

RENDERED: MARCH 24, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001819-ME

OTIS W. CAMPBELL

APPELLANT

v.

APPEAL FROM POWELL CIRCUIT COURT
HONORABLE LARRY MILLER, JUDGE
ACTION NO. 00-CI-00038

BONNIE SMITH (DARNALL)

APPELLEE

OPINION AFFIRMING

** ** * * *

BEFORE: DYCHE, McANULTY, AND TACKETT, JUDGES.

DYCHE, JUDGE: Otis W. Campbell and Bonnie Smith are the parents of a son born on May 27, 1999. The parties were never married to each other, although they lived together until the child was about six months old, when Smith moved out. In June 2000 joint custody of the child was established, with Campbell as the primary residential custodian. The issue was revisited in 2002 (Campbell was seeking sole custody) and remained the same.

In January 2004 Campbell moved for the child's visitation with Smith to be supervised. He alleged abuse on her

part. Two months later Smith filed a motion to compel visitation and to change the child's primary residence to hers. The child was submitted to a number of examinations and evaluations, and the allegations against Smith were not able to be substantiated.

After a lengthy hearing, the special domestic relations commissioner recommended Smith as primary residential custodian and set a very specific visitation schedule. The commissioner's report was adopted, after briefing and another hearing, by the Powell Circuit Court, and Campbell appeals. We affirm.

Campbell first argues that Kentucky Revised Statute (KRS) 403.340 prohibits a change of custody in this case. He initially challenges the trial court's standard of review, insisting that it was bound by KRS 403.340(3) from modifying custody absent a finding 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." Campbell claims that the domestic relations commissioner failed to limit testimony to "facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree." The commissioner overruled appellant's objection to questioning that concerned matters prior to the previous decree. However, the Commissioner stated,

in overruling the objection, that the testimony elicited would be considered for its historical value only.

Campbell contends that this contested evidence was "integral to the recommendation to move Jacob from his father's home, not just considered as background history." But the Commissioner's report indicates otherwise. Its recommendation for a change in primary residential custodian was based on Campbell's repeated attempts to alienate the child from his mother and the resulting harm to the child.

The record clearly refutes Campbell's second contention, viz., that the lower court incorrectly modified custody solely because of appellant's failure to provide visitation with appellee. We thus decline to discuss it further.

Campbell next asserts that the 2002 order is a custody decree and therefore required the court to employ the "serious endangerment" rather than "best interest of the child" standard. KRS 403.340(2). Again we disagree: the 2002 order simply maintained the status quo rather than effected a modification concerning custody; furthermore, the trial court did employ the "serious endangerment" standard albeit it was not required to do so. We find no error in this regard.

Campbell's next argument is that the evidence does not support the decision, thereby rendering it clearly erroneous,

arbitrary and an abuse of that court's discretion. We have examined the evidence of record and hold that it does, in fact, support the commissioner's recommendation and the trial court's affirming of same.

Nor is there any merit to Campbell's complaint that the court's decision was based on a "preference for mothers." Campbell enjoyed residential custody of the child for the first six years of his life; to argue that the court gave preference to the mother is disingenuous at best.

Appellee's objections to the transcript as provided are not properly taken and are rendered moot by our decision in this case.

The order of the Powell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lois T. Matl Prewitt
Catherine C. DeLoach
Lexington, Kentucky

BRIEF FOR APPELLEE:

Denotra Spruill Gunther
Lexington, Kentucky