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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000962-ME

TARSHA MOORE-SEMAKULA

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE JERRY J. BOWLES, JUDGE
CIVIL ACTION NO. 93-FC-001947

ANGELO MOORE

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON AND McANULTY, JUDGES; HUDDLESTON, SENIOR JUDGE.¹
HUDDLESTON, SENIOR JUDGE: Tarsha Moore-Semakula appeals from a
Jefferson Family Court order that granted primary residential
custody of the daughters born to the marriage of the parties to
their father, Angelo Moore.

Angelo and Tarsha were married in Louisville in 1991.
The two children at issue in this case, Jasemine and Charity,

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

were born in 1989 and 1991, respectively. Tarsha and Angelo separated in 1993, and a final decree dissolving their marriage was entered on November 10, 1993. The decree specified that the "issues of custody and control of the two minor children and of property distribution shall be reserved." Angelo was to continue paying \$73.00 per week in child support.

At the time of the divorce, Tarsha was an undergraduate at the University of Louisville, studying to become a teacher. In 1999, she was offered a teaching position in Milwaukee, and moved there with her daughters. After they had been living in Milwaukee for two years, Tarsha was accepted into a Master of Fine Arts in Creative Writing program in Minneapolis-St. Paul. She and her daughters moved to Minnesota in September 2001 in order for her attend graduate school. Tarsha experienced serious financial difficulties at this time because she did not have the proper certification to work as a substitute teacher in Minnesota, nor was she receiving any child support from Angelo. She contacted Angelo for help, but he was only able to send her a few hundred dollars. Tarsha and Angelo agreed that Jasmine and Charity would move to Louisville and live with their father until Tarsha had resolved her financial problems. Angelo had meanwhile remarried; he and his wife LaCole have one child together and two other children from LaCole's previous marriage.

Jasemine and Charity moved into their father's house in Louisville and started school in October 2001. On May 16, 2002, Angelo filed a motion in Jefferson Family Court for a change in physical custody, stating that he wanted to prevent Tarsha from keeping the children if they visited her in Minnesota during the summer. Meanwhile, the girls returned to Minnesota to live with their mother, who had recently remarried.

After an attempt at mediation failed because neither parent contacted the mediator, a hearing on Angelo's motion was held in Jefferson Family Court on February 27, 2003. The family court judge also conducted individual *in camera* interviews with the two girls.

On April 7, 2003, the family court entered an order directing that the children would reside with their mother for the remainder of the school year. The order further specified that they would spend the first half of their 2003 summer vacation with their father and the second half with their mother. Beginning with the 2003-04 school year, the children were to reside primarily with their father, and spend Christmas and spring break periods with their mother. All subsequent summers were to be spent with their mother, with the father granted a two-week visitation period during those times. In arriving at its decision to award primary residential custody to Angelo, the court relied heavily on the *in camera* interview with

Jasemine. In the interview, Jasemine described her troubled relationship with her mother, and expressed her desire to live with her father. Jasemine stated that her mother had called her a "lying whore" and a "slut," had told her that she wished she had never given birth to her, and had stated that if Jasemine went to live with her father she would have nothing more to do with her. Tarsha did not deny making these statements. Jasemine also said that she had attempted to commit suicide, although Tarsha denied any knowledge of this episode. Jasemine told the court that she preferred living at her father's house and that she got along well with her stepsisters. Charity also said she liked living with her stepsisters. Both girls expressed reservations about their mother's remarriage.

On appeal, Tarsha argues that the family court erred on both procedural and substantive grounds in awarding primary custody to Angelo. Tarsha does not challenge the accuracy of the family court's findings of fact. Rather, she contends that the court abused its discretion in failing to weigh the evidence before it according to the mandates of the relevant statutes. Tarsha argues that the court's failure to specify which legal standards or statutory factors it applied in arriving at its custody determination is a *per se* abuse of discretion. She urges us to conduct a *de novo* review of her claims on the ground

that the family court's interpretation and application of the statutes is inadequate as a matter of law.

We have reviewed Tarsha's claims but do not agree with her that they require *de novo* review by this Court. Specifically, Tarsha argues that the family court failed adequately to consider the effects of Angelo's past history of domestic violence, that the court failed to make the threshold findings necessary to justify a modification of custody, and finally, that the factual findings of the court do not adequately weigh the statutory "best interests of the child" factors. Fundamentally, these claims are not matters of statutory interpretation, but concern the sufficiency of the evidence and the weight that was given to certain portions of the evidence by the family court. We therefore apply the "clearly erroneous" standard to review the factual findings of the family court.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

² See Ky. R. Civ. Proc. (CR) 52.01; Reichle v. Reichle, 719 S.W.2d 442, 444 (Ky. 1986).

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

⁴ See Reichle, supra note 2.

be disturbed absent an abuse of discretion.⁵ Abuse of discretion implies that the trial court's decision is unreasonable or unfair.⁶

Tarsha claims that the court failed to make mandatory findings about the impact of Angelo's history of domestic violence on Jasmine and Charity. She points specifically to Kentucky Revised Statutes (KRS) 403.270(2)(f), which directs the court to consider "[i]nformation, records, and evidence of domestic violence as defined in KRS 403.720" in determining the best interests of the child and KRS 403.270(3) which states:

The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child. If domestic violence and abuse is alleged, the court shall determine the extent to which the domestic violence and abuse has affected the child and the child's relationship to both parents.

In its order, the family court noted that Angelo admitted that there had been incidents of physical violence against Tarsha during the course of their marriage, and that he had been convicted of an assault on his present wife.

Tarsha contends, however, that KRS 403.270 requires the court to make specific factual findings regarding the impact of domestic violence on the children. While the court must

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

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

consider all the statutory factors, it need not make specific findings pertaining to each factor, only to those it determines are relevant. "In child custody cases, the trial court must consider all **relevant** factors including those specifically enumerated in KRS 403.270(1)[now (2)] in determining the 'best interests of the child.' In so doing, it is mandatory under CR 52.01 that the facts be so found specifically."⁷ The alleged failure on the part of the family court judge to make adequate findings of fact on the issue of domestic violence was not brought to his attention as required by Kentucky Rules of Civil Procedure (CR) 52.02 or CR 52.04; consequently, the issue was waived.⁸ Tarsha's argument that it was not her role or responsibility to ask for specific findings on the impact of domestic violence is unsupported; there is no indication that the requirement of a written request or motion under CR 52.04 is waived as to this particular section of KRS 403.270.⁹

Although we agree that Angelo's history of domestic violence is an issue of grave concern, substantial evidence supported the family court's determination that Jasemine's

⁷ McFarland v. McFarland, 804 S.W.2d 17, 18 (Ky.App. 1991) (emphasis supplied).

⁸ See Cherry, supra note 5.

⁹ See id. ("The trial judge did not make as in-depth findings of fact as could have been made so as to clearly comply with CR 52.01; however, CR 52.04 provides: 'A final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02.'")

relationship with her mother was causing "considerable stress and trauma" justifying a change of custody. "In reviewing the decision of the trial court, . . . the test is not whether the appellate court would have decided [the case] differently, but whether the findings of the trial judge were clearly erroneous or that he abused his discretion."¹⁰ The court did not abuse its discretion in determining that the evidence of Angelo's violent behavior (which the record shows was never directed at either of the children) was not as compelling as the testimony elicited during the *in camera* interview with Jasemine.

Tarsha next contends that the family court's order is impermissibly vague because it fails to indicate whether Angelo's motion was treated as a custody modification request or as an initial determination of custody.

As we have already noted, there was no formal court-ordered custody arrangement established at the time of the dissolution of Tarsha and Angelo's marriage in 1993. However, the record shows that the children were in Tarsha's primary residential custody, with Angelo's acquiescence, from the time of the divorce in 1993 until 2001. KRS 403.340(1) states that "[a]s used in this section, "custody" means sole or joint custody, whether ordered by a court or agreed to by the parties." Surely this arrangement, where the children lived

¹⁰ Id.

with Tarsha without any challenge from Angelo for eight years, qualifies as a custody agreement between the parties. Furthermore, Angelo's motion requested a "change of custody from my former wife." This characterization of the action went unchallenged by Tarsha.

Tarsha further argues that, assuming this was a modification of custody, the court failed to find the necessary change in circumstances to justify a modification under KRS 403.340. The statute provides in pertinent part:

[T]he 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.

Tarsha contends that the requirements of (b) were not met because she consented only to a temporary modification of the custody agreement when she allowed Jasmine and Charity to live with their father. Nonetheless, the record contains sufficient evidence of a change in circumstances to support the court's modification of custody. Although Tarsha describes Jasmine's account of her suicide attempt and her arguments with her mother as the "whims" of a teenage girl, the evidence also supports the view that Jasmine's physical and emotional health was endangered.

Tarsha's final argument is that the court did not give enough weight to Angelo's history of domestic violence and his failure to pay child support, and that it placed undue weight on its interview with Jasmine. We acknowledge that Angelo's failure to pay child support placed tremendous strain on Tarsha. We also note, however, that there is no evidence in the record that she ever attempted to enforce the child support provisions of the dissolution decree. Furthermore, there is no maximum or

minimum number of factors that must be present in order to justify a modification of custody, nor must certain factors be given more weight than others. In Sherfey v. Sherfey,¹¹ for example, custody was awarded to grandparents primarily on the basis of the child's strongly-stated desire to continue living with them. "[W]e are not prepared to define precisely the quantum of proof necessary to justify awarding the care, custody and control of a minor to one parent over the other."¹² We reiterate that if Tarsha believed that the family court's findings of fact were inadequate, a proper means of recourse was through a written request or motion pursuant to CR 52.02.

Because the factual findings of the family court were supported by substantial evidence, and because Tarsha failed to request more detailed findings, the family court's custody order is affirmed.

ALL CONCUR.

¹¹ 74 S.W.3d 777 (Ky.App. 2002).

¹² Cherry, supra note 5.

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