

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000404-MR

JACQUILINE FRANCISCO BARNES

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JEAN CHENAULT LOGUE, JUDGE
ACTION NO. 99-CI-00764

KIRK ANTHONY GARRETT

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: McANULTY, MILLER, AND TACKETT, JUDGES.

McANULTY, JUDGE: This is an appeal to determine the primary residential custody of the two daughters of Jacqueline Francisco Barnes (hereinafter appellant) and Kirk Anthony Garrett (hereinafter appellee). The parties were never married. The Madison Circuit Court awarded them joint custody of the children, and designated appellee primary residential custodian. Appellant argues that the trial court applied the incorrect standard to this case, as she claims this was a custody modification rather than an initial custody determination. In addition, appellant argues that the trial court's award of custody was contrary to the evidence before the court. Finally, she argues that the

trial court relied upon evidence which was not properly before the court.

Appellant contends that the trial court erred in using the "best interest of the child" standard in KRS 403.270 because this was not an initial custody determination, but a modification of a previous custody order. In 1993, appellee's paternity of the children was established in the Madison District Court. At the same time, appellee was ordered to pay child support. Appellant was the custodian of the children, and appellee had visitation with them. In 1997, appellee became behind on child support payments, and the parties returned to district court to resolve the matter. The parties agreed to have joint custody of the children. The Madison District Court entered an Agreed Order Holding Child Support in Abeyance and Order Payment on Arrears on August 19, 1997. The order stated, in pertinent part:

The parties herein, having agreed to the terms of child support for the minor children Brittney Garrett, d.o.b. 6/1/90 and Kember-Le Garrett, d.o.b. 4/18/93; the parties of the minor children currently have joint custody and having, therefore, agreed that child support payments be suspended and the Court being duly advised therefrom;

IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

1. That current child support payments shall be held in abeyance for so long as the parties have joint custody of the minor children or until further orders of the Court.

Appellant alleges that this was an award of joint custody so that when appellee filed his petition for custody and visitation in this case it should have been treated as a modification of a custody decree under KRS 403.340. KRS

406.051(2) permits a district court to exercise jurisdiction, concurrent with that of the circuit court, to determine matters of child custody and visitation in cases where paternity is established under the Uniform Act on Paternity. Appellant contends that the district court exercised this jurisdiction in her case. She argues that the result of this is that the circuit court had to find a serious endangerment to the children, under KRS 403.340(2), in their present environment, since it had been less than two years since the district court order.

We disagree. The statute in question governs the modification of a "custody decree." We do not find that the district court issued any decree or order awarding custody in this case. Rather, the district court's order deals only with the issue of child support. The court did not make an award of custody, but dealt only with the custody arrangement decided upon by the parties. Most significantly for our decision, we note that nowhere in the Agreed Order is there any indication that the district court employed the factors designated in KRS 403.270 and the best interest of the child standard to determine custody. These are requirements under KRS 403.270 when a court is ruling on custody issues. Therefore, we find that the trial court was issuing an order regarding child support while acknowledging the predetermined custody arrangement of the parties, not issuing a "custody decree."

The determination of the Madison Circuit Court below as to custody issues was an initial custody determination in this

case. The Madison Circuit Court's use of the best interests of the child standard was proper.

Next, appellant argues that even if the trial court employed the correct standard, the award of custody in this case was contrary to the evidence. Appellant did not designate the videotape of the hearing in this case, and so we are unable to review the evidence presented to determine whether the award was supported by the evidence. See CR 75.01.

Appellant further argues that the trial court failed to follow the factors in KRS 403.270 in reaching its decision on custody. Having reviewed the findings of fact and order in this case, we believe the trial court considered all of the factors in the statute in determining its decision on custody. We do not find that the trial court concentrated on some factors to the exclusion of others.

Appellant argues that the trial court improperly considered the results of her drug test, and that the drug test results were hearsay and were not properly authenticated at the hearing in this case. Without a videotape of the hearing, we are unable to review these arguments as to the admission of the drug tests into evidence or even as to the preservation of objections to this evidence. Therefore, we find that these arguments were not preserved for review.

Finally, appellant argues that the trial court erred in giving appellant's drug use any consideration without a finding that this misconduct had affected or was likely to affect the children adversely, citing Krug v. Krug, Ky., 647 S.W.2d 790

(1983). We are unable to determine whether appellant objected to the drug test evidence on this ground without the videotape of the hearing. Further, appellant did not make a request for a finding of fact on this issue. CR 52.04. Appellant argues that KRS 403.270(3) requires a finding of fact as to how appellant's drug use impacted the parent/child relationship in this case. Krug stated that the trial court may consider whether misconduct of a parent is likely to adversely affect the child in the future if it continues. Id. at 793. The court stated in its findings that appellant's drug usage, and exposure of the children to it, was of concern to the court. We believe the trial court articulated a finding that the drug use of appellant had affected or would affect the children. We conclude that the findings of the trial court were sufficient on this point. We do not find any error.

We affirm the Order of the Madison Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Tracey E. Burkett
Richmond, Kentucky

BRIEF FOR APPELLEE:

Jimmy Dale Williams
Richmond, Kentucky