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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001659-ME

MARK MCCORD — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NO. 03-CI-500805

JESSICA MCCORD, (NOW LANGEFELD) — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND NICKELL, JUDGES; KNOPF,[1] SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Mark McCord appeals the July 17, 2007, order granting sole custody to Jessica Langefeld of her and Mark's two infant children. We affirm.

The parties were divorced on September 10, 2003. At that time, they agreed to share equal custody and joint parenting time of their two children. Under this agreement, the children rotated their time with each parent one week at a time. In an effort to maintain their joint custody agreement, the parties engaged a parenting

[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.

coordinator, Mitch Charney, in 2004. In 2005, Mr. Charney referred the parties to a family counselor. There is an extensive history of the parties being unable to cooperate with one another and make simple parenting decisions without the help of Mr. Charney.

Jessica currently resides in northeast Jefferson County and Mark resides in southern Jefferson County. At the time of the custody modification hearing, the children attended a school which was within close proximity to Mark's home and about a 35 minute drive from Jessica's home. The parties disagreed about where the children should attend school, with Jessica desiring for them to attend a school closer to her residence and Mark wishing them to stay in their current school. At the time of the hearing, Mark was engaged and had voiced a potential plan to move his residence to a neighborhood closer to Jessica. Due to Mark's habit of frequently changing his mind regarding this plan, it was never clear to the court whether or not the move was going to take place.

On April 12, 2007, Jessica filed a motion to modify custody, requesting that she be awarded sole custody of the children and be designated as the primary residential custodian. She also requested modification of the timesharing schedule. The parties participated in a custodial evaluation with Dr. Edward Berla and the matter was heard before the circuit court on July 10, 2007. In an order, entered July 17, 2007, the circuit court granted sole custody to Jessica and generated a new timesharing schedule. In its order, the court noted that the modification was in the best interest of the children due to the ongoing conflict between the parties. This appeal followed.

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)).

On appeal, Mark argues that the trial court's modification constituted an abuse of discretion because the court failed to properly apply KRS[2] 403.340(3). Specifically, Mark argues: 1) there was no change in the circumstances of the parties or the children since the entry of the decree in 2003; 2) the court failed to properly apply the six factors set out in KRS 403.340(3); and 3) the custody modification was against the wishes of himself and the children, as well as the recommendations of Mr. Charney and Dr. Berla. KRS 403.340(3) reads:

> If a court of this state has jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act, the 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;

[2] Kentucky Revised Statutes.

(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.

KRS 403.270(2) states:

The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all relevant factors including:

(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.
>
> In its order, the trial court stated, in part:
>
> The conflict between these parties is so continual they cannot agree on the most trivial of issues. . . . The parties are unable to communicate with each other and reach an agreement on the simplest of matters. . . .
>
> The Court finds that Ms. Langefeld has made an attempt to resolve the school issue in accordance with the recommendations of all of the professionals in this case. However, Mr. McCord has refused to commit to any change or compromise. . .the parties have been unable to agree, without the assistance of both Mr. Charney and Ms. Cumbler,[3] on major medical decisions[,]. . .about what kind of foods [their daughter] should be eating[,]. . . on the sleeping arrangements for the children. . . .
>
> However, there is no indication that the conflict between the parties is likely to improve in the future. The Court does not believe it is realistic that the parties should be required to use a parenting coordinator and family counselor indefinitely to resolve their conflicts. . . . The Court has considered the statutory factors of KRS 403.270 and KRS 403.340 and concludes that it is in the children's best interests to modify custody.
>
> In support of his argument, Mark relies on the Kentucky

Supreme Court case of *Fenwick v. Fenwick*, which states:

> joint custody modification falls exclusively within the purview of KRS 403.340 and .350, and the previous judicially-created "gateways" to joint custody modification are inapplicable. Thus, joint custody is not subject to modification at the mere whim of a party or simply because the parties disagree as to a child-rearing decision. Nor is the lack of cooperation by one or both parties grounds for modification of joint custody unless it rises to the statutory level required for modification of custody under KRS 403.340.

Fenwick v. Fenwick, 114 S.W.3d 767, 784 (Ky. 2003).

[3] Judith Cumbler is the family therapist of the parties.

In *Fowler v. Sowers*, 151 S.W.3d 357 (Ky.App. 2004), this Court found that the holding in *Fenwick* was superseded by the subsequent alteration of KRS 403.340.

> It is true that KRS 403.340 was significantly altered by the General Assembly in 2001. The strict standards for modification in the pre-2001 version of the statute were intended to inhibit further litigation. In enacting its amendments, the General Assembly not only relaxed the standards for modification of custody, but it also expanded upon the factors to be considered when modification is requested. The statute now directs the trial court to consider and to permit a change of custody based on the factors enumerated in KRS 403.270(2), the statute used in making initial custody decisions. The former standards for modification . . . are now mere elements or factors to be considered by the court.
>
> Although Fenwick was decided after the 2001 changes to KRS 403.340, the Court acknowledged that its decision was based on the pre-2001 version of KRS 403.340 because that was the version in effect at the time of the entry of the orders under its review. Thus, Fenwick carries quite limited precedential weight.

Id. at 359 (citations omitted).

Prior to *Fowler*, custody modification has been found appropriate in situations in which both parents are found to be fit but are unable to cooperate with each other. *See Scheer v. Zeigler*, 21 S.W.3d 807, 814 (Ky.App. 2000). However, it was still necessary that the lack of cooperation rise to the statutory level required for modification of custody under KRS 403.340. *Fenwick*, *supra* at 784. Although the standards of KRS 403.340(3) have been relaxed since the finding in *Fenwick*, we believe that a situation in which parents fail to cooperate with one another can rise to the level of physical, mental, moral or emotional endangerment as considered, and

required, by KRS 403.340(3) for custody modification. Seemingly, so did the trial court in the case sub judice.

In addition to the text already cited from the trial court's order, this Court notes the additional language:

> (f)or almost four (4) years, the parties have engaged in conflict over parenting issues both in and out of court. The conflict between the parties has continued since the parties' divorce and has required the constant use of both a parenting coordinator and family counselor to resolve even minor conflicts. *The parties' children are placed in the middle of the conflict to their detriment*. (Emphasis added).

This language, taken in conjunction with the foregoing excerpts, is sufficient to satisfy this Court that the trial court properly applied KRS 403.340(3) as well as KRS 407.270 when deciding to modify custody. It is clear that the trial court felt that the constant conflict between the parties was detrimental to the children. Specifically, the trial court cited that the children had been unable to participate in extracurricular activities, had been subjected to disparaging remarks about their mother from their father and had been placed in potentially harmful sleeping situations. The trial court placed the brunt of the blame on Mark, stating "[t]here has been no indication by either the parenting coordinator or the family therapist that Mr. McCord has made any improvements in his abilities to co-parent the children." It stands to reason that when parties can not put their differences aside in an effort to best care for the needs of their children, the best interests of the children are not being met. Likewise, it follows suit that such a situation can be remedied by modifying the custody determination and designating one parent as sole custodian. As unfortunate as it is, such is the case before us, and it does not warrant a finding of abuse of discretion.

Lastly, although the wishes of the parties and the children are a factor to be considered by the court, it is not a determining factor. Therefore, failure of the trial court to make a finding in agreement with the wishes of a party or the children is not an abuse of discretion. The same is true for recommendations made to the court from therapists, parenting coordinators, custody evaluators, or anyone else who may have an opinion in the matter. The judge is the final adjudicator, and as such, may give as much or as little weight as he or she deems appropriate to any suggestions by third parties.

For the foregoing reasons, the July 17, 2007, order of the Jefferson Family Court is hereby affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas M. Denbow
Louisville, Kentucky

BRIEF FOR APPELLEE:

Troy DeMuth
John H. Helmers, Jr.
Helmers Demuth &Walton PLC
Louisville, Kentucky