

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001006-ME

LISA BARRETT

APPELLANT

v.

APPEAL FROM OHIO CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 99-CI-00158

PAUL BARRETT

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.¹

ACREE, JUDGE: Lisa Jo Barrett appeals from a judgment of the Ohio Circuit Court denying modification of the child custody agreement with her ex-husband, Paul Wade Barrett. We affirm.

Lisa and Paul were divorced on October 5, 1999. The Barretts' marriage produced one child, K.B., born in 1998. Paul was granted "standard visitation" by the Ohio Circuit Court. On October 22, 2004, Paul filed a motion for expanded visitation,

¹ Senior Judges David C. Buckingham and Michael L. Henry sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

treated by the trial court as a motion to amend joint custody. On November 23, 2004, following Lisa's allegations that Paul was sexually molesting K.B., an Emergency Protective Order (EPO) was issued by the Ohio District Court. The EPO was later dismissed on December 16, 2004 by the Ohio Circuit Court. On that same day, the circuit court issued an order in response to Paul's October 22 motion. Paul's visitation rights were more clearly defined and he withdrew his motion for overnight visits.

On January 20, 2005, Lisa moved to temporarily suspend Paul's visitation rights pending an investigation into her allegations of sexual misconduct. The motion was granted. A State Police investigation was conducted and report submitted by Detective Brian Whitaker. Following that report, visitation was reinstated.

On March 17, 2005, Paul filed a motion for a change of custody. The case was referred to a domestic relations commissioner (DRC) for hearings. Numerous witnesses testified during the hearings, including K.B. and several doctors who examined her for signs of sexual contact. Following the hearing, the DRC concluded that there was insufficient evidence of sexual abuse. He further stated that because of the damage this court battle had caused to the child, a change of custody was not in her best interest at the time. Paul's visitation rights, as established in previous orders, were to continue and his motion for a change of custody was denied. On April 10, 2006, the Ohio Circuit Court adopted the DRC's recommended order in its entirety and overruled all of Lisa's exceptions and objections to the order. This appeal followed.

The findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of the court. Kentucky Rules of Civil Procedure (CR) 52.01. Thus, when the trial court adopts the recommendations of the DRC, those recommendations fall under the same standard of review that is applied to a trial court's findings. *See Greater Cincinnati Marine Service, Inc. v. City of Ludlow*, 602 S.W.2d 427, 429 (Ky. 1980), and *Wells v. Sanor*, 151 S.W.3d 819, 822 (Ky.App. 2004).

In *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003), the Supreme Court held that a reviewing court may set aside findings of fact in a custody case “only if those findings are clearly erroneous, i.e., whether or not those findings are supported by substantial evidence.” *Allen v. Devine*, 178 S.W.3d 517, 524 (Ky.App. 2005), *citing Moore*, 110 S.W.3d at 354. Substantial evidence has been defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. *Id.* Mere doubt as to the correctness of a finding will not justify its reversal. *Id.*

“After a trial court makes the required findings, it must then apply the law to the facts.” *Id.* “The determination of the proper law to be applied to the facts is reviewed *de novo*.” *Id.* “The resulting custody award as determined by the trial court will not be disturbed unless it constitutes an abuse of discretion.” *Id.* “Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.” *Id.*

The same standard of review applies to this Court's review of the trial court's denial of a motion to terminate visitation of a joint custodian.

Lisa presents two arguments. First, that the findings of the trial court were not supported by the evidence. Second that the trial court applied the wrong standard of proof – a lower standard – to Paul's motion to amend the joint custody order.

Lisa's first argument fails. Though Lisa states that the court erroneously relied upon only seven (7) witnesses, we identify at least twelve (12). Those witnesses include the parties, the child, three (3) physicians, two (2) workers from the Cabinet for Families and Children, two (2) law enforcement officers, two (2) officers of the court and one (1) representative from the Pennyryle Child Advocacy Center. While it is true that the court's order fails to summarize every witness's testimony, including Lisa's friends and family members, it is not necessary that every bit of evidence support the trial court's decision. Furthermore, even “on close factual questions[,]” which is not the case here, this Court will not second guess a trial court that has had the opportunity not only to listen to the testimony of the witnesses, but to observe their demeanor when presenting it. *Richardson v. Richardson*, 309 Ky. 565, 18 S.W.2d 387, 390 (Ky. 1949).

The clear and deciding factor in the trial court's decision is that, despite Lisa's enthusiastic urging of the appropriate investigatory authorities who gave her allegations every benefit of any doubt, those authorities found insufficient evidence of sexual abuse to take any action against Paul. Having carefully reviewed the record, we

conclude that the court's findings of fact were amply supported by credible evidence and that none of the findings was clearly erroneous.

Lisa's second argument must also fail. She complains that the trial court erroneously forecasted its application of an incorrect, lower standard of proof applicable to Paul's motion affecting joint custody. The statement which Lisa finds objectionable appears in the court's order granting a hearing on Paul's motion for an increase in visitation. It is not contained in the order deciding Paul's motion. However, even if that statement had appeared in the latter order, we would not find error since Paul's motion was denied.

For the foregoing reasons, the order of the Ohio Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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