

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000953-MR

ARMINDA MARIE DAVIS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE B. VANMETER, JUDGE
ACTION NO. 99-CI-00175

JAMES ROBERT FARMER and
CABINET FOR FAMILIES AND CHILDREN

APPELLEES

OPINION

AFFIRMING

** ** * * * * *

BEFORE: JOHNSON, MINTON, and TACKETT, Judges.

MINTON, Judge. Armina Marie Davis ("Davis") appeals from an order of the Fayette Circuit Court, entered April 7, 2003, which awarded sole custody of the parties' minor son to her ex-husband, James Robert Farmer ("Farmer"). Finding no error, we affirm.

Davis and Farmer were married on September 4, 1996. This marriage produced one child, R. C., born on October 13,

1997. Apparently, Farmer and Davis's marriage began to deteriorate after they moved into the same house with Davis's parents, Earl and Lois Goins, and her forty-year-old brother, Tyler Sinclair. Believing that Davis's family was straining their marriage, Farmer convinced Davis to move out of her family's place and into a separate apartment. After Davis and Farmer moved into their apartment, Davis's family relocated to the apartment directly across the hallway from Farmer and Davis. Soon thereafter, Davis and Farmer separated. Immediately after the parties' separation, Davis filed a domestic violence petition against Farmer in the Fayette District Court. In her petition, Davis alleged that Farmer had physically abused her. Davis further alleged that Farmer had physically abused R. C. by hitting the child's head against the ceiling while tossing him into the air. Based upon Davis's allegations, the district court issued an Emergency Protective Order ("EPO"), which required Farmer to vacate the residence. He then filed a petition for divorce. The record contains no medical evidence that Farmer ever abused R. C. by hitting his son's head against a ceiling.

On January 29, 1999, the parties entered into a mediation agreement. According to this agreement, Davis was granted temporary sole custody of R. C. The parties also agreed that Farmer would have supervised visitation twice a week.

Further, Farmer agreed to pay Davis temporary child support and maintenance. Finally, both parties agreed to cooperate with a custodial evaluation to be conducted by the Friend of the Court's office.

For reasons not explained in the record, Davis refused to cooperate with the custodial evaluation that was being conducted by Joanne Rice of the Friend of the Court's office. According to Rice, Davis initially refused to undergo a psychological evaluation by Dr. Diana Hartley. Davis's lack of cooperation forced the Friend of the Court, on October 15, 1999, to file a motion with the trial court to compel Davis to undergo the psychological evaluation with Dr. Hartley. Eventually, Davis did submit to the court-ordered evaluation but failed to answer thirteen written questions, responded defensively to the evaluation, failed to provide medical authorizations to allow Rice to obtain R. C.'s medical records, refused to cooperate in making appointments, and refused to provide routine information to Rice, such as disclosing her employment. In August 2000, the Friend of the Court's office filed another motion to compel Davis to cooperate with its evaluation.

Despite Davis's lack of cooperation, Rice was able to complete and submit her report to the trial court. In her report, Rice found no evidence that Farmer had ever abused R. C. Rice also believed that R. C. should be spending more time with

Farmer and suggested a gradual elimination of Farmer's supervised visitation but recommended that Farmer not lift R. C. into the air during visits. Rice also opined that Farmer should become more involved in R. C.'s medical care. As for Davis, Rice recommended that she report any suspected abuse of R. C. to the Cabinet for Families and Children ("CFC") and refrain from speaking negatively about Farmer in front of R. C. Rice also strongly suggested that Davis's brother, Sinclair, should have much less involvement with R. C. According to Rice, Sinclair's demeanor during her investigation was, at times, testy, belligerent, and "like that of a precocious twelve-year-old boy who was seeking approval." Rice believed that, based upon her findings, Davis and Farmer should be granted joint custody of R. C.

On November 1, 2000, the trial court entered an order that granted Farmer unsupervised visitation on specific dates but left sole custody of R. C. with Davis. The decree of dissolution of marriage was entered on April 27, 2001; but the trial court reserved for adjudication at a future date the issues of child custody, child support, and timesharing.

Throughout the litigation of this matter, Davis continued to express the belief that Farmer was abusing R. C. In order to confirm this belief, Davis took R. C. to numerous medical providers in an effort to find some physical condition

related to Farmer's alleged physical and sexual abuse. On February 1, 1999, Dr. Julie Lindemuth examined R. C. and found his physical condition to be normal. Unsatisfied with this result, Davis took R. C. to a medical clinic in Rowan County. This clinic referred her to a neurologist, Dr. Edward Escobar. Dr. Escobar arranged for R. C. to have an EEG and a CT scan on April 27, 1999. The results of the EEG were normal. The CT scan, however, noted an abnormality described as "multiple old bilateral centrum semiovale white matter hypodensities in watershed distribution" that were most consistent with a hypoxic/ischemic event. Dr. Escobar provided no opinion as to what type of hypoxic or ischemic event had occurred.

Davis had also taken R. C. to the St. Claire Medical Center and the Menifee Medical Center, alleging that Farmer had sexually and physically abused the child. Medical examinations conducted at these locations produced normal results.

Davis also took R. C. to Violet Vago, a physical therapist working for St. Claire Homecare Agency. Vago found R. C. to be a "toe-walker," a condition that was intermittent and increased when the child became tired. Vago recommended that the family help the child do exercises to strengthen his legs. Davis's brother, Sinclair, refused to permit R. C. to perform these exercises, claiming that R. C.'s legs could not be spread since he was a victim of sexual abuse. Vago noted that

the family consistently discussed the allegations of sexual abuse in front of R. C. Vago informed Rice during her investigation that Davis's family members were very dramatic about R. C.'s alleged physical conditions in order to present Farmer in a bad light. Further, Vago stated that when she was treating R. C. in the home, she observed only normal toddler behaviors that the family had blown completely out of proportion. Finally, Vago, on Davis's insistence, prescribed R. C. leg braces on a limited basis. Shortly thereafter, the Davis family discharged Vago based upon their belief that R. C. should wear the braces at all times.

Davis also involved the courts in her endless pursuit of evidence against Farmer. On October 16, 2001, Davis filed a petition with the Montgomery District Court alleging that Farmer had sexually abused R. C. The Montgomery District Court entered an EPO that allowed Farmer only supervised visitation with the child during the pendency of that proceeding. The district court also ordered CFC to investigate Davis's allegations. At a February 2002 hearing, social worker Blanche Zalone informed the district court that the sexual abuse charges against Farmer were found to be unsubstantiated. At this point, the district court urged the parties to resolve their disputes by agreement. At the district court's suggestion, the parties agreed that the October 16, 2001, petition would be dismissed with a finding

that no domestic violence had occurred. Moreover, the parties entered into an agreed order on February 13, 2002. This agreed order granted the parties joint custody of R. C., with Farmer to have unsupervised visits every other week. The parties also agreed to exchange the child at CFC's Montgomery County office.

On March 15, 2002, immediately after Farmer picked up R. C. at CFC's Montgomery County office, Davis filed another domestic violence petition with the Montgomery District Court alleging that Farmer had again physically and sexually abused R. C. As a result of this petition, the district court entered another EPO; and R. C. was subsequently removed from Farmer's custody. These allegations were later found to be unsubstantiated by CFC.

Davis's allegations of March 15, 2002, also prompted CFC to investigate R. C.'s physical and emotional health. According to Denise Weider, a CFC specialist, Davis had taken R. C. to Dr. James Jackson in Morehead for treatment of Attention Deficit Hyperactivity Disorder ("ADHD"). Dr. Jackson prescribed clonidine to treat the ADHD. Later, R. C. was referred to Dr. Sarah Winter at Cincinnati Children's Hospital for a developmental evaluation at Davis's request. Dr. Winter determined that R. C. did not have a clear diagnosis for ADHD and advised Davis to discontinue using clonidine. Dr. Jackson never received a copy of Dr. Winter's report, nor was he even

aware that R. C. had been evaluated by Dr. Winter. On March 26, 2002, Davis's family contacted Dr. Jackson's office and obtained a refill for clonidine. Finally, CFC removed R. C. from Davis's custody on April 26, 2002. During this removal, Davis gave Weider the child's clonidine prescription but never informed Weider of Dr. Winter's diagnosis. Afterward, Weider discovered that Davis was medicating R. C. against Dr. Winter's advice. Moreover, during her investigation, Weider learned from the child's psychologist, Dr. Christopher Allen, that the child was sexually precocious and that nobody in the family was beyond suspicion. Thus, on May 16, 2002, Weider filed a juvenile petition with the Fayette District Court. That court ultimately placed R. C. in CFC's custody.

On January 24, 2003, Farmer filed a motion to modify the trial court's February 13, 2002, order establishing joint custody. In his motion, Farmer noted that CFC had removed R. C. from Davis's custody and requested that the trial court grant him sole custody of their child.¹ A hearing was held in this matter on March 20, 2003. After hearing all of the evidence, the trial court entered an order granting Farmer's motion to modify custody. The trial court further granted Davis

¹ CFC did not object to or otherwise contest Farmer's motion. CFC did, however, object to R. C. returning to the custody of the Davis family.

supervised visitation but ordered that R. C. have no contact with Davis's parents or her brother. This appeal follows.

On appeal, Davis argues that the trial court erred in awarding Farmer sole custody of R. C. In support of this argument, Davis contends in her brief that the evidence presented by all parties at trial did not "remotely support the extreme judgment entered" by the trial court.

In reviewing a child custody determination, the standard of review is whether the factual findings of the trial court are clearly erroneous.² Findings of fact are clearly erroneous if they are manifestly against the weight of the evidence.³ 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.⁴ Ultimately, a trial court's decision regarding custody will not be disturbed absent an abuse of discretion.⁵ Abuse of discretion implies that the trial court's decision is unreasonable or unfair.⁶ In reviewing the decision of the trial court, therefore, the test is not whether the appellate court would have decided it differently but whether the findings of

² Kentucky Rules of Civil Procedure (CR) 52.01; Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986).

³ Wells v. Wells, Ky., 412 S.W.2d 568, 570 (1967).

⁴ Reichle, *supra*.

⁵ Cherry v. Cherry, Ky., 634 S.W.2d 423, 425 (1982).

⁶ Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994).

the trial judge were clearly erroneous or an abuse of judicial discretion.⁷

In Scheer v. Zeigler,⁸ we held that the same criteria apply for a modification of joint custody as apply to a modification of sole custody. Thus, in order for there to be a modification of joint custody, as in all custody cases, the party seeking modification must first meet the threshold requirements for modification contained in KRS⁹ 403.340.

KRS 403.340(2) mandates that no motion to modify a custody decree shall be made earlier than two years after being entered, unless the court permits it to be made on the basis of affidavits that there exists a reason to believe that the child's physical, mental, moral, or emotional health may be seriously endangered by the child's present environment. Here, there is no question that, on the basis of affidavits from Weider, Farmer, and Dr. Allen that were submitted to the trial court with Farmer's motion to modify custody, the trial court had sufficient information permitting it to believe that R. C.'s physical, mental, moral, and emotional health were seriously endangered while he was residing with the Davis family. Accordingly, the trial court correctly determined that it possessed the authority to consider Farmer's motion.

⁷ Cherry, *supra*.

⁸ Ky.App., 21 S.W.3d 807 (2000).

⁹ Kentucky Revised Statutes.

KRS 403.340(3) sets forth the threshold circumstances that must be met in order for the circuit court to reconsider an initial custody award:

If a court of this state has jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act, the court shall not modify a prior custody decree unless after hearing it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree, that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interests of the child. When determining if a change has occurred and whether a modification of custody is in the best interests of the child, the court shall consider the following:

- (a) Whether the custodian agrees to the modification;
- (b) Whether the child has been integrated into the family of the petitioner with consent of the custodian;
- (c) The factors set forth in KRS 403.270(2) to determine the best interests of the child;
- (d) Whether the child's present environment endangers seriously his physical, mental, moral, or emotional health;
- (e) Whether the harm likely to be caused by a change of environment is outweighed by its advantages to him; and
- (f) Whether the custodian has placed the child with a de facto custodian.

The test trial courts must use to determine the best interests of the child is codified in KRS 403.270(2). This statute states in pertinent part:

The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all relevant factors including:

- (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.

Contrary to Davis's assertions, there is no evidence in the record before us indicating that the trial court failed to apply the relevant factors listed in both KRS 403.340(3) and KRS 403.270(2). In particular, the trial court extensively addressed whether modification of custody was in the child's best interests by specifically determining whether the environment provided by the Davis family seriously endangered R. C.'s physical, mental, moral, or emotional health and whether the harm likely to be caused by changing his environment is outweighed by its advantages to him. In addressing these two factors, our review reveals that the trial court correctly determined:

[T]hat the repeated filings of Domestic Violence Petitions by the mother show an abuse of legal process and evidence an effort to prevent visitation by the father. Further, the mother has not promoted the child's relationship with his father, but has in fact actively undermined that relationship. The mother's perception of facts is often different from that of third parties, such as social workers and physicians. She provided a video tape of

the child to the Friend of the Court's Office demonstrating what she considered to be problematic behavior by the child, but in the opinion of the custodial evaluator and the Court, this behavior was normal for a child that age. Similarly, the mother has failed to recognize that no head injury had occurred to the child, despite determinations by experts. She has reported that the child is afraid of his father and does not wish to visit him, although every witness other than the mother and her family state that child and father have a strong bond. The mother lacks any insight into how her perception of these facts may differ from impartial third parties.

The mother sought medication for the child that he did not need, and then when informed that the medication was not necessary and that the child should be weaned from it, she nonetheless failed to take him off the medication.

These actions by the mother constitute emotional abuse that creates a serious potential for continued danger to the child and the harm likely to be caused by a change of environment is outweighed by the advantages to the child.

In addition to these facts, the record reveals that the whole Davis family, following the breakup of the marriage, engaged in a concerted effort to deny R. C. any contact with his father. Davis took the child to numerous medical providers, misled them about the child's history and prior medical treatment, and ultimately failed to follow the recommendations of these medical providers if their advice was contrary to her ultimate goal of collecting medical proof to support her theory

that Farmer had physically or sexually abused R. C. The incident with the child's leg braces is typical of this pattern. Davis insisted that the child obtain leg braces, even though the physical therapist opined otherwise. Davis and her family refused to allow R. C. to exercise as the therapist instructed. However, when the therapist finally relented and recommended braces under very limited circumstances, Davis discharged the therapist and forced the child to endure the braces at all times.

The most damaging evidence the trial court considered in determining whether modification of custody was in the child's best interest involved Davis's acquisition and potentially harmful administration of clonidine. The record reveals that Davis obtained a prescription for clonidine for the child by falsely informing Dr. Jackson that he had been diagnosed as having ADHD. When evaluated by Dr. Winter on February 27, 2002, she determined that the child did not have ADHD and recommended that he be weaned off of clonidine. Nevertheless, Davis telephoned Dr. Jackson and had him renew the clonidine prescription without informing Dr. Jackson of Dr. Winter's recommendation. In fact, Davis administered clonidine to R. C. up until the day CFC placed him in foster care. Thus, the record clearly demonstrates that Davis cruelly and deliberately manipulated numerous medical professionals in

an attempt to gain an advantage over Farmer in this custody proceeding. In light of this substantial evidence of Davis's physical, mental, and emotional abuse of R. C., we believe that the trial court properly concluded that the child's best interests would be served by modifying the custody decree to grant sole custody to Farmer. Accordingly, we believe Davis's arguments to the contrary are completely without merit.

Davis also contends that the trial court abused its discretion in preventing all contact between the child and the Davis family. We strongly disagree.

Our review of the entire record leads us to conclude that Davis and her family have attempted to convince the child that his father was evil and had sexually abused him. The custodial evaluation indicates that the Davis family openly discussed the sexual abuse allegations against Farmer in front of the child. Moreover, Weider testified about a letter, supplied by the Davis family, from family friend Vernon Engle. Engle's letter indicates that after the child returned from a visitation period with his father, Engle, along with the Davis family, took him to a van and immediately undressed him for an inspection. Engle wrote that when the Davis family removed the child's diaper, Engle smelled a pungent odor that he ascribed to anal sex. Conducting this strip search immediately after the child returned from visiting with his father demonstrates the

Davis family's insensitivity to the child's physical, mental, and emotional health and exposes their own contemptible obsession with building a case for abuse.

In view of the entire record before us, it is clear to us that the trial court considered the best interest of the child by analyzing and applying the relevant factors listed in KRS 403.340(3) and KRS 403.270(2). The record demonstrates that there was sufficient evidence for the court to conclude that R. C.'s best interests would not be served by allowing both parents herein to maintain joint custody. Accordingly, we cannot conclude that the trial court abused its discretion by awarding Farmer sole custody of R. C. CR 52.01.

For the aforementioned reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Susan S. Kennedy
FOWLER, MEASLE & BELL, LLP
Lexington, Kentucky

BRIEF FOR APPELLEE FARMER:

Robert M. Pfeiffer
Lexington, Kentucky

BRIEF FOR APPELLEE CABINET FOR
FAMILIES AND CHILDREN:

David W. Mossbrook
Lexington, Kentucky