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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
August 16, 2023 Session

BENJAMIN McCURRY v. AGNESS McCURRY

**Appeal from the Circuit Court for Washington County
No. 38147 Thomas J. Wright, Senior Judge¹**

No. E2022-01037-COA-R3-CV

This is an appeal from the trial court’s denial of a petition for emergency custody and its sua sponte entry of a joint mutual restraining order between the parents involved in a custody dispute. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed; Case Remanded**

JOHN W. MCCLARTY, J., delivered the opinion of the court, in which D. MICHAEL SWINEY, C.J. and KRISTI M. DAVIS, J., joined.

Agness McCurry, Johnson City, Tennessee, pro se.

Sandy Phillips, Johnson City, Tennessee, for the appellee, Benjamin McCurry.

MEMORANDUM OPINION²

Agness McCurry (“Mother”) and Benjamin McCurry (“Father”) were married in 2016. One child was born of the marriage in 2017. The parties separated in 2018 and were divorced in 2019. The court entered a permanent parenting plan naming Father as the

¹ Sitting by Supreme Court designation.

² Rule 10 of the Rules of the Court of Appeals of Tennessee provides: This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated “MEMORANDUM OPINION,” shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

primary residential parent, sparking endless litigation from Mother concerning her interactions with Father and her disbelief in the integrity of the judicial system.

This particular action originated with Mother's filing of a petition for emergency protective custody of the Child on July 7, 2022. Mother alleged that Father had moved from the address designated in the co-parenting plan and was now co-habiting with his fiancée while caring for the child. She also raised various issues concerning the scheduling of their co-parenting time. The court denied the petition, by order entered on July 7, 2022, stating that it did not find "sufficient allegations to justify an immediate, ex parte modification" to the parenting plan. The court advised Mother to file an appropriate motion for a modification of the parenting plan if she desired a change in the current plan.

The same day, Father filed a petition for an order of protection against Mother, alleging continual harassment via telephone, text, and in person. He claimed that she came to his fiancée's house uninvited, prompting him to call the police. She also failed to return the child at the appointed time. He feared that Mother, a foreign national, would depart from the country with the child. The court ultimately dismissed the petition, finding that Father failed to establish the evidence in the petition by a preponderance of the evidence.³

Following the denial of Father's requested order of protection, the court, sua sponte, entered a joint mutual restraining order by order, entered on July 14, 2022, "restraining and prohibiting both parties from coming about, contacting, harassing, threatening, stalking or in any way interfering with the other, at home, work, or any other place." The court limited all permissible contact between the parties to text or email concerning only issues involving the child, except in the case of an emergency. Mother then filed a motion to stay the court's enforcement of the denial of her petition for emergency custody and the joint mutual restraining order. This appeal followed the denial of Mother's motion to stay.

Mother, appearing pro se, argues that Father's violation of the parenting plan as evidenced by his change in address required an emergency change in custody. She further asks this court to vacate the joint mutual restraining order as a violation of her due process rights. Father elected not to file a brief in opposition or to appear at oral argument.

As to the trial court's denial of Mother's petition for emergency protective custody, we first note that trial courts are vested with broad discretion in matters of child custody. *See Whitaker v. Whitaker*, 957 S.W.2d 834, 836–37 (Tenn. Ct. App. 1997). Appellate courts will not interfere with the trial court's decision except upon a showing of an abuse of that discretion. "An abuse of discretion occurs when the trial court . . . appl[ies] an incorrect legal standard, reaches an illogical result, resolves the case on a clearly erroneous assessment of the evidence, or relies on reasoning that causes an injustice." *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 105 (Tenn. 2011). Here, the trial court denied the petition,

³ Meanwhile, Father's fiancée was granted a temporary order of protection against Mother.

holding that it did not find sufficient allegations to justify an emergency change in custody. The court advised Mother to file an appropriate motion for a modification of the parenting plan if she desired a change in the current plan.

In her petition, Mother alleged that an emergency change in custody was necessary because Father had changed his address without the court's permission and was now cohabitating with his fiancée. Mother did not allege sufficient facts to establish that the child had been harmed by the fiancée or was in danger of harm by the fiancée. *See generally Small v. Small*, No. M2009-00248-COA-R3-CV, 2010 WL 334637, at *19 (Tenn. Ct. App. Jan. 28, 2010) (finding that a restriction prohibiting contact from a parent's paramour was unnecessary when there was no evidence of harm). She claimed that the child was forced to share a bed with his future stepbrother, a fact denied by Father and his fiancée in the record before this court. Having reviewed the record, we affirm the trial court's denial of Mother's petition for an emergency change in custody and its instruction to Mother to file the appropriate motion for modification of the current permanent parenting plan in accordance with Tennessee Code Annotated section 36-6-101.

As to the trial court's entry of the joint mutual restraining order, we first note that Mother is permitted to discuss issues concerning the child with Father through text and email in an effort to document their interactions given the contentious nature of these ongoing trial proceedings. Mother is permitted to contact Father concerning the child through other means in the event of an emergency. We hold that this slight change in the mode of communication between Mother and Father is not in violation of her Due Process rights. Further, this change in communication is in the best interest of the child, who was present when Mother appeared unannounced to confront Father concerning his alleged change in residence.

In so holding, we must acknowledge that time has marched on since the trial court's entry of the orders appealed from in July 2022. While additional issues and concerns have likely arisen between the parties during the pendency of this appeal, this court is limited to ruling upon the matters in the record in this particular action. The jurisdiction of this court is appellate only. Tenn. Code Ann. § 16-4-108.

For the reasons stated above, we affirm the decision of the trial court. The case is remanded for such further proceedings as may be necessary. Costs of the appeal are taxed to the appellant, Agness McCurry.

JOHN W. MCCLARTY, JUDGE