

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001842-MR

TOBI DAUENHAUER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY COREY, JUDGE
ACTION NO. 93-FD-001714

DOUGLAS DAUENHAUER

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: BARBER, COMBS, AND TACKETT, JUDGES.

BARBER, JUDGE: The Appellant, Tobi Dauenhauer ("Tobi"), contends that the trial court abused its discretion in modifying the parties' joint custody arrangement and in "terminating" visitation with her two sons pending her completion of a therapy program. Finding no error, we affirm.

Tobi and the Appellee, Doug Dauenhauer ("Doug"), were married on September 29, 1988. They were divorced on July 6, 1995. The parties have two minor children, Michael and Matthew. Michael is Tobi's natural son and Doug's adoptive son born on May 1, 1987. Doug adopted Michael when he was 22 months old. Matthew is the parties' natural son born on December 27, 1988.

On July 6, 1995, the trial court entered a judgment awarding the parties joint custody with the children residing primarily with Doug during the regular school year and with Tobi during the summer. By order entered November 3, 1995, the visitation provisions in the judgment were somewhat modified.

On June 3, 1999, Doug filed a motion seeking sole custody and requesting that Tobi's visitation be limited or supervised. In his supporting affidavit, Doug outlined a series of events which led to his filing the subject motion. Doug alleged that, after he filed a motion to hold Tobi in contempt for failure to pay child support, she retaliated by telling their son, Michael, that Doug was not his father.

On February 27, 1997, the court entered an order restraining Tobi from allowing Michael to have contact with his biological family. On December 8, 1997, a commissioner's hearing was held on a motion to hold Tobi in contempt for facilitating visitation with the child's biological father in contravention of Court order, failure to provide visitation and failure to make child support payments. The Domestic Relations Commissioner concluded:

A history of this case indicates there is not just one isolated incident of refusal to adhere to the Court's order, but there have been no less than four instances, beginning with the contempt found by Judge Corey in 1996. Thereafter, Tobi has violated no less than three Court orders, those including contact with the child's biological father, visitation order that she return the child by 7:00 p.m. and additional child support arrearages of over \$3,000.00. Your Commissioner recommends that she be found in contempt of Court.

By order entered March 3, 1998, the trial court confirmed the Commissioner's report and order except for an award of attorney's fees to Doug.

Doug alleged that, following entry of that order, Tobi embarked on a "a steady campaign to interfere with his relationship with the children." Doug maintained that Tobi suddenly began making regular visits to school which were disruptive and had a negative impact upon the children. Doug also alleged that, throughout the remainder of the 1997-98 school year, Tobi began "beating on his door, peering through windows, and making numerous telephone calls." Doug stated that, as a result of Tobi's actions, his current wife, Mary, filed a criminal complaint against Tobi which resulted in a restraining order being issued in an attempt to keep Tobi away from Doug's residence. Doug also claimed that as a result of Tobi's "scheming" an action had been initiated by the Cabinet for Children and Families over allegations that he had abused the children. These allegations led to the court appointing Terry Fontenot as a counselor for the children and ordering the parties to cooperate with him.

On March 14 and April 11, 2000, a hearing was held on Doug's motion for sole custody and to limit or require supervision of Tobi's visitation. Several witnesses testified including Paula Berry, Ph.D., the court-appointed custody evaluator; Terry Fontenot, the children's counselor and Ed Vaughn, LCSW, Tobi's counselor. On June 30, 2000, the trial court entered a judgment granting Doug sole custody of the two

minor children, Matthew and Michael. The trial court ordered that Tobi "shall be entitled to visitation with the children from Friday at 6:00 p.m. until Sunday at 6:00 p.m. on alternating weekends once . . . [she] begins cooperating with the treatment plan proposed by the children's therapist, Terry Fontenot, and Mr. Fontenot recommends resumption of Respondent's regular visitation with the children." The court further ordered that the "parties shall cooperate with any limited supervised visitation plan recommended by Mr. Fontenot as a part of the children's therapy."

On appeal, Tobi argues that the trial court abused its discretion in modifying the parties' joint custody arrangement and in awarding sole custody to Doug. Tobi attempts to persuade us that the trial court's decision is based upon a "clearly erroneous" finding, -- "that the children's present environment when under Respondent's [Tobi's] influence seriously endangers their mental and emotional health because of the Respondent's continuing efforts to undermine the Petitioner's [Doug's] parental authority and to alienate these children from their father." Tobi maintains that the facts presented at trial, as set forth in her statement of case, do not support the court's finding. We disagree.

It is apparent that the evidence was in conflict. Tobi's omission of any reference to Terry Fontenot's testimony in her "statement of the case" speaks for itself. Instead of focusing on the issue that she raised Tobi devotes her argument on appeal to telling us what Doug did or didn't do as

justification for her own conduct. We are not the finder of fact. This Court is bound by the "clearly erroneous" standard of review found in CR 52. We may not disturb the lower court's findings, if they are supported by substantial evidence. Poe v. Poe, Ky. App., 711 S.W.2d 849 (1986).

The record reflects that Paula Berry, Ph.D., a court-appointed psychologist reported being "troubled by the parental alienation Tobi Dauenhauer perpetuates by her behavior -- the most obvious defining action being her introduction of Michael to his biological father." Dr. Berry stated that it would be "more honest" to recommend Doug for sole custody "as opposed to the present joint custody arrangement which appears to be 'in name only.'" Dr. Berry believes that Tobi's emotionality, impulsivity, and lack of insight rendered her poorly equipped to engage in healthy joint-decision making with Doug; further, Dr. Berry was reluctant to recommend greater contact between Tobi and her sons due to Tobi's undermining of the children's relationship with Doug.

The record also reflects that Terry Fontenot believed that there was emotional abuse by one parent -- Tobi. Mr. Fontenot testified that he was against keeping the custody arrangements as they are now. He stated that the boys continue to be damaged by Tobi, and he would like to see an end to joint custody with sole custody awarded to Doug. Clearly, the trial court's finding has a substantial evidentiary foundation. The trial court did not abuse its discretion in modifying the

parties' custody arrangement; therefore, the award of sole custody to Doug is affirmed.

Tobi also contends that the trial court "essentially terminated" her relationship with her children pending her compliance with or completion of a treatment plan that was "wholly undefined" in the trial court's judgment. The trial court ordered that Tobi shall be entitled to visitation from Friday at 6:00 p.m. until Sunday at 6:00 p.m. on alternating weekends, once she begins cooperating with the treatment plan proposed by the children's therapist, Terry Fontenot, and upon Mr. Fontenot's recommendation to resume Tobi's regular visitation with the children. The court also directed the parties to cooperate with any limited supervised visitation plan recommended by Mr. Fontenot as a part of the children's therapy.

Mr. Fontenot's proposal is discussed by the trial court at page 6 of the judgment:

He [Fontenot] would like to have Respondent [Tobi] work with him and the children in a family counseling session in addition to participating in her own counseling [with Ed Vaughn]. He notes that Respondent needs to apologize to the children for coloring things and poisoning them against their own father. He believes that the children need to hear a clear statement from Respondent that she is taking responsibility for her actions.

Tobi would have us believe that the trial court's "result" is contrary to the recommendation of the "court's own expert" based upon one sentence selected from Dr. Berry's report. Tobi omits the fact that Dr. Berry stated "it would be more honest" to recommend Doug as the sole custodian and that she was reluctant to recommend greater contact between Tobi and her sons

due to Tobi's undermining of their relationships with their father.

Dr. Berry testified that she had spoken with Mr. Fontenot. Dr. Berry concurs with his recommendation of 6-8 sessions with Tobi and her sons directed at decreasing parental alienation. Dr. Berry believes that Tobi needs to recognize that the children should not participate in making adult decisions such as those involving money. Dr. Berry testified that she and Mr. Fontenot agreed that the 6-8 sessions of counseling prior to resuming Tobi's visitation with the boys would be a good recommendation. Dr. Berry believes that at the end of those sessions Mr. Fontenot would be in the better position to recommend whether the resumption of visitation should be incremental or all at once.

Matters involving visitation rights are held to be peculiarly within the discretion of the trial court. Drury v. Drury, Ky. App., 32 S.W.3d 521 (2000). The trial court's order regarding visitation is based upon the recommendations of the children's therapist and the court-appointed psychologist. There is no abuse of discretion. The judgment of the Jefferson Family Court entered June 30, 2000 is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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