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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001366-ME

CHRISTINA RUSSO — APPELLANT

v.

APPEAL FROM GRANT CIRCUIT COURT
HONORABLE R. LESLIE KNIGHT, JUDGE
ACTION NO. 12-CI-00231

SCOTT A. RUSSO — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, MAZE, AND NICKELL, JUDGES.

NICKELL, JUDGE: Christina Russo, mother of L.R.,[1] challenges the Grant Circuit Court's modification of custody. We affirm.

Scott and Christina Russo married in 2005 and divorced in 2012. L.R., a son born in 2010, is their only child. At the time of dissolution, they agreed

[1] Pursuant to Court policy, the minor will be referred to by initials only.

to joint legal custody with equal parenting time. Additionally, Scott was to pay monthly child support and provide health insurance for the child; L.R. was to reside in Grant, Kenton, Boone or Campbell Counties; and, the parents were to consult each other before choosing doctors, schools, religious instruction, major medical procedures, discipline and extracurricular activities—to ensure they acted in their son's best interest.

The agreement worked well until 2013 when Scott, a police officer, accepted a job in Florida. He saw the new job as an opportunity to earn more money, afford his son a better life, and continue his relationship with his girlfriend who had moved to Florida to advance her career with the Department of Justice. In preparing to relocate to Florida in July 2013, Scott gave notice he intended to move and asked the trial court to modify the parenting schedule, which it did.

In mid-2013, cooperation between Scott and Christina had deteriorated. By January 2016, their relationship had become turbulent and contentious with even the simplest decisions being brought to the trial court for resolution based upon the Domestic Relations Commissioner's (DRC) recommendation. Scott ultimately sought modification of custody in 2016, painting himself as a model of stability in terms of employment, personal life and residence.

Christina's life, however, was a different story. Since dissolution, she had moved four times—living for a time outside the four counties allowed by the agreement—and had been fired as a chiropractor's receptionist when she could not

work her full shift due to child care issues. She left a second job due to a pregnancy with Michael O'Brien, a man with whom she and L.R. lived while she was a stay at home mother. At the time of trial, she had her own apartment and had been working in home health care about one month.

As a police officer, Scott found Christina's involvement with O'Brien particularly troubling. O'Brien has an extensive criminal history,[2] and is prone to domestic violence as evidenced by protective orders Christina has taken against him. O'Brien has also received protective orders against her. Christina and O'Brien dropped the protective orders against one another and ultimately recanted the original stories they had told police and social workers with the Cabinet for Health and Family Services (CHFS). Christina maintains she must have contact with O'Brien because they have a son together, but admits they cannot be a couple.

Scott did not want L.R. around O'Brien. In November 2015, he sought a no contact order upon learning O'Brien had threatened Christina while L.R. was in the home. In the motion, Scott alleged L.R. is routinely around O'Brien during the day, has spent the night with him, and was left alone in O'Brien's care during the second week of November. According to Scott, O'Brien has struck both O'Brien's son and L.R. Also included in the motion were allegations Christina had "pulled a firearm" on O'Brien in August 2015 while L.R. was in the home, and Christina had caused a disturbance requiring a police

[2] Scott recited part of O'Brien's criminal history: "possession of cocaine, drug paraphernalia, multiple public intoxications, disorderly conduct, fleeing and evading, resisting arrest, open container, operating on a suspended license, reckless driving, and theft of services."

response on September 2, 2015, when she threatened to withhold O'Brien's son from him—two instances of Christina perpetrating domestic violence. The matter was heard on December 23, 2015. On December 30, 2015, the DRC tendered a recommended order of no contact.[3] The trial court overruled Christina's objections and entered the order, but not until February 11, 2016. The DRC found contact between L.R. and O'Brien may have continued as late as March 2016, stopping only when a social worker convinced Christina the trial judge, not just the DRC, had signed the no contact order.

Scott was further alarmed upon learning Christina had taken L.R. to job sites when she helped O'Brien in his commercial cleaning business. Scott believed this exposed L.R. to more dangers.

Of equal concern to Scott was Christina's persistence in taking L.R. for chiropractic treatment—fifty-six visits before the child's fifth birthday—with "absolutely no injury, no medical diagnoses and no condition justifying the treatment." Scott claims he was unaware chiropractic visits were occurring, learning of them only after bills were submitted for payment to his Health Savings Account (HSA). He saw this as an unnecessary depletion of funds that could be

[3] The DRC recommended O'Brien be ordered to have no contact with L.R. but made the order "subject to review upon proper motion being made by [Christina]." Citing lack of notice, Christina filed a written protest of the recommended order. Scott argued there was no reason for the DRC not to act since no motion in the case had ever been heard as scheduled because Christina always requests a continuance—although this time she did not; the motion addressed an immediate threat of serious bodily harm to L.R.; and finally, Christina rejected Scott's offer to enter a temporary agreed order. On January 11, 2016, Christina claimed the order did not exist and was merely the DRC's recommendation of no contact. She later told a CHFS investigator she would not stop going around O'Brien. On February 1, 2016, Christina said O'Brien had been staying in her apartment and L.R. confirmed he still had active contact with O'Brien.

used for real medical needs in the future. When Scott complained, the trial court ordered Christina to personally bear the cost. She submitted more bills against the HSA. When Scott moved to have Christina held in contempt, the trial court found a violation of its order, but not serious enough to constitute contempt. To redress the violation, Christina was ordered not to subject L.R. to more chiropractic treatment without a referral from a medical doctor. She took the child for more chiropractic treatment, claiming she believed an oral referral was adequate. When Scott complained a third time, Christina was held in contempt and sanctioned $500 —an amount ultimately credited against Scott's child support obligation.

Not only payment of, but need for, chiropractic treatment was hotly contested by the parties. Christina maintained L.R. began receiving treatment when he was just eight days old to correct "turned in feet" which are common in her family. In contrast, Scott referenced paperwork showing treatment did not begin until L.R. was fifteen months old and the phrase "turned in feet" did not appear in his medical records until the forty-ninth visit. According to Scott, the first forty-eight visits were for "headaches, general pain/stiffness and fever." Scott further alleged in Christina's failed efforts to get a medical referral, she had lied to two or three physicians, saying it was needed only for insurance purposes—omitting all mention of the trial court's order. When Christina was finally told to take L.R. to an orthopedist—not a chiropractor—slight turning in of the child's feet was confirmed, but treatment was not recommended.

About a month before trial was to occur, Christina's attorney withdrew, prompting Scott to seek a status conference to narrow the issues to be heard since litigation had spanned many years and multiple attorneys. A status conference occurred, but neither Christina—nor anyone on her behalf—attended. Subsequently, on the DRC's recommendation, the trial court ordered the hearing to occur as scheduled since there was sufficient time for Christina to retain new counsel. Evidence was to be restricted to "matters not previously argued."

On April 15, 2016, current counsel entered an appearance on Christina's behalf. Five days later, the DRC heard approximately seven and one-half hours of testimony. While trial was to be limited to events of the last year, the DRC gave Christina's attorney great leeway in revisiting previously resolved issues. At the close of the proof, both sides were directed to submit proposed findings and conclusions. Both parties complied.

On June 22, 2016, the DRC tendered a twelve-page report noting it had taken judicial notice of evidence entered in several prior hearings, and finding numerous salient facts. After overruling Christina's written objections, the trial court affirmed the DRC's recommended order on August 18, 2016. It is from this order Christina now appeals.

ANALYSIS

Christina's first complaint is the trial court has applied the wrong standard. Citing *Pennington v. Marcum,* 266 S.W.3d. 759 (Ky. 2008), she admits Scott filed a "Motion for Modification of Custody," but claims the court erred in

awarding him "primary residential custody" under KRS[4] 403.270(2) and 403.340(3). She argues all Scott really wanted was a change in the parties' visitation/time-sharing arrangements which should have been decided under KRS 403.320(3). Scott acknowledges modification of timesharing/visitation falls within the purview of KRS 403.320, but goes on to say a request for a change in residential custody usually falls under KRS 403.270(2) and 403.340(3).

This issue is not properly before us. Christina has not complied with CR[5] 76.12(4)(c)(v) requiring each argument in the appellant's brief to begin with "a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." Not only has she failed to tell us where and how the claim was preserved, our review of the record indicates KRS 403.320(3) was not argued in the thirteen pages of objections filed on her behalf, nor was it mentioned during hearings held before the trial court on July 13, 2016, and July 27, 2016. As an appellate court, we are authorized to consider questions "fairly held to have been brought to the attention of the trial court." *Richardson v. Commonwealth*, 483 S.W.2d 105, 106 (Ky. 1972) (internal citations omitted). Having failed to object to the DRC's application of KRS 403.270(2) and 403.340(3), she cannot raise that argument for the first time on appeal in this Court. *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled by Wilburn v. Commonwealth,* 312 S.W.3d 321 (Ky. 2010). Furthermore, she did not

[4] Kentucky Revised Statutes.

[5] Kentucky Rules of Civil Procedure.

request palpable error review pursuant to CR 61.02; *Herndon v. Herndon,* 139 S.W.3d 822, 827 (Ky. 2004).

Christina's other argument is divided into four subparts, each focusing on the court's view of specific aspects of proof—Christina's obsession with chiropractic care; L.R. living in a "volatile" environment while in Christina's care; Christina perpetrating domestic violence; and, Christina likely violating the no contact order. The gist of the entire argument is the trial court viewed the evidence differently than Christina.

Pursuant to CR 52.01, we set aside factual findings only if clearly erroneous. In reviewing a case, we must give "due regard . . . to the opportunity of the trial court to judge the credibility of the witnesses." *See Murphy v. Murphy*, 272 S.W.3d 864 (Ky. App. 2008). It is not a matter of whether this Court would reach a different conclusion, but whether the trial court's findings of fact "are clearly erroneous, whether it applied the correct law, or whether it abused its discretion." *See B.C. v. B.T.,* 182 S.W.3d 213, 219–20 (Ky. App. 2005).

Custody decisions between parents are determined by what is in the best interests of the child guided by factors set out in KRS 403.270(2) and 403.340(3). Applicable factors in this case are KRS 403.270(2), (a) parental wishes; (c) interaction and interrelationship of child with parent(s), siblings and others; (d) child's adjustment to home, school and community; (e) mental and physical health of all involved; and, (f) presence of domestic violence. Also to be considered are two factors in KRS 403.340(3), (d) does the child's current

environment seriously endanger his physical, mental, moral or emotional health; and, (e) will any harm likely resulting from changing his environment outweigh its advantages. Both parents want custody of L.R.[6] Therefore, L.R.'s best interests will be decided based on the six remaining factors, all of which were specifically addressed in the DRC's report and adopted in full by the trial court. Unless we deem one of the DRC's findings to be "clearly erroneous," there has been no abuse of discretion by the trial court. *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008). With the foregoing in mind, we evaluate Christina's claims.

First, Christina faults the court for describing her reliance on chiropractic treatment as a "seeming unhealthy obsession" that may have "unknown long term (sic) consequences for the child." The court's order fairly assessed the proof:

> [t]here was no evidence introduced that the chiropractic treatments were necessary, were beneficial or were in any manner successful in treating any medical issues [L.R.] may have had. There was also no evidence that these treatments caused any harm to the child.

If Christina had proof of the value of the chiropractic sessions, or the absence of harm being caused by them, she could have put it into the record. She did not.

Curiously, the first witness she called at trial was Dr. Brett Koester, the chiropractor who treated L.R. and for whom she worked as a receptionist until being fired. Christina's counsel made clear from the start, Dr. Koester had not been called to provide a medical opinion and was not asked to do so. Instead, he

[6] The child was not interviewed.

was asked about treatment he had provided to Scott and office practices for maintaining patient records and privacy. Christina cannot fault the trial court for a failure of her own proof. The parties spent a good amount of time talking about chiropractic care and the absence of a referral for it from a medical doctor. The court would have been remiss in not mentioning it. There was no clear error and no abuse of discretion.

Second, since 2013 Christina has been involved in a "toxic" relationship with O'Brien. She argues the domestic violence she has suffered at O'Brien's hands has not impacted L.R. because he is a happy, bright, well-adjusted little boy and is "on track" developmentally. Christina apparently overlooks the fact that while she has been her son's primary residential custodian since March 2014, he has not been in her exclusive care. He has been left alone with O'Brien and has visited with Scott in Florida. She cannot take sole credit for her son's happiness and development.

L.R.'s impression of his mother's battles with O'Brien lends credence to the trial court's use of the word "upheaval" in characterizing Christina's life. L.R. told a social worker "he has seen [Christina and O'Brien] fight a lot with voices, hands, spitting, throwing shoes, breaking plates, and calling the police; [L.R.] also stated that it makes him want to hit [O'Brien] in the head."

Christina takes the court to task for pointing out the dichotomy in Scott's life and hers since dissolution of their marriage. The court did not script their lives nor their testimony. There was no proof of upheaval in Scott's life—his

employment history, residence and personal relationship have been consistent. In contrast, there was significant proof of domestic violence and upheaval in Christina's life and by extension—in L.R.'s life. Christina moved four times in four years; lost two jobs; and chose to maintain a "toxic" relationship with a violent man.

Christina faults the social worker for expressing concern that L.R.'s exposure to domestic violence may not manifest itself outwardly for many years—something Christina claims the social worker could not know and was unqualified to suggest. L.R.'s comment about wanting to hit O'Brien in the head demonstrates he has already learned to counter violence with violence.

Moreover, it does not help that Christina and O'Brien frequently turn to law enforcement, CHFS and the courts for help—procuring protective orders against one another—only to drop the EPOs and recant their prior stories. We discern no clear error in the trial court's findings of fact and no abuse in the trial court's exercise of its discretion.

Third, Christina portrays herself as a victim of domestic violence—a myopic view ignoring reports she perpetrated violence herself. Police witnessed at least one active dispute in which Christina and O'Brien injured one another. There was also proof Christina had pulled a handgun on O'Brien and had threatened to withhold his son from him. The trial court had to choose between the credibility of social workers and police officers—people without a personal stake in the outcome of this case—who generated official reports, and Christina and O'Brien—people

who made the initial reports and then recanted them. Being confronted with wildly conflicting evidence, we have no reason to say the trial court made the wrong choice. *S.D.O. v. Commonwealth*, 255 S.W.3d 517, 521 (Ky. App. 2008). Again, we discern no clear error and no abuse of discretion.

Finally, Christina claims the trial court erred in finding she likely violated the no contact order as late as March 2016. The order was recommended by the DRC in December 2015 and ultimately signed by the trial court on February 11, 2016. Any contact that may have occurred *prior* to entry of the order by the trial court would not have violated a valid court order. However, a CHFS report pertaining to an investigation of maltreatment and domestic violence predicted—based in part on Christina's own words—she would not abide by the terms of the no contact order. A social worker wrote on February 1, 2016:

> [Social worker] stated that [CHFS] recommended she and [O'Brien] have no contact to ensure another D/V incident does not happen in front of the children. [Social worker] stated if [CHFS] determines there is a risk of harm, [CHFS] will open the case. Christina stated that CHFS should keep an open case because there is no way she can keep a no contact agreement. She stated that the kids love each other and miss each other so they let them visit. Christina stated that [O'Brien's] schedule is always changing and they cannot avoid spending time together. Christina stated [O'Brien] had stayed there at the apartment a few times but that they are not together. Please note that Christina was crying and upset. [Social worker] feels as if [Christina] has no intention of leaving this relationship.

An entry dated February 15, 2016, while the no contact order was in force, reads:

> [Social worker] called [O'Brien]. [He] stated that he and Christina got back together in December but are no longer together now. [O'Brien] stated that he spoke to Rick Scott, Christina's attorney, and he stated there is no court order. [Social worker] call (sic) [O'Brien] back and left a voicemail telling him about the active court order of no contact with [L.R.].

Another entry for February 15, 2016, reads:

> [Social worker] called Grant County Clerks (sic) Office. They confirmed a no contact order between [O'Brien] and [L.R.] was filed on 02/11/2016.

While still concerned Christina would reunite with O'Brien, CHFS closed the case based on verbal assurances from Christina and O'Brien that they are no longer together, there will be no future instances of domestic violence, and they will obey all court orders—including the prohibition on O'Brien having any contact with L.R. We discern no clear error in the DRC's findings of fact, nor in the trial court's exercise of its discretion in entering the DRC's recommended order.

It was Christina's burden to prove clear error in the factual findings adopted in full by the trial court. *Pennington,* 266 S.W.3d at 769. As previously noted, this was an issue of witness credibility. Considering the totality of the evidence, we simply cannot say the trial court erred in disbelieving Christina and O'Brien. Therefore, we affirm the custody modification ordered by the Grant Circuit Court.

ALL CONCUR.

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