RENDERED: NOVEMBER 7, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001122-MR

LAURA KATHRYN TUCK SMITH — APPELLANT

v.

APPEAL FROM OHIO CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 00-CI-00178

TONY RICHARD SMITH, JR. — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: McANULTY AND SCHRODER, JUDGES, AND MILLER, SENIOR JUDGE.[1]

SCHRODER, JUDGE. Appellant, Laura Smith ("Laura"), challenges an order of the Ohio Circuit Court granting primary residential custodianship of her three children to their father, Tony Richard Smith ("Rick"). We affirm.

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On January 11, 2001, the Ohio Circuit Court issued a final judgment pursuant to an agreed settlement in the divorce of Laura and Rick Smith. Laura was appointed the primary residential custodian of the Smiths' three children, Lucas and Lakayah (twins born in 1992), and Maggie (born in 1993). Rick was granted weekly and holiday visitation rights.

In August of that year, the Sheriff of Butler County filed juvenile petitions in the Butler District Court, stating that one of the girls was neglected and the boy and other girl were abused. The petitions stemmed from an altercation between Laura and her mother-in-law in the presence of the children. Thereafter, the custody dispute between Laura and Rick alternated between the Butler County and Ohio County courts.

The Butler District Court scheduled a hearing regarding the sheriff's petitions, but through some oversight, Laura was not notified of the hearing. On August 23, 2001, the district court proceeded in her absence and granted Rick a temporary removal order for the children. Laura's motion to vacate the order was denied, but a date for a hearing into the matter was set, and she was granted visitation rights in the interim. Then, on November 19, 2001, the district court sua sponte cancelled the hearing on the grounds that Rick had filed a motion to modify custody in the Ohio Circuit Court.

The Ohio Circuit Court referred Rick's motion for modification of custody to the Domestic Relations Commissioner for a hearing. Meanwhile, Laura filed a motion entitled "Petition for Immediate Entitlement of Custody" in Butler Circuit Court and received an expedited hearing before a Special Domestic Relations Commissioner. The Special Commissioner found that no apparent emergency had existed to justify the removal of the children from Laura's custody; that she had not received proper notice of the hearing and was therefore denied due process when it was held in her absence; and that without such a hearing, the children would not have been removed from her custody. The Commissioner ordered that the Butler District Court order be vacated and that primary custody be restored to Laura. The Commissioner also stated, however, that actual physical custody should remain with Rick pending the outcome of the Ohio Circuit Court hearing on his motion to modify custody.

Subsequently, on January 9 and 10, the Domestic Relations Commissioner appointed by the Ohio Circuit Court held a hearing and entered a report with findings of fact recommending that Rick's motion to modify custody be granted and that he be awarded primary custody of the children. Laura filed objections and exceptions to the report and a motion to supplement the record with the related Butler County case; the motion to supplement the record was granted but her exceptions

to the change in custody were denied by an order of the Ohio Circuit Court on May 7, 2002.

In reviewing a child custody determination, the standard of review is whether the factual findings of the trial court are clearly erroneous.[2] See CR 52.01; see also Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986). Findings of fact are clearly erroneous if they are manifestly against the weight of the evidence. See Wells v. Wells, Ky., 412 S.W.2d 568, 570 (1967). Since the trial court is in the best position to evaluate the testimony and to weigh the evidence, an appellate court should not substitute its own opinion for that of the trial court. See Reichle, 719 S.W.2d 442. Ultimately, a trial court's decision regarding custody will not be disturbed absent an abuse of discretion. See Cherry v. Cherry, Ky., 634 S.W.2d 423, 425 (1982). Abuse of discretion implies that the trial court's decision is unreasonable or unfair. See Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994). In reviewing the decision of the trial court, therefore, the test is not whether

[2] The appellee has not filed a brief in this appeal. Pursuant to CR 76.12(8)(c)(i), this Court may choose to accept the appellant's statement of the facts and issues as correct. "Where those facts conflict with findings of fact by the trial court, however, we may accept them only where we can say that the trial court's findings are clearly erroneous. CR 52.01; Tuskos Engineering Corp. v. Tuskos, Ky. App., 676 S.W.2d 794, 797 (1984)." Whicker v. Whicker, Ky. App., 711 S.W.2d 857, 858-859 (1986). The standards of review are therefore identical.

the appellate court would have decided it differently, but whether the findings of the trial judge were clearly erroneous or that he abused his discretion. See Cherry, 634 S.W.2d 423.

As a preliminary argument, Laura states that the facts alleged in the affidavits offered in support of the motion for modification of custody pursuant to KRS § 403.340 were insufficient to justify a de novo review of custody by the Domestic Relations Commissioner.

KRS 403.340(2) states in part that "[n]o motion to modify a custody decree shall be made earlier than two (2) years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe that . . . [t]he child's present environment may endanger seriously his physical, mental, moral, or emotional health."

The affidavits in question were provided by Carol Smith, Rick's mother, and Eva Hawes, Laura's mother. The affidavits describe two separate incidents in which Laura behaved violently towards Carol and Eva in the presence of the children. Carol's affidavit states that Laura had come with the girls, Maggie and Lakayah, to pick up Lucas, whom Carol had been babysitting. Lucas did not want to go with Laura, so she put him forcibly into her car and told him that "they are going to come and get you and lock you up and no one will be able to get you!" Lucas escaped from the car and ran away, pursued by Laura

who was shouting at him. The police were called and succeeded in calming Lucas down. He agreed to be driven to his mother's house by Carol. When they arrived, he refused to get out of the car. Laura consequently jumped onto the trunk of Carol's car and then pulled open the driver's side door. While the women argued, Lucas ran away into the woods. This entire episode was witnessed by his sisters.

In the second affidavit, Eva Hawes, Laura's mother, describes a violent altercation between herself and Laura in which Laura used bad language in front of the children and then physically attacked Eva, striking her numerous times in the face. Eva consequently made a complaint for assault in the fourth degree against Laura.

Laura claims that, based on the holding in West v. West, Ky. App., 664 S.W.2d 948 (1984), these two affidavits contained insufficient factual information to warrant a custody modification hearing. We disagree. In West, this Court stated that "[g]iven the trial court's reluctance to change custody, the movant must present facts in his affidavit that compel the court's attention. He cannot simply assert the statutory requirements for modification of the court's custody decree." West, 664 S.W.2d at 949. The affidavits in this case contain more than a bare assertion of the statutory requirements. In light of the detailed allegations of violence against family

members in the presence of the children, the Ohio Circuit Court did not err in considering the affidavits sufficient to justify a hearing on Rick's motion to modify custody.

Laura also claims that the affidavits merely "bootstrapped in" the Butler District Court action, because the episode involving Carol Smith was also the basis of the petitions provided by the sheriff which led to the grant of temporary custody to Rick by the Butler District Court. Laura argues that since the Special Commissioner later found that the facts alleged by the sheriff did not constitute enough of an emergency to remove custody temporarily from Laura, the affidavits were also insufficient to warrant a custody hearing by the Ohio Circuit Court. The decision temporarily to remove a child from a parent's custody and the decision to grant a hearing are different determinations, however, and the Special Commissioner's holding that the affidavit was insufficient to justify the former is not dispositive of whether a hearing into a modification of custody was warranted. Furthermore, the Ohio Circuit Court was also provided with the further evidence contained in the second affidavit from Laura's mother, Eva Hawes. Although the Special Commissioner appointed by the Butler Circuit Court found that the children should not have been removed from Laura's primary residential custodianship in the first place, the Special Commissioner expressly deferred to

the findings of the Ohio Circuit Court to bring an ultimate resolution to the custody issue, on the grounds that it was the court where the original divorce proceedings were heard.

Laura also contends that the case should never have been heard because the court failed to make a vital preliminary determination. She cites Stroud v. Stroud, Ky. App., 9 S.W.3d 579 (1999), for the proposition that the court is required to find that there has been an inability or bad faith refusal on the part of one or both of the parties to cooperate before a custody order may be modified.. The holding in Stroud, however, was based on Mennemeyer v. Mennemeyer, Ky. App., 887 S.W.2d 555, 558 (1994), which was subsequently overruled by Scheer v. Zeigler, Ky. App., 21 S.W.3d 807, 812-14 (2000). The court did not, therefore, need to make a preliminary finding that Laura was unable, or in bad faith refused, to cooperate with Rick regarding the children's custody.

In regard to the Domestic Relations Commissioner's findings of fact, Laura argues that they were insufficient to demonstrate that the environment she provided for the children endangered their physical, mental, moral, or emotional health.[3]

[3] It should be noted that once the threshold determination to hold a hearing has been made under KRS 403.340(2)(a), the court may then proceed to consider whether the requested modification of custody is in the best interests of the child, using the factors listed in KRS 403.340(3). There was some confusion at the hearing regarding the reference to the Uniform Child Custody

The Commissioner conducted a lengthy hearing in which he heard testimony from numerous witnesses including the children themselves and their guardian ad litem; Laura and Rick; Carol Smith; Carol Smith's sister, who witnessed the altercation with Laura; Eva Hawes; Laura's father, who witnessed the altercation with Eva Hawes; members of the Butler County sheriff's department; and a social worker.

The Domestic Relations Commissioner based his modification of custody on the following findings of fact: 1) The testimony of the children themselves that they felt unsafe living with their mother. 2) That Laura demonstrated violent behavior in the presence of the children when she physically attacked her mother, Eva Hawes, and when she jumped on her mother-in-law Carol Smith's car and tried to remove Smith from the car by force. 3) That Laura had made comments to Lucas that she was "through with him and did not want him." 4) That Laura made comments to the children that Rick could have Lucas and

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Jurisdiction Act in KRS 403.340(3) and whether this meant that the Commissioner was precluded from considering the factors regarding "the best interests of the child" listed in that section. The factors listed in KRS 403.340 may, however, be "applie[d] to all cases, regardless of whether the custody order originated with the court now asked to consider a change of custody, or originated elsewhere. . . . the U.C.C.J.A. is a threshold consideration in every case, and the prefatory reference to it in KRS 403.340(2)[now (3)] does no more than make clear that when a court is asked to entertain a change of custody case it shall not do so unless the circumstances covered by the U.C.C.J.A. are present." Quisenberry v. Quisenberry, Ky., 785 S.W.2d 485, 488 (1990). (emphasis original.)

Maggie and she would keep Lakayah. 5) Laura physically abused Lucas by dragging him from under a bed and spanking him with her boyfriend, Steve Camplin's belt. During the spanking she hit Lucas' head and caused him to sustain a black eye.

These findings of fact were fully supported by the testimony of witnesses at the hearing. The guardian ad litem for the children testified that it was a "safety and security issue," that the children felt safe with their father and not with their mother and that the incidents reported in the affidavits "weighed heavily on their minds." The sheriff of Butler County testified that when Lucas was brought to his house after Laura's dispute with Carol Smith, he was scared, hyper, twisting his hands, and talking quickly. Lucas also stated that he was afraid of Steve Camplin, and that Camplin kept guns behind his couch.

Laura contends, however, that the Commissioner's findings are inadequate on the following grounds: 1) the findings do not relate to "the environment" she provided for the children, as required by the statute, because they involved altercations with the grandparents and occurred after custody had been temporarily taken from Laura; 2) the episodes of violence were "hotly contested" and therefore do not provide a sufficient basis for modifying custody; 3) there are inadequate findings of physical abuse relating to the girls, Maggie and

Lakayah; and 4) the testimony of the children should be discounted because they were only interviewed after they had been in the custody and control of Rick and his parents for months and that their influence would have skewed the children's testimony.

In regard to the first point, we find that the objection stems from an overly narrow interpretation of the term "environment," and consequently we refuse to discount evidence of violent behavior by Laura because it occurred after the children were taken from her custody or because the violence was directed at grandparents. Environment in this context must surely include the behavior of the parent in the presence of the child. It was therefore not clearly erroneous for the Domestic Relations Commissioner to view Laura's behavior as evidence of the sort of environment she provided for the children.

As to the contention that the episodes were "hotly contested," the witnesses at the hearing were largely in agreement as to the facts later outlined by the Commissioner, with the only dissenting testimony coming from Laura herself and her father. We can find nothing clearly erroneous in the Commissioner's account of the events.

Although no testimony was offered to show that Laura physically abused the girls, physical abuse is not required to effect a change of custody. Furthermore, evidence of the

potential for any form of injury is sufficient. "Many kinds of neglect or abuse or exposure to unwholesome environment speak for themselves, and the proof of the neglect or abuse or exposure is in itself sufficient to permit a conclusion that its continuation would adversely affect children." Krug v. Krug, Ky., 647 S.W.2d 790, 793 (1983).

> The key word in KRS 403.340 is the word "may." We do not perceive that this word connotes that the injury to the "physical, mental, moral or emotional health" must have already occurred or be occurring at the present time. The potentiality for such danger is the test and the courts are not required to wait until the damage is done.

S. v. S., Ky. App., 608 S.W.2d 64, 65 (1980).

Finally, we see no reason to discount the testimony of the children that they felt unsafe with their mother and preferred to remain with their father. The Domestic Relations Commissioner was able personally to interview the children, and their guardian ad litem. We have viewed the tapes of these interviews, and we find nothing clearly erroneous in his findings.

For the foregoing reasons, we affirm the order of the Ohio Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT: NO BRIEF FOR APPELLEE

Wesley V. Milliken
Bowling Green, Kentucky