provided to either the family court or this Court.[5]

[5] While we take note of Kentucky Rule of Appellate Procedure 32(E)(1)(c) ("materials and documents not included in the record shall not be introduced or used as exhibits in support of

Andrew presented the court with an evaluation for a "Parenting Assessment" which recommended Andrew attend 16 weeks of the Parenting Program. (R. at 458-68). If all courses have been completed, the required documents may be provided to the family court per its January 2, 2024 order. We find the court's instructions to be clear and trust it will reconsider Andrew's timesharing arrangement if he complies with the instructions.

CONCLUSION

For the aforementioned reasons, the Bullitt Family Court's order is AFFIRMED.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Andrew Timberlake, *pro se*
Shepherdsville, Kentucky

BRIEF FOR APPELLEE:

J. Scott Wantland
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briefs"), we emphasize this Court is unaware of any facts or evidence to support Andrew's claim, regardless of being introduced through proper procedure.