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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001889-ME

NATASHA DALE

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 00-CI-00009

BENJAMIN DALE

APPELLEE

OPINION AFFIRMING

** ** *

BEFORE: ABRAMSON AND TAYLOR, JUDGES; KNOPF,¹ SENIOR JUDGE.

ABRAMSON, JUDGE: Natasha Dale appeals from the August 14, 2006 Findings of Fact, Conclusions of Law and Order entered by the Montgomery Circuit Court awarding primary residential custody of her then nine-year-old daughter to her former husband, Benjamin Dale. Having reviewed the record and finding that the trial court's decision is supported by substantial evidence, we affirm.

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5) of the Kentucky Constitution and KRS 21.580.

Since June 6, 2000, both Benjamin and Natasha have shared joint custody of their daughter, Madisen, by agreement formalized in their divorce decree. Prior to the trial court's order at issue herein, Natasha has always been the child's primary residential custodian. On August 16, 2005, however, Benjamin filed a motion to modify that custody arrangement. After an October 24, 2005 hearing involving testimony by a number of witnesses, the trial court entered an order temporarily awarding Benjamin sole custody of Madisen and providing for visitation² by her mother. The court held several subsequent hearings to review the status of the arrangement, and on at least one occasion suspended Natasha's visitation rights.

A final custody hearing occurred on August 2, 2006. Once again, the parties testified along with several witnesses. At the conclusion of the hearing, the trial court ruled that the parties would share joint custody of Madisen, with Benjamin being the primary residential custodian. Subsequently, on August 14, 2006, the trial court entered its written Findings of Fact, Conclusions of Law and Order wherein it formalized its decision and set forth the reasons supporting it. This appeal followed.

In *Crossfield v. Crossfield*, 155 S.W.3d 743 (Ky.App. 2005), this Court held that a change in the primary residential custodian amounts to a modification of the joint custody arrangement. *See also Scheer v. Zeigler*, 21 S.W.3d 807 (Ky. App. 2000)

² We recognize that a more modern, and a more accurate, characterization of the time spent by a non-custodial parent with a child is “time-sharing” rather than “visitation” since the latter term may imply short, infrequent visits. *See, e.g., Fenwick v. Fenwick*, 114 S.W.3d 767 (Ky. 2003). However, because the trial court in the present matter used the term “visitation” in its Findings of Fact, Conclusions of Law and Order, and further because Kentucky's statutes retain that term rather than the more appropriate “time-sharing,” we will refer in this Opinion to the time spent by a non-custodial parent with his or her child as “visitation.”

(sitting *en banc*) (modification of joint custody arrangement subject to custody modification statutes). Because of this, any such change is subject to the provisions of Kentucky Revised Statute (KRS) 403.340. Subsection 3 of that statute provides, in pertinent part:

[T]he court shall not modify a prior custody decree unless after [a] hearing it finds, upon the basis of facts that have arisen since 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.

Likewise, the relevant factors referred to in KRS 403.270(2) are:

- (a) The wishes of the child's parent or parents . . . 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

Additionally, KRS 403.340(4) instructs that in determining whether a child's present environment seriously endangers his or her “physical, mental, moral, or emotional health, the court shall consider all relevant factors”

In its August 14, 2006 Findings of Fact, Conclusions of Law and Order, the trial court indicated that its initial decision in October 2005 to award temporary sole custody of Madisen to Benjamin was supported by what it believed was substantial evidence in the record. According to the trial court, the totality of the evidence revealed:

- Natasha had assaulted Madisen's cheerleading coach;
- Natasha had abused a teacher;
- Natasha had verbally abused school officials;
- Natasha had placed inordinate pressure on the child to have an appearance and engage in activities beyond her maturity level;
- Natasha did not encourage Madisen spending time with Benjamin;
- Natasha was not supportive of the relationship between Madisen and Benjamin;
- Natasha has a substantial history of charges for bad checks;

- Several witnesses testified that Natasha had stolen cash from them;
- One witness testified that Natasha had made numerous unauthorized purchases over the internet using the witness's credit card;
- At the time of the hearing, Natasha was unemployed;
- Madisen had been expelled from her cheerleading team solely because of Natasha's behavior; and
- Madisen had excessive tardiness and absenteeism in school.

The trial court further noted that between the October 24, 2005 temporary order and the August 14, 2006 final order, the evidence indicated that additional issues relative to Natasha's relationship with Madisen had arisen:

- Natasha did not assist with her daughter's transition between households;
- Natasha required Madisen “to keep a diary or journal documenting all activities at her father's house”; and
- More allegations of theft were raised against Natasha. One such allegation involved a theft of cash by Natasha during a Thanksgiving party, with the cash used to buy birthday gifts for Madisen. Upon the advice of the Montgomery County Sheriff's Office, Benjamin did not allow Madisen to have the gifts. This matter was resolved without prosecution because Natasha's mother made a cash payment to the victim of the theft.

Moreover, though not specifically set forth in the Findings, the trial court noted during a hearing held on August 2, 2006 that it found especially disconcerting the fact that several of the alleged thefts occurred while Madisen was in Natasha's custody. In light of this

evidence, the trial court found that “there has been a change of circumstances since the original custody order entered in this case. The statutory requirements of KRS 403.430 and KRS 403.270 [have] been met and modification is appropriate.”

Natasha challenges these findings, claiming that they are unsupported by substantial evidence. We disagree. Our review of the findings is guided by Kentucky Rule of Civil Procedure (CR) 52.01, which states that “[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses.”

Civil Rule 52.01 provides in part that findings of fact shall not be set aside unless clearly erroneous with due regard given to the opportunity of the trial judge to view the credibility of the witnesses. The rule also provides that in all actions tried upon facts without a jury, the court shall find the facts specifically and state separately its conclusions of law. One of the principal reasons for the rule is to have the record show the basis of the trial judge's decision so that a reviewing court may readily understand the trial court's view of the controversy. . . . These rules clearly apply to child custody cases and the findings of fact are particularly important in such situations.

Reichle v. Reichle, 719 S.W.2d 442, 444 (Ky. 1986). Under CR 52.01, findings of fact should not be disturbed on appeal where there is sufficient evidence of probative value to sustain such findings. *Phelps v. Brown*, 295 S.W.2d 804 (Ky. 1956). This is true even if there is substantial and credible evidence on both sides of the issues. *White v. Howard*, 394 S.W.2d 589 (Ky. 1965). Even if there is some doubt in the mind of a reviewing court concerning the findings of the lower court, those findings should not be set aside on the basis of a mere doubt. *Warner v. Sanders*, 455 S.W.2d 552 (Ky. 1970). In short, the

reviewing court should not substitute findings of fact for those of the trial court where they were not clearly erroneous. *Bennett v. Horton*, 592 S.W.2d 460 (Ky. 1979).

Turning to the present matter, we disagree with Natasha's claim that the trial court's findings were in conflict with the evidence of record. To the contrary, our review of the documentary record as well as the testimony of the witnesses offered at the various hearings held in this matter demonstrates that there was ample evidence to support each of the trial court's findings. This is not to say that there was no evidence supporting Natasha's claims. In fact, there was testimony, including her own, that favored her position in this dispute and could have potentially supported a decision by the trial court in her favor. This conclusion is plainly demonstrated by the fact that the trial court, after temporarily awarding Benjamin sole custody of Madisen in October 2005, ultimately allowed Natasha to share joint custody of her daughter.

However, a trial court's findings are not subject to reversal simply because there was competing or contradictory evidence. *White, supra*. As long as the findings of the trial court are not clearly erroneous and there is evidence of probative value to support them, this Court must not disturb them on appeal. *Bennett, supra; Phelps, supra*. Having carefully reviewed the record herein, we find that there was sufficient evidence before the trial court to support its findings in this matter. For example, though Natasha minimizes the importance of her criminal record, the trial court's concern about the number of offenses, including instances resulting from Natasha's own volatility when dealing with educators or coaches, simply cannot be discounted. Similarly the troubling

allegations of theft were raised by not just one witness, but by several. Though Natasha attempted to discredit these individuals, the trial court was in the best position to view the parties and their witnesses first-hand and to determine credibility. This Court is not now in a position to “second guess” the trial court's conclusions, and so long as there is sufficient evidence to support them, we will not disturb them. *Warner, supra*. In sum, because Natasha has not shown that the findings of the trial court are clearly erroneous, we decline to set them aside. The Montgomery Circuit Court's August 14, 2006 Findings of Fact, Conclusions of Law and Order is affirmed.

ALL CONCUR.

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