

Commonwealth Of Kentucky

Court Of Appeals

No. 1997-CA-003248-MR

TABITHA KAY BOWLING
(now PREWITT)

APPELLANT

v.

APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JAMES A. KNIGHT, JUDGE
ACTION NO. 95-CI-00420

TERRY NEIL BOWLING

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: HUDDLESTON, KNOFF, AND MILLER, JUDGES.

KNOFF, JUDGE. Tabitha Kay Bowling (now Prewitt) (hereafter Tabitha) appeals from an order of the Johnson Circuit Court entered on November 19, 1997, awarding the parties joint custody and shared physical possession of their son. We affirm.

The parties married in May 1989 and separated in September 1995. During the marriage, the parties had a son, Matthew Neil Bowling, born on June 28, 1992. Terry filed a petition for dissolution of marriage in September 1995 in which he requested sole custody of the child. In August 1996, Tabitha filed a motion seeking an order establishing temporary joint custody with the child's primary physical residence being with

Terry. In September 1996, the domestic relations commissioner (DRC) issued an order establishing temporary joint custody with Terry having primary physical custody of the child by agreement of the parties, and Tabitha retaining liberal visitation. At this time, Tabitha was enrolled as a full-time student at Morehead State University at Morehead, Kentucky, while Terry and the child lived in Van Lear, Kentucky.

In November 1996, the DRC held a hearing on the divorce petition. On May 12, 1997, the DRC filed a proposed order and judgment dissolving the marriage, dividing the marital property and awarding custody of the child. In the proposed order, the DRC recommended joint custody of the child with Terry receiving primary physical possession. The DRC's opinion indicated that the custody award was based primarily on the child's medical condition. The DRC noted that the child suffered from otitis media and reactive airway disease that was exacerbated by cigarette smoke. The DRC stated that the record indicated Tabitha and her parents were smokers and the child was exposed to a smoke filled environment while with them. Therefore, the DRC granted Terry primary physical custody with Tabitha having visitation in a smoke-free environment when she was in Van Lear. The DRC also provided for alternating weeks of custody/visitation of the child during the summer months when Tabitha was not attending college.

In May 1997, Tabitha filed exceptions to the DRC's recommended findings of fact and conclusions of law challenging the granting of primary physical custody to Terry. In her

memorandum, Tabitha stated that she did not smoke cigarettes and that there was no evidence in the record that she was not a fit and proper person to be the primary physical custodian of the child. She also objected to the restriction on summer visitation to periods when she was not attending college classes. In June 1997, Terry filed a response to Tabitha's exceptions to the DRC's recommendations. He argued that Tabitha's parents did smoke around the child, that the child had already enrolled in school, that he was well adjusted to his then current environment, and that many of the child's blood relatives still resided in Van Lear. Terry also objected to extended placement of the child in Tabitha's residence while she attended classes because there was no family member in Morehead to watch over the child.

In September 1997, the circuit judge ordered that the issue of custody be referred back to the DRC for additional evidence on the exceptions filed by the parties. In October 1997, the DRC conducted a hearing on the exceptions. On November 19, 1997, the DRC issued an order amending the May 12, 1997, order, which states that "the parties have resolved their differences and all issues regarding the exceptions which were filed by respondent (Tabitha)." The November order awarded the parties joint custody with a shared physical arrangement. Terry was granted physical possession of the child during the week while the child was in school, and Tabitha was granted physical possession of the child during the weekends. During the summer months when the child was not in school, he was to reside with each parent on an alternating two (2) week basis. The parties

also were to share physical possession of the child on alternating holidays. The order also stated that neither party would receive child support payments because they were sharing "an equal amount of time with the child." The trial judge adopted the recommendations in the November order. Tabitha then filed this appeal.

As a general rule, a trial court has broad discretion in determining the best interest of the children when awarding child custody, Krug v. Krug, Ky., 647 S.W.2d 790, 793 (1983), and in determining whether to award sole custody or joint custody. Squires v. Squires, 854 S.W.2d 765, 770 (1993). In reviewing a child custody determination, the standard of review for the trial court's factual findings is whether they are clearly erroneous. Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986); Basham v. Wilkins, Ky. App., 851 S.W.2d 491, 493 (1993). In addition, the trial court's ultimate legal decision on the type of child custody should not be disturbed absent an abuse of discretion. Dudgeon v. Dudgeon, Ky., 458 S.W.2d 159, 160 (1970); Cherry v. Cherry, Ky., 634 S.W.2d 423, 425 (1982). The trial court is in the best position to evaluate the testimony and weigh the evidence, so an appellate court generally should not attempt to substitute its own opinion for that of the trial court. See Reichle, 719 S.W.2d at 444; Bickel v. Bickel, Ky., 442 S.W.2d 575, 576 (1969).

Tabitha argues that the trial court erred by granting primary physical possession of their son to Terry. She attacks the factual finding of DRC as stated in the May 1997 proposed

order and recommendations involving the child's respiratory medical problems. Tabitha contends that there is not evidence in the record that she smoked cigarettes or that she lived with her parents, who smoke cigarettes.

Tabitha's focus on the May 1997 order is puzzling in part because the recommendations in that order were amended by the November 1997 order after remand to the DRC for further evidence. The November 1997 order increased the amount of time the child was to reside with Tabitha and attempted to more closely equalize physical possession between the parents, rather than grant Terry primary physical possession. Tabitha does not challenge the joint custody status and the November 1997 order states that it reflected an agreement between the parties.

In addition, the Court's review is limited to the record submitted by the parties on appeal. As required by Kentucky Rule of Civil Procedure (CR) 76.12(4)(c)(iv), the parties are to provide specific citations to the record in support of their arguments. Under CR 75.07(2), the parties are obligated to designate the transcriptions of proceedings not otherwise part of the record for inclusion in the record on appeal. The current record on appeal does not contain transcripts for the evidentiary hearings before the DRC.

Further, Tabitha has failed to designate the necessary hearings for inclusion in the record and has failed to include citations in her appellate brief to any evidentiary portion of the record. The appellant bears the burden of seeing that the record on appeal contains the materials necessary to support his

position. See Oldfield v. Oldfield, Ky., 663 S.W.2d 211 (1984); Seale v. Riley, Ky.App., 602 S.W.2d 441 (1980). Failure to make a proper designation and include in the record transcripts of evidentiary proceedings necessary for appellate review can result in dismissal of the appeal. Id. Where the record does not include a transcript of evidence or a narrative statement in lieu of a transcript, "we must assume the record supports the factual determinations of the trial court." Dillard v. Dillard, Ky.App., 859 S.W.2d 134, 137 (1993).

In the case at bar, Tabitha agreed to allow Terry to have primary physical possession of their son during the pendency of the divorce. At the time of the final custody hearing, the child had been enrolled in school and had resided in the marital residence since his birth. See, Eviston v. Eviston, Ky., 507 S.W.2d 153 (1974) (no abuse of discretion in awarding sole custody to father to allow child to reside in marital residence). The child had adjusted to Terry's home, and the school and community in Van Lear. See KRS 403.270(1)(d). Assigning Terry physical possession of the child during the week is reasonable under the circumstances. The record contains a letter from the child's pediatrician that his respiratory problems were exacerbated by cigarette smoke and that he had experienced problems after visiting with Tabitha and her parents. Tabitha does not dispute that her parents smoke cigarettes and that the child's medical condition is affected by cigarette smoke.

Tabitha argues that in determining the best interests of a child, "where all things are equal natural preference for a

mother would dictate award of custody to her." She cites to Casole v. Casole, Ky.App., 549 S.W.2d 805 (1977) in support of this argument. This "tender years" maternal presumption recognized in early case law has been repudiated by statute. KRS 403.270(1) explicitly states: "The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent." (Emphasis added). See, also, Jones v. Jones, Ky.App., 577 S.W.2d 43, 45 n.1 (1979) (noting that June 1978 amendment to KRS 403.270 abrogated the tender years presumption). In Squires v. Squires, Ky., 854 S.W.2d 765, 768 (1983), the Court stated that under KRS 403.270, "[i]t is equally clear that neither parent is the preferred custodian and the parents' wishes, while appropriate for consideration, are not binding on the trial court." Casole was decided prior to the amendment of KRS 403.270 in 1978. Accordingly, Tabitha's reliance on the "tender years" presumption clearly is without merit.

In conclusion, Tabitha has failed to support her complaint by citation to the record. She also has not demonstrated that the trial court abused its discretion in assigning partial physical possession of the child to Terry. In fact, the final custody award created a near equal sharing of physical possession that also provided stability and continuity for the child. Tabitha has not demonstrated sufficient grounds to overturn the trial court's decision.

For the foregoing reasons, we affirm the order of the Johnson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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