

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002279-MR

JESSICA J. LALONDE

APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE GEORGE DAVIS, JUDGE
ACTION NO. 08-CI-01308

ADAM N. LALONDE

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: TAYLOR, CHIEF JUDGE; KELLER, JUDGE; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Jessica J. LaLonde appeals from that portion of a decree of dissolution of marriage that confirmed the report of the domestic relations commissioner and awarded her joint custody of a minor child but granted

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

physical custody of that child to her former husband Adam N. LaLonde. After our review, we affirm.

The couple married on April 30, 2005 in Michigan. A son named Tyson was born to the couple on August 1, 2006. Jessica was diagnosed with Bipolar II disorder and on the recommendation of her doctor, stopped working outside the home in July, 2007. Adam worked different jobs primarily in sales or factory work and played in professional softball leagues during the summer. In April 2008, the family moved to Ashland, Kentucky when Adam was offered a job as a softball coach and trainer. Jessica stayed home to care for her son while Adam worked evenings and travelled on weekends with the softball team during the summer.

In September 2008, Jessica moved back to Michigan with the couple's son. The couple agreed they would alternate time with their son approximately every three weeks. Jessica found a job, moved into an apartment and enrolled her son in a day care program. She returned her son to Kentucky and his father on September 28, 2008 in accord with the original agreement. Jessica also filed a petition for divorce in Michigan alleging her son was a Michigan resident. Adam then filed a motion for temporary relief in Kentucky and obtained temporary custody. The Michigan trial court determined the child was a resident of Kentucky and that Kentucky was the appropriate venue for any divorce proceeding. Jessica was only able to see her son twice in the following two months until a regular schedule of visitation was developed.

A final hearing was held on February 2, 2009 before a domestic relations commissioner. That hearing was suspended in order to secure the testimony of the mental health providers who had been treating Jessica in Michigan. A telephonic deposition of Jessica's psychiatric nurse practitioner was taken on April 30, 2009 and she described Jessica's medications and treatment for the Bipolar II disorder. On May 28, 2009, Jessica's psychologist was deposed and confirmed that use of alcohol would have an effect on Jessica's medications. On August 11, 2009, Adam was allowed to submit rebuttal evidence in response to the depositions of Jessica's Michigan based mental health care providers.

The domestic relations commissioner filed a report on October 20, 2009 recommending the parties have joint custody with Adam being designated as the primary physical custodian and with Jessica being awarded parenting time with her son pursuant to the Boyd County Timesharing Guidelines. Jessica in turn filed exceptions to the domestic relations commissioner's report. Those exceptions were overruled by the trial court which adopted the domestic commissioner's report and granted a decree of dissolution on November 9, 2009. This appeal followed.

Jessica first argues the commissioner's decision was partially based on improperly admitted evidence. Adam introduced pictures of Jessica taken from the social network site Facebook. These pictures in general display Jessica enjoying parties and apparently consuming alcoholic beverages against the advice of her mental health treatment providers. Adam argued she had obviously not been

truthful with her treatment providers when she indicated she had suspended or significantly diminished her consumption of alcohol. Jessica objected to the introduction of the pictures which was overruled. She now argues Adam failed to properly authenticate the photographs and their admission into evidence was improper. We disagree.

Demonstrative evidence such as these pictures must be supported by sufficient evidence to support a finding that the pictures are an accurate representation of what is claimed. Kentucky Rules of Evidence (KRE) 901(a). While typically, such supporting evidence is the testimony of the person who took the picture that it accurately depicts the reality of the photographed situation that is not the only manner to authenticate a photograph. Authentication only requires “[t]estimony that a matter is what it is claimed to be.” KRE 901(b)(1). Here, it was Jessica herself who acknowledged that indeed, she had been drinking alcohol and the pictures accurately reflected that activity. That testimony was sufficient to authentic the photographs and they were properly admitted into evidence.

Jessica additionally argues that because Facebook allows anyone to post pictures and then “tag” or identify the people in the pictures she never gave permission for the photographs to be published in this manner. She also argues that with the advent of modern digital techniques, photographs may easily be altered and the time and date stamps associated with the photographs left doubt as to when they were taken. She does not however provide anything but argument to support these propositions. There is nothing within the law that requires her

permission when someone takes a picture and posts it on a Facebook page. There is nothing that requires her permission when she was “tagged” or identified as a person in those pictures. Similarly, although we acknowledge that modern digital photography techniques may allow for the alteration of a photograph, Jessica did not suggest such techniques were employed. She instead acknowledged the photographs were accurate which leads to the conclusion they were not altered. We find nothing to cause us to disagree with the admission of the photographs as evidence.

Jessica next argues the trial court and the commissioner failed to adhere to the standards of the determination of child custody required by statute. We disagree. The trial court is required to consider

- (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 403.270;
- (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.

Kentucky Revised Statutes (KRS) 403.270(2).

The record is clear and Jessica acknowledges the commissioner and the trial court analyzed each required factor. Her argument continues however that the trial court did not consider the weight of those factors specifically as Jessica would wish them to be considered. She desires to give a greater weight to the relationships a child may have with extended family members while diminishing the weight given to her mental health condition. *See* KRS 403.270(2)(c) and (e).

There is nothing that requires the trial court to give any specific weight to any particular factor. Absent an abuse of discretion or a decision that is clearly erroneous, we will not overturn the fact finders view of which factor may be considered more important in any individual situation when determining custody. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982).

Jessica next argues the trial court did not consider her and Adam's environment and work schedules to determine which would provide "the most appropriate school schedule and training for" their son. On the contrary, the record is clear there was testimony from a number of individuals including Adam's employer, a minister who saw the child twice a week, a babysitter and a family friend. All testified to the environment Adam maintained for his son. The trial court considered that testimony in its decision.

Jessica also argues that spousal abuse should have been considered by the trial court. Adam did at one point in his testimony admit to striking Jessica at a casino. There was no further elaboration from either party concerning this event. Jessica never raised the issue of spousal abuse below and we will not consider it now for the first time on appeal.

Finally, Jessica asserts the trial court failed to make specific findings how her mental health affected her ability to be a custodial parent. It is clear from the extensive report the commissioner and trial court relied on the significant factor that not only was Jessica being treated for Bipolar II disorder but that she seemingly ignored the advice of the mental health practitioners and continued to consume alcoholic beverages in spite of the knowledge that it was not recommended.

Additionally, some question remained about whether Jessica was forthright with those mental health practitioners and concern that she would be unable to be completely honest with the trial court. She now suggests that the failure of the trial court to specifically find any relationship between her drinking alcohol, her apparent misstatements of fact and her mental health is fatal to any determination of the trial court. It was incumbent upon Jessica to request additional findings of fact if she considered those provided inadequate. CR 52.04. She did not do so.

Ultimately, this entire case and Jessica's arguments boil down to whether the record supports the trial court's determination of custody. We will not

disturb that decision unless the trial court is shown to be clearly erroneous. *Moore v. Asente*, 110 S.W.3d 336, 353-54 (Ky. 2003). There is substantial evidence to support the findings of the trial court and its decision will not be disturbed.

We therefore affirm the decision of the Boyd Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Elizabeth Opell Thomas
Ashland, Kentucky

BRIEF FOR APPELLEE:

Roger W. Hall
Ashland, Kentucky