

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002378-MR

KAVEN RUMPEL AND
KATHIE RUMPEL

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 98-FC-004661

ERIC BARMORE AND
BRITTANY R. BARMORE

APPELLEES

AND: NO. 2000-CA-001648-MR

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APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: EMBERTON, GUIDUGLI AND McANULTY, JUDGES.

GUIDUGLI, JUDGE. Kaven and Kathie Rumpel (Appellants) appeal from two separate orders of the Jefferson Family Court, the first of which awarded custody of Eric Cash Barmore (Cash) to Brittany and Eric Barmore (Appellees), and the second order, which prohibited Appellants from removing Cash from the Commonwealth of Kentucky (Southern Indiana is excepted from this order) "during any of visitation unless the custodial parents expressly, in writing and in advance, permit such removal." We affirm.

Cash was born on April 25, 1997, to the Appellees. As a result of numerous problems, including illegal activity, domestic violence, and allegations of neglect, Cash was removed from the custody of Appellees and temporary custody of Cash was given to the Appellants on April 16, 1998. Approximately two and one-half months later, on June 30, 1998, Cash was returned to the Appellees by order of the juvenile court. Shortly thereafter, on July 6, 1998, the Appellants filed their original petition seeking visitation with Cash. However, on August 26, 1998, Appellants filed an amended petition seeking custody of Cash based upon their status as de facto custodians pursuant to Kentucky Revised Statutes (KRS) 403.270(1)(a).

The matter was referred to a Domestic Relations Commissioner who held a hearing on the visitation issue on October 14, 1998. The Commissioner filed his eight (8) page report on December 18, 1998, recommending Appellants be given specific pendente lite visitation. However, the Family Court judge entered an order on December 30, 1998, limiting the Appellants' visitation to alternate weekends from Saturday at

6:00 p.m. until Sunday at 6:00 p.m. and on alternate weeks on Friday at 6:00 p.m. until Saturday at 6:00 p.m. Visitation was later changed (order entered January 20, 1999) to alternate weekends from Friday at 6:00 p.m. until Monday at 6:00 p.m. In the meantime, (January 5, 1999), the Cabinet for Families and Children closed their juvenile file regarding Appellees.

A two-day hearing was held on the custody petition on March 31, 1999 and April 1, 1999. After hearing testimony from numerous witnesses, reviewing exhibits and depositions, as well as subsequent motions, memoranda and legal arguments of the parties, the Family Court judge entered her order of September 3, 1999, in which she awarded sole custody of Cash to Appellees. Appellants filed appeal No. 1999-CA-002378-MR, contesting the custody order.

On appeal, Appellants contends the Family Court's finding that awarding custody of Cash to Appellees was in his best interest was clearly erroneous. After setting forth a fourteen page chronological listing of events since 1989 which Appellants believe to be important and relevant as to the best interest test applied in custody cases (see KRS 403.270), Appellants then present ten (10) specific incidents which they claim the Family Court's findings are clearly erroneous. We have reviewed each of Appellants' alleged erroneous findings, and having thoroughly reviewed the record and video taped proceedings of the two-day hearing, find no error.

In the Family Court's thirteen (13) page order awarding custody of Cash to the Appellees, the court lists the nineteen

(19) witnesses who testified either at the hearing or by deposition, as well as the twenty-four (24) exhibits introduced at trial. The judge then thoroughly examined the evidence presented and reviewed all relevant factors pursuant to KRS 403.270. As she stated in her order at page 7:

The Court is required pursuant to KRS 403.270 to determine custody in accordance with the best interest of the child and equal consideration should be given to each parent. The Court is to consider all relevant factors. In this case, the Court is giving equal consideration to the grandparents [Appellants] and to the parents [the Appellees].

As the trial court correctly pointed out in its order KRS 403.270 requires that the circuit court "determine custody in accordance with the best interests of the child [with] equal consideration . . . given to each parent[.]" Additionally,

[t]he 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.

As noted in KRS 403.270, the list is not necessarily exclusive. The court is only required to consider these factors; the statute does not require the court to make findings of fact as to each factor.

In McFarland v. McFarland, Ky. App., 804 S.W.2d 17 (1991), we determined that the court's simple statement that "the Respondent is the fit and proper person to have custody of the three minor children" was less than adequate under the requirements of KRS 403.270, and remanded for more specific findings. However, in the case under consideration, the findings are extensive and the record reflects that substantial, albeit conflicting, evidence was presented to the court.

"Findings 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 the witnesses." CR 52.01. "[T]he reviewing court's basic concern is whether there is sufficient evidence, as detailed by the record, to support the decision of the trial court. If so, then the trial

court's decision is not clearly erroneous." Taylor v. Taylor, Ky., 591 S.W.2d 369, 370 (1979).

We agree with Appellees that Appellants are attempting to re-litigate this case on appeal. Because several of the facts were in dispute below, it is possible that another court would have made different findings. However, we will not substitute our judgment for that of the circuit court unless a manifest abuse of discretion has occurred. See, Smith v. Smith, KY., 429 S.W.2d 387 (1968). The test of abuse of discretion is "whether the trial judge's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles." Commonwealth v. English, Ky., 997 S.W.2d 941, 945 (1999) (citations omitted). We are not persuaded that the Family Court's decision failed this test. Having reviewed the entire record, we cannot find that the Family Court failed to give adequate consideration to all the relevant factors before it awarded custody to the Appellees. The court's finding that Cash's interests would be best served by remaining with his natural parents was supported by substantial evidence. Thus, we find no clear error in any of the court's factual findings and no abuse of discretion in its custody decision.

A secondary issue in this appeal is that the trial court refused to accept "complete criminal histories" of the Appellees as evidence during the evidentiary hearing held in this case. A review of the record indicates that Appellants attempted to introduce into the record numerous traffic violations of the Appellees dating back to May 7, 1989. These violations involved charges for no insurance, improper registration plates, speeding,

no operator's license, reckless driving, attempting to elude, operating on a suspended license, failure to register a transfer, violation of vehicle exhaust testing, failure to notify of a change of address, etc. While these violations were excluded, the court did permit testimony as to more serious criminal activity such as driving under the influence, assaults, drug offenses, and domestic violence. The court's order addressed the past pattern of behavior of Appellees, both criminal and otherwise, which it deemed significant and relevant to the custody issue. We find no abuse of discretion in this matter and further find that if any error occurred, which we do not believe did, that it was harmless error and would be no basis for reversal. CR 61.01.

As to Appellants' second appeal (No. 2000-CA-001648), relating to summer visitation and prohibiting Appellants from removing Cash from Kentucky or Southern Indiana, we affirm.

The court considered Appellants' motion to take Cash to South Carolina for vacation during a hearing held on May 30, 2000. On June 1, 2000, the court entered its order denying the motion noting that it considered the parties' arguments. Thereafter, the court entered its June 20, 2000, order which is the subject of this appeal. The order stated that:

On Motion of the respondent, Brittany Barmore, and the Court being sufficiently advised,

IT IS HEREBY ORDERED that the respondents, or their agents, are prohibited from removing Cash Barmore from the Commonwealth of Kentucky during any periods of visitation unless the custodial parents expressly, in writing and in advance, permit

such removal, Southern Indiana excluded from order.

Appellants concede that trial court orders dealing with matters such as visitation will not be disturbed absent a showing of an abuse of discretion. CR 52.01. Appellants cite Bales v. Bales, Ky., 418 S.W.2d 763 (1967), which set the standard for appellate review in such cases:

We review this case within the framework of CR 52.01 which prescribes that the findings of fact by the trial court shall not be set aside unless 'clearly erroneous.' We are also mindful of the principle that the chancellor's determination in matters of custody and visitation will not be disturbed absent a showing of an abuse of his judicial discretion. Moreover, in custody and visitation cases, the doors of the court remain open for the purpose of modifying orders upon a showing of changed conditions requiring such modification for the best interests and welfare of the child involved. KRS 403.070.

Id. at 764.

As mentioned earlier in the discussion of the first appeal referencing the Smith case, "because several of the facts were in dispute below, it is possible that another court would have made different findings. However, we will not substitute our judgment for that of the circuit court unless a manifest abuse of discretion has occurred." While it is unfortunate that the parties hereto cannot come to amicable resolutions concerning the custody and visitation of Cash, and each party can easily point out glaring faults and inadequacies of the other, the Family Court's order in this matter is supported by substantial evidence and is not clearly erroneous nor an abuse of discretion.

For the foregoing reasons, the orders of the Jefferson Family Court, which are the subject of Appeal Nos. 1999-CA-002378-MR and 2000-CA-001648-MR, are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEES, IN APPEAL
NO. 1999-CA-002378-MR:

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No brief filed for Appellee,
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2000-CA-001648-MR