

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001452-ME
&
NO. 2007-CA-001847-ME

C.T.

APPELLANT

v.

APPEAL FROM FAYETTE FAMILY COURT
HONORABLE TIMOTHY PHILPOT, JUDGE
ACTION NOS. 04-CI-02076,
05-J-01407 & 05-J-01408

F.T.;
COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES;
I.T., A CHILD; AND I.T., A CHILD

APPELLEES

OPINION
AFFIRMING

** **

BEFORE: ACREE, CLAYTON, AND KELLER, JUDGES.

KELLER, JUDGE: C.T. appeals from the consolidated cases of a dissolution/custody action and the companion dependency/neglect/abuse action decided by the Fayette Family Court. For the reasons set forth below, we affirm.

FACTUAL BACKGROUND

In May of 2004, a “self help” legal service petition for dissolution of marriage was filed *pro se* by C.T. (hereinafter Mother) with an answer and affidavit in support of the final decree filed *pro se* by F.T. (hereinafter Father). A document entitled “marital settlement” was filed simultaneously, purporting to settle by agreement all marital affairs with respect to property and child support and other financial matters. The document evidenced an agreement to joint legal custody of a son born in 1999 and a daughter born in 2001 with alternate weekly visitation. Prior to the entry of any order of the court, Father retained counsel who filed a motion to have Father named primary residential custodian. The motion alleged that Mother had allowed the children to associate with nefarious individuals she had met while employed as an exotic dancer at a strip club. There were additional allegations that Mother was using alcohol and drugs and taking the children on “dates”. Mother responded alleging cruel and abusive behavior directed toward her by Father. A custody evaluation was ordered in September of 2004 due to the allegations and failure of the parents to resolve the issue by agreement.

Thereafter, Mother petitioned the Fayette District Court for a domestic violence order on two occasions. The final domestic violence petition alleged that

Father had sexually abused the children. In September 2005, the circuit court ordered the DVO dismissed,¹ but suspended Father's visitation and later mandated his visitation be supervised. In November 2005, Father filed a motion to limit Mother from spending the night with T.L. (hereinafter boyfriend) while in the company of the children.

In July 2006, a seven-day trial was conducted. Evidence was given that Mother had left the children in the care of her boyfriend for extended periods of time and she allowed her children to be driven by her boyfriend, despite knowing that his driver's license was suspended due to a conviction for Second Offense Driving Under the Influence. Numerous absences from school were also noted. Multiple expert witnesses testified as to the interviews they had conducted with the children and their opinions regarding the abuse allegations. The Court found that Father had not abused the children² and awarded joint custody to the parents. The circuit court ordered gradual implementation of equitable timesharing and set out guidelines for the parents to follow, including therapy for the children,³ and prohibited the parents from disparaging each other.

Almost immediately, problems with parenting time ensued and continued, with accusations of misbehavior on the part of Mother, and reluctance

¹ The court ordered the parties to have no contact with each other, except what contact was necessary to effectuate visitation.

² Father was never charged with a crime. The children denied any abuse in a forensic interview conducted by the Children's Advocacy Center. The video of this interview was later introduced as evidence during the July 2006 hearing.

³ The order of the court of September 2006 consists of 43 pages.

on the part of the son to visit with his Father. Throughout the fall of 2006, matters continued to escalate with Mother referring to Father as an “abuser” and “pervert” within earshot of the children. The circuit court then entered Emergency Custody Orders directing the children to be placed in foster care.

During a hearing conducted in December 2006, the circuit court heard testimony by the therapist for the children that Mother had caused the children to miss a therapy appointment. Additionally, the designated visitation supervisors testified to Mother’s hostile and threatening behavior toward them in the presence of the children. The court then ordered the children placed with the Cabinet for Families and Children, restricting both parents to supervised visitation. After a prolonged hearing in January 2007, the court found the children to be neglected and that Mother had inflicted emotional injury upon the children, which was documented in a fifteen page judgment.

Subsequently, the quality of the visits between Father and the children dramatically improved. The children remained in foster care and eventually Father moved for sole custody. The circuit court, in a hearing held in February 2007, overruled the motion “at this time” and set the motion for reconsideration at a later date. The motion remained pending and the court outlined a timesharing schedule. The court ordered counseling with a different therapist, Kristi Brooks (Brooks).⁴

In April 2007, the court held yet another hearing due to visitation problems. Brooks communicated to the court that Mother had failed to attend a

⁴ The previous therapist declined to conduct further therapy with the children due to unpaid bills.

counseling session. The court then ordered Mother to have no contact with the children outside the presence of Brooks due to the ongoing problems with visitation and her failure to follow the court's previous orders.

In June 2007, the court held a hearing on the original custody motion. During the two day hearing, testimony revealed Mother had once again violated the court's order prohibiting her from having contact with the children outside of Brooks' presence and she had again made inappropriate comments to the children. Conversely, the court heard testimony that visitation between Father and the children showed marked improvement. The court also heard evidence of property issues during the June 2007 hearing, and entered a separate order in July 2007 dividing what remained of the marital estate.

After this hearing, but prior to the court entering its written order granting Father sole custody,⁵ two events occurred. First, Mother filed a motion requesting the Judge to recuse himself, based primarily upon Brooks' testimony that she believed the Judge to be biased. Brooks had testified that she believed the Judge's bias was evident as it was his goal to return the children to Father. Second, Mother's boyfriend was arrested for attempting to hire an undercover police officer to kill Father. Police reported the boyfriend provided cash, pictures of Father, and his work and vehicle information. The detective had observed the boyfriend's car at Mother's home after the attempted procurement of the hit man, and additionally had monitored his cell phone activity with Mother.

⁵ The circuit court's Findings of Fact and Conclusions of Law are twenty-six pages long.

The court heard testimony from the detective in August 2007, whereupon Mother invoked her right against self incrimination when asked why she continued to see her boyfriend after his arrest, and refused to answer any other questions relating to the boyfriend's alleged criminal act. The court then denied visitation to Mother until these questions were answered and confirmed Father's status as sole custodian. The court also overruled the motion to recuse and entered Amended Supplemental Findings of Fact and Conclusions of Law and the Property Decree on August 14, 2007. This appeal followed.

STANDARD OF REVIEW

Our standard of review in a case involving dissolution of marriage and child custody is whether the trial court abused its discretion. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *McKinney v. McKinney*, 257 S.W.3d 130, 133 (Ky. App. 2008). A reviewing court may not substitute findings of fact for those of the trial court unless they are clearly erroneous. *Bennett v. Horton*, 592 S.W.2d 460 (Ky. 1979). A factual finding is not clearly erroneous if it is supported by substantial evidence. "'Substantial evidence' is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people." *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky. App. 2002). The Kentucky Rules of Civil Procedure (CR) 52.01 instruct: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the

opportunity of the trial court to judge the credibility of the witnesses.”

As to the division of property within a dissolution proceeding, the trial court likewise must apply the facts to the law of the case. “The property may very well have been divided or valued differently; however, how it actually was divided and valued [is] within the sound discretion of the trial court.” *Cochran v. Cochran*, 746 S.W.2d 568, 569-70 (Ky. App. 1988) (citation omitted).

Mother has alleged error due to the trial judge’s refusal to recuse himself from the case in June 2007. “[T]he standard for determining whether a motion [to recuse] is legally sufficient is whether the facts alleged would place a *reasonably prudent person* in fear of not receiving a fair and impartial trial.” *Dean v. Bondurant*, 193 S.W.3d 744, 748 (Ky. 2006)(emphasis in original). With the above factual background and the applicable standards of review ascribed, we will address the issues raised by Mother in the order set forth below.

ANALYSIS

I. Division of Property

Mother argues in her appeal that the family court erred in awarding Father nearly all of the marital assets. A review of the record does not support this contention. To be clear, there is no statutory basis requiring that property be divided equally. “Rather, the trial court is to divide the marital property in just proportions, considering all relevant factors.” *Wood v. Wood*, 720 S.W.2d 934, 935 (Ky. App. 1986).

In the instant case, we cannot say that the division of the marital assets was clearly erroneous or an abuse of discretion. On the contrary, the record reveals that what remained of the couple's assets consisted of debts one or both had incurred. Father had spent a great deal of money in attorney fees defending against accusations made by Mother. Mother testified that the great majority of her attorney fees were paid by others or were free.⁶ Referencing the prior "self-help" settlement agreement, which the family court found on its face to be fair and equitable to both parties, the court divided the various debts and assets essentially according to the couple's initial agreement. We conclude the court committed no error and divided the debts in just proportions.

II. Recusal of the Trial Judge

The motion for recusal of the trial judge pursuant to Kentucky Revised Statute (KRS) 26A.015 was made and overruled at the end of an exceptionally protracted and bloody custody battle. Given the sheer amount of time spent, the volumes of facts found, and the factual findings entered, Mother's allegation that the court had pre-judged the case borders on the absurd. Similarly, Mother's accusation that the judge was prejudiced against her because of her employment as a stripper is clearly refuted by the fact that the court gave Mother sole custody from August of 2005 until August of 2006.

⁶ Mother had had no less than six separate attorneys represent her during the pendency of this case. Father maintained the same attorney/firm throughout the proceedings.

Likewise, the use by Mother of the allegations of Kristi Brooks is wholly without merit. Brooks was bothered by the court's direction that she counsel the children based upon the goal of returning custody to Father.

[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

Liteky v. United States, 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994).

There is nothing in the record to suggest that the court could not judge the case fairly. It appears that Brooks misunderstood her role in the proceedings and the legal implications of the term “custody,” which led her to the conclusion the court was biased. Nevertheless, the court acted properly and with admirable patience throughout this difficult case. The family court noted in its order of August 14, 2007, “After hearing evidence for many hours, and days, and now years, this court indeed has formed ‘opinions’ about the case . . . Mother does not like this court’s findings, but that is not a basis for ‘recusal’.” We agree.

III. Emotional Injury

Mother’s next assertion is that the court erroneously found the children suffered “emotional injury” as defined by statute. KRS § 600.020 (24) defines “emotional injury”:

an injury to the mental or psychological capacity or emotional stability of a child as evidenced by a substantial and observable impairment in the child's ability to function within a normal range of performance and behavior with due regard to his age, development, culture, and environment as testified to by a qualified mental health professional[.]

Mother argues that the evidence does not support the conclusion that the children were dependent, neglected or abused and thus should not have been removed from her custody and placed in foster care. On January 19, 2007, the court entered supplemental findings of fact in the juvenile cases following an Emergency Custody Order entered December 1, 2006.

In the supplemental findings, the family court detailed the testimony upon which it relied, along with findings that the parties failed to comply with previous orders to engage in parenting coordination. Mother was found to have violated an order to cooperate with supervised visitation. Furthermore, Mother failed to cooperate with therapy for the children and had violated the order to refrain from denigrating Father in the presence of the children. The court referenced testimony and opinions of a qualified mental health professional from the Children's Advocacy Center who had testified at the trial and the hearing which took place in January of 2007. This "child victim therapist" had conducted therapy with the children and gave her opinion concerning the welfare of the children. This testimony, along with the above noted violations of court orders unambiguously substantiated the finding that the children were neglected and suffered emotional injury within the plain meaning of KRS 600.020(24).

IV. Modification of Custody

Under KRS 403.270(2), the circuit court is required to determine custody in accordance with the best interests of the child by considering the following factors:

- (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;
- (b) The wishes of the child as to his custodian;
- (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
- (d) The child's adjustment to his home, school, and community;
- (e) The mental and physical health of all individuals involved;
- (f) Information, records, and evidence of domestic violence as defined in KRS 403.720;
- (g) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;
- (h) The intent of the parent or parents in placing the child with a de facto custodian; and
- (i) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school.

Mother maintains first, that the family court did not have jurisdiction due to the failure of Father's motion to be accompanied by two affidavits as required by KRS 403.350. This allegation is specious and mystifying as two affidavits are attached to the motion for sole custody filed by Father on February 7, 2007.

Second, Mother objects to the family court's refusal to speak to the children or allow them to testify. Mother asserts the court did not consider the children's wishes or the interrelationship between family members as required by the statute. Correspondingly, she complains the guardian *ad litem* (GAL) did not interview the children during the pendency of the proceedings.

In her brief, Mother cannot realistically dispute the detailed reasoning offered by the family court to support its ruling of sole custody for Father. Multiple witnesses testified to Mother's extreme behavior and her ongoing disregard for the court's orders. The family court articulated a clear basis in fact and correctly applied the law to the facts. Mother allowed herself to become so enraged, as to, at the very least, incite her boyfriend to hire a "hit man" to do away with the children's Father. Prior to this event, the court acted properly in denying unfettered access to the children by Mother. Once the plot was exposed, the proof of the precision with which the court judged this matter became abundantly clear.

Lastly, we do not condemn but rather applaud the court for using its discretion to disallow testimony from two young children who were clearly traumatized by the enduring drama of their parents divorce. Furthermore, it

appears that the GAL adequately advocated for his clients' best interests without subjecting them to yet another "expert" interview that is not required by law. The GAL and the court had the benefit of numerous opinions from experts as well as other witnesses to form their assessment of a then eight-year-old boy and five-year-old girl. Their young age and the pressure applied by Mother severely diminish, if not completely obscure, the value of their opinions or testimony. The continued pursuit by Mother to put her children directly in the "line of fire," only further proves the soundness of the family court's judgments.

For the above reasons, the orders of the Fayette Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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