

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001044-ME

RUTH ROBINSON

APPELLANT

v.

APPEAL FROM CLARK CIRCUIT COURT
HONORABLE JEFFREY M. WALSON, JUDGE
ACTION NO. 04-CI-00134

TODD LUCAS

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; DIXON, JUDGE; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Ruth Robinson appeals the April 25, 2007, order awarding joint custody to herself and Todd Lucas of the parties' minor children and naming Todd as primary residential custodian. We affirm.

The parties cohabited for many years, during which time were born two minor children. Although the parties never married, paternity of the children was never a question. In February 2003, the parties ended their long-term relationship. The children

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

resided with Ruth with regular time-sharing by Todd. In 2004, Ruth filed a petition for custody and visitation with the Clark Circuit Court. The parties agreed to mediate. At the mediation the parties agreed to joint custody with Ruth to be the primary residential custodian and Todd having time-sharing. It was also agreed that Todd would pay child support. In May 2004, an agreed order reflecting the outcome of the mediation was prepared by Todd's counsel. This order was never signed by Ruth nor entered in the record.

In September of 2005, in response to Ruth's plans to move to Indiana with the children, Todd filed several motions to prohibit Ruth from moving out of the state with the children or, in the alternative, for a change in primary custody. Todd also filed a motion for temporary custody and visitation. The parties were referred to mediation, which was unsuccessful. Todd re-noticed his motions. The motions were set to be heard on December 13, 2005. On that date, the court noted on its docket that Ruth failed to appear. The court then ordered that Ruth was not to relocate with the children, ordered Todd to have specific regular and holiday time-sharing, and scheduled the matter for a final hearing on February 20, 2006.

Prior to the scheduled hearing, Ruth informed Todd that she was no longer planning to move to Indiana. The parties came to an agreement regarding the custody and time-sharing of the children. This agreement was similar to the agreement of May, 2004, but it included a provision that Ruth would not relocate with the children without permission of the court or written agreement of the parties. The new agreement also included an increase in the amount of child support that Todd was to pay to Ruth. A

proposed agreed order was drafted by Todd's counsel but never signed by Ruth nor submitted to the record.

On April 3, 2007, after receiving reports that the children were not being properly supervised as well as reports that a domestic violence perpetrator had been staying at Ruth's home, Todd filed another motion for temporary custody and visitation. The motion was to be heard on April 10, 2007, at which time neither Ruth nor her counsel appeared. Counsel for Todd informed the court that she had not been contacted by Ruth nor her counsel regarding the matter. The court took Todd's testimony and on April 12, 2007, the court entered an order granting joint custody to the parties and naming Todd as the primary residential custodian.

On April 16, 2007, a motion to intervene and set child support, filed by the Commonwealth of Kentucky, Cabinet for Health and Family Services ("CHFS"), was set to be heard. The motion was passed until further notice. Ruth then filed a motion to alter, amend or vacate the April 12, 2007, order. The motion was heard and the court took testimony of both parties. On April 25, 2007, the trial court entered an order establishing Todd as primary residential custodian and setting out a time-sharing schedule for the parties. This appeal followed.

Ruth argues that the trial court committed error by allowing Todd's motion to change custody. Specifically, she argues that the trial court failed to consider all the requirements of KRS 403.270 in determining the best interest of the children; she and Todd were not given equal consideration as mandated by KRS 403.270; the court refused her requests for a custodial evaluation; Todd's motion for custody should have been accompanied by an affidavit; she was not given a fair hearing; the children were not

asked where they would prefer to reside; and the court's findings that Todd was more stable and responsible were unsupported.

A custody award shall not be disturbed unless it constitutes an abuse of discretion. *Allen v. Devine*, 178 S.W.3d 517, 524 (Ky.App. 2005).

‘[a]buse 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.’ . . . The exercise of discretion must be legally sound.

Id. (quoting *Sherfey v. Sherfey*, 74 S.W.3d 777, 783 (Ky.App. 2002) (quoting *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994)).

Although the parties had mediated on several occasions and had come to an agreement, neither of those agreements was entered into the record. Therefore, the April 12, 2007, order of the trial court was an initial custody determination as governed by KRS 403.270, not, as Ruth suggests, a modification of a prior determination, as governed by 403.350. Therefore, Ruth's argument regarding the requirement of an affidavit does not apply.

KRS 403.270(2) states that custody shall be determined in accordance with the best interests of the child and equal consideration shall be given to each parent. The statute further states that the court shall consider all relevant factors including the following:

- (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.

KRS 403.290 grants the trial court the power to consider custody evaluations as well as the wishes of the children when determining custody. However, these methods are left to the discretion of the court and are not a mandatory requirement. Therefore, the trial court's decision not to use a custodial evaluation or interview the children as to their wishes fails to be an abuse of discretion.

After reviewing the trial court tape, we are satisfied that the trial court considered all relevant factors when determining custody. Ruth's custody rights were not taken away, as she suggested in her brief with the introduction of several cases dealing with such an issue. Instead, it was ordered that she and Todd share joint custody of the children. The trial court stated that the testimony showed that Ruth was not a bad mother and that he felt it was important to develop a time-sharing schedule for Ruth so that the children could spend time with her. It did, however, note that it was his opinion that Ruth

lacked judgment in her parental decisions such that Todd should be the appropriate primary residential custodian. Specifically, the trial court cited to Ruth's decision to leave the children without proper supervision, her involvement with an alleged domestic violence perpetrator, and an incident at her home between two of her guests, which resulted in violence. The decision to appoint Todd as primary residential custodian is well within the discretion of the trial court.

Ruth and counsel argue that they were not present at the time the April 10, 2007, motion was heard because they were unaware of the motion. Counsel claims to have been out of town and therefore did not receive notice until returning and was also unable to notify Ruth. The trial court stated that it believed that Ruth and counsel had not been informed but also indicated that there was a history of Ruth not showing up for court dates. Any possible error created by proceeding without Ruth, with the testimony on April 10, 2007, was remedied by the testimony taken on April 24, 2007, where Ruth and her counsel were present. Ruth claims that she was unprepared for a hearing at that time. However, instead of raising this objection then, she proceeded, through counsel, to perform examination and cross-examination of the parties. We believe this argument to be without merit. The April 24, 2007, hearing took place upon the filing of Ruth's motion to alter, amend or vacate the April 12, 2007, order. For Ruth to argue that she was unprepared to argue against Todd's motion for custody would propose that she was also unprepared to argue the merits of her own motion. Furthermore, the two weeks that had passed between the April 10, 2007, hearing and the April 24, 2007, hearing was sufficient time for Ruth and her counsel to review the tape of the April 10, 2007, testimony, which was but approximately ten to fifteen minutes in length, and acquaint themselves with the

arguments which Todd had presented in his motion for custody. The failure of Ruth to properly prepare in such a manner is not an error of the court. Counsel for Ruth did state that he wished to gather some witnesses on behalf of his client. The trial court, however, stated that no witness testimony could counter the conclusion that Ruth had made poor parenting decisions at the detriment of her children, a conclusion brought about by her own testimony.

Ruth further claims she was “maligned” and “ambushed” by the court and suggests that she was discriminated against because of her economic and educational status. Our review of the trial record fails to support these allegations. Neither of the parties testified regarding the economic or educational level of the other. The trial court does address Ruth's pattern of failing to make it to court dates as well as his opinion that she had made poor parenting decisions. These comments are insufficient to prove discrimination or bias and instead serve to support the court’s decision that Todd should be the primary residential custodian.

This court fails to find an abuse of the trial court’s discretion and therefore the April 25, 2007, order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Edward E. Dove
Lexington, Kentucky

BRIEF FOR APPELLEE:

Elizabeth Elkins Bond
Winchester, Kentucky