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Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000195-MR

CHRYSTAL DAWN FLOWERS

APPELLANT

v. ADVANCED APPEAL FROM METCALFE CIRCUIT COURT
HONORABLE BENJAMIN L. DICKINSON, JUDGE
ACTION NO. 97-CI-00140

JAMES EDWARD CAMPBELL

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: COMBS, HUDDLESTON, and MILLER, Judges.

COMBS, JUDGE: Chrystal Dawn Flowers (formerly Campbell) appeals from an order entered by the Metcalfe Circuit Court on December 28, 2000, that changed the primary residential custodian of her son from her to her former husband, James Edward Campbell. We affirm.

Chrystal and James were married on April 13, 1996. Their son, Dakota Taylor, was born on September 10, 1996. The parties' marriage was dissolved by decree on March 3, 1998. Pursuant to the divorce decree, the parties were awarded joint custody of Dakota with Chrystal to be the "principal residential custodian of the child."

On October 4, 2000, James filed a motion requesting that he be designated residential custodian of the child. James alleged that Chrystal had telephoned him days earlier and had asked "that he take Dakota and keep him safe because of various

problems including physical abuse" perpetrated against her by her boyfriend, Stevie Trent. In support of the motion, James also filed an affidavit, in which he swore as follows:

On occasion, Chrystal has had a black eye, which, according to my son, came as a result of Stevie Trent striking her. Recently, on the 19th day of September, Chrystal called me and asked that I come to Edmonton to take Dakota with me so he would be safe. . . .On that occasion, she was very swelled and bruised. According to both her and Dakota, this was a result of a "fist fight that Mommy had with Stevie."

Campbell Affidavit at 1-2.¹

The Domestic Relations Commissioner (DRC) heard evidence in this matter at hearings conducted on November 2, 2000, and on November 5, 2000. His report was filed November 20, 2000. The DRC noted that the parties had initially "divided custodial time with the child more or less evenly, three days with the father and three days with the mother." After discussing evidence related to Chrystal's developing relationship

¹A domestic violence petition was filed by Chrystal against Stevie Trent on September 19, 2000. She related the events that precipitated her petition as follows:

Stevie called me at work. He was mad. Dakota had told him that he had saw his dad. He told me not to ever call back. I went over to our trailer and got some of the kids clothes and also mine. Then I went down to his moms to get the kids. He went inside with Matthew. We got into an argument he got me down on the ground, hit me in the face, knocked my glasses off. He finally let me have Matthew. But before I could leave he hit me in the face again. This happened in front of the kids.

The petition was subsequently dismissed at Chrystal's request.

with Trent, the DRC concluded that the evidence "paints a classic picture of psychological and physical abuse." Before concluding his report, the DRC noted that he had interviewed the child off the record with the consent of the parties. Without disclosing the contents of the interview, the DRC revealed that it had provided supporting evidence of violence in the child's home. Concluding his report, he found that "it is in Dakota's best interest to reside with his father." He believed it "highly likely that Dakota is exposed to violence in his own home on a regular basis" and was concerned that "Dakota may well be a victim of that violence himself if he remains in that home." Finding that Dakota's physical, moral, and emotional health was endangered by his continued residence with Chrystal and Trent, the DRC recommended that the child reside primarily with James. Chrystal's exceptions to the report followed.

The circuit court entered its order confirming the change of residential custodian on December 28, 2000. This appeal followed.

On appeal, Chrystal argues that the circuit court erred by permitting the DRC's unrecorded interview of four-year-old Dakota. While KRS 403.290(1) requires a record to be made of the court's interview of a child in chambers, the parties to this matter urged the court to conduct an off-the-record interview with the child. Having specifically waived this procedural point, Chrystal cannot now complain and allege error.²

²While Chrystal contends that the videotaped record of the second day's hearing (in which counsel responded to the court's
(continued...)

Next, Chrystal complains that the evidence does not support the trial court's findings and that the findings do not support a modification of custody. In reviewing a child custody determination, the standard of review is whether the factual findings of the trial court are clearly erroneous. CR 52.01; Reichle v. Reichle, Ky., 719 S.W.2d 442 (1986). Findings of fact are clearly erroneous if they are manifestly against the weight of the evidence or if they are not supported by substantial evidence. Wells v. Wells, Ky., 412 S.W.2d 568 (1967). Since the trial court is in the best position to evaluate the testimony and to weigh the evidence, an appellate court should not substitute its own opinion for that of the trial court. Reichle, supra. A trial court's decision's regarding custody will not be disturbed absent an abuse of discretion. Cherry v. Cherry, Ky., 634 S.W.2d 423 (1982). Abuse of discretion implies that the trial court's decision is unreasonable or unfair. Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679 (1994).

Having reviewed the record, we hold that the trial court's findings are based on substantial evidence and are not clearly erroneous. Moreover, the court did not abuse its discretion in reaching its ultimate determination based on those findings. Again, the court specifically found that "Dakota's physical, moral, and emotional health is endangered by his continued residence with Chrystal and Trent." This finding is a

²(...continued)
request to interview the child off-the-record) was not made a part of the appellate record, our review nonetheless indicates that it was received by this court with the remainder of the trial court record.

necessary determination pursuant to KRS 403.340(2)(c) and is more than amply supported by the record.

There was considerable testimony before the DRC about Dakota's exposure to Trent's violent temper. The allegations that Crystal initially made against Trent in her Petition for Domestic Violence Order were consistent with statements she made weeks later to an investigating social worker, Jeremy Catron. The DRC was not persuaded by Chrystal's later testimony apparently tailored toward minimizing the volatile nature of her household. The trial court did not abuse its discretion in modifying the parties' custody arrangement.

The order of the Metcalfe Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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