

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002006-ME

M.D.A.

APPELLANT

v.

APPEAL FROM BARREN FAMILY COURT
HONORABLE W. MITCHELL NANCE, JUDGE
ACTION NO. 03-CI-00110

D.A., JR.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON AND VANMETER, JUDGES; GRAVES,¹ SENIOR JUDGE.

GRAVES, SENIOR JUDGE: M.D.A. appeals from an order of the Barren Family Court granting D.A., Jr.'s, motion to modify custody and awarding him primary residential custody of the parties' minor child, L.F.A. We affirm.

¹ Senior Judge J. William Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

FACTUAL AND PROCEDURAL BACKGROUND

The parties were married on December 14, 2002. Their only child, L.F.A., was born prior to the marriage on June 22, 2001. On February 21, 2003, M.D.A. filed a petition for dissolution of marriage. In the divorce proceedings, M.D.A. and D.A., Jr., each sought custody of L.F.A.

On November 18, 2003, the family court entered a decree dissolving the marriage, reserving, however, the issue of custody. On June 28, 2004, the family court entered an order awarding the parties' joint custody of the child, with M.D.A. designated as the primary residential custodian.

On December 16, 2005, D.A., Jr., filed a motion accompanied by two affidavits asserting reasons why the prior custody award should be modified to designate him as the child's primary residential custodian. Following an evidentiary hearing, on June 12, 2006, the family court entered an order granting D.A., Jr.'s, motion to modify custody. Because of a problem with the distribution of the original order, however, the order was reissued and entered on August 28, 2006. This appeal followed.

STANDARD OF REVIEW

In custody matters tried by a court without a jury, the court's “[f]indings 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.” Kentucky Rule of Civil Procedure (CR) 52.01; *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky.App. 2002). “A factual finding is not clearly erroneous if it is supported by substantial evidence.”

Sherfey, 74 S.W.3d at 782. “Substantial evidence” is “evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people.” *Id.* As stated in *R.C.R. v. Commonwealth, Cabinet for Human Resources*, 988 S.W.2d 36 (Ky.App. 1998), “when the testimony is conflicting we may not substitute our decision for the judgment of the trial court.” *Id.* at 39.

After a trial court makes the required findings of fact, it must then apply the law to those facts. The resulting custody award as determined by the trial court will not be disturbed unless it constitutes an abuse of discretion. *Sherfey*, 74 S.W.3d at 782-83. Broad discretion is vested in trial courts in matters concerning custody and visitation. *See Futrell v. Futrell*, 346 S.W.2d 39 (Ky. 1961); *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky.App. 2000). “Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.” *Sherfey*, 74 S.W.3d at 783. Essentially, while “[t]he exercise of discretion must be legally sound,” *id.*, in reviewing the decision of the circuit court, the test is not whether the appellate court would have decided it differently, but whether the findings of the trial court were clearly erroneous or an abuse of discretion. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). Mere doubt as to the correctness of the trial court's decision is not enough to merit a reversal. *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967).

ALLEGED ERRONEOUS FINDINGS

M.D.A. alleges that the family court made three erroneous findings in support of its decision to modify custody: (1) that her friend Anthony Mosby had been convicted of drug charges which resulted in his receiving shock probation and participation in drug rehabilitation; (2) that her friend Ronnie Shirley had been a defendant in drug prosecutions; and (3) that M.D.A. had been involved in a series of romantic relationships. M.D.A. argues that a result of these three erroneous findings, the family court's custody decision should be overturned.

To place matters in context, we begin by setting forth in full the family court's findings relevant to our review:

10. That so as to determine

- whether a change has occurred in the circumstances of the child or his custodians ([M.D.A.] and [D.A., Jr.] being the child's joint custodians and [M.D.A.] having been designated the child's primary residential custodian) since entry of the prior decree (on June 28, 2004), and
- whether a modification of custody (from designation of [M.D.A.] to designation of [D.A., Jr.] as primary residential custodian, each of the parties having joint custody of the child) is necessary to serve the best interests of the child, with respect to consideration of the following relevant factors among those stated in KRS^[2] 403.340(3), the court finds as follows:

*(a) the factors set forth in KRS 403.270(2) to determine the best interests of the child;*³

² Kentucky Revised Statutes.

³ KRS 403.340(3)(c).

(i) *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;*⁴ and

(ii) *the mental and physical health of all individuals involved;*⁵

A. [M.D.A.] has had a series of residences, a series of romantic relationships (some with persons of questionable character), and a series of jobs, in that:

(1) the only time the parties' child, L.F.A., has not resided with [M.D.A.] was during the period beginning in late August 2005 (when [M.D.A.] consented to the child's enrollment in the Portland [Tennessee] Montessori Academy on August 29, 2005) and ending November 22, 2005, and during such period the child resided in the home of his paternal grandparents, D.A., Sr., and S.A., his wife (in Tennessee) where [M.D.A.] also resided;

(2) during such period beginning in late August 2005 and ending November 22, 2005, [M.D.A.] had agreed that the child could reside in the home of his paternal grandparents because [M.D.A.] and [D.A., Jr.] then were contemplating reconciliation, but their reconciliation was unsuccessful;

(3) upon failure of the parties' efforts to reconcile, [M.D.A.] notified [D.A., Jr.] by telephone and, on November 22, 2005, unilaterally removed the residence of the parties' child, L.F.A., from the home of the child's paternal grandparents (D.A., Sr., and S.A., his wife) in Tennessee, to the home of [M.D.A.'s] aunt, B.C., in Louisville, Kentucky, where [M.D.A.] and the parties' child remained until after Christmas 2005;

(4) [M.D.A.] later moved from Louisville, Kentucky, back to 115 Leech Avenue, Glasgow, Kentucky, where she was working at T Mart on Lexington Drive on a limited, part-time

⁴ KRS 403.270(2)(c).

⁵ KRS 403.270(2)(e).

basis; thereafter [M.D.A.] left this address to reside at 190 Hidden Cove, Lucas, Kentucky, and, even later, resided on McKenna Street in Glasgow, Kentucky;

(5) [M.D.A.] has had a series of romantic relationships, including, but not limited to, relationships with Anthony Mosby, Josh Pedigo, Chad Ritchie, and Shane Vance (Mr. Shane Vance having maintained an unmarried cohabitation living arrangement with [M.D.A.] from early January 2005 until April 2005);

(6) [M.D.A.'s] romantic relationship with Anthony Mosby is particularly noteworthy because Mr. Mosby has pleaded guilty to some significant drug charges resulting in shock probation and participation in drug rehabilitation; moreover, [M.D.A.] has had the child, L.F.A., in the presence of Anthony Mosby, and on at least one occasion Anthony Mosby accompanied [M.D.A.] and L.F.A. to Scottsville, Kentucky, for a custodial exchange;

(7) [M.D.A.] has been connected with Ronnie Shirley, who has been a defendant in drug prosecutions; on occasion Mr. Shirley has provided transportation for [M.D.A.] to take the child to Allen County, Kentucky, for custodial exchange; and,

(8) [M.D.A.] (who does have a loving relationship with the child) has held a series of fairly non-productive jobs, indicating that her earlier intentions and efforts toward advancing her education and securing work have not been successful; [M.D.A.] has experienced a nomadic lifestyle [] the past several months, often engaging in significant social contacts with persons entangled in the illegal drug culture;

whereas,

B. [D.A., Jr.] has remarried, taken possession of an adequate dwelling, and acquired suitable employment, all of which tend to enable [D.A., Jr.] to provide a stable home environment for the parties' child in that:

(1) [D.A., Jr., and S.A., his wife (the spouses having been married recently), have established a stable home

environment, have ample room and ability to care for, nurture, and educate [L.F.A.];

(2) the family headed by [D.A., Jr.] and his wife, Susanne Alexander, includes [D.A., Jr.'s] wife's four-year-old son, [], with whom [L.F.A.] appears to have bonded favorably; although S.A. has most recently worked as a dental assistant, she is not working at the time because of having given birth to her and [D.A., Jr.'s] daughter in March 2006; and

(3) [D.A., Jr.] has substantial and productive employment and that he has been engaged in such employment for a significant period of time, and is capable of and willing to support, nurture, and educate L.F.A.;

and,

(b) that, pursuant to KRS 403.340(3)(e), the harm likely to be caused by a change of environment is outweighed by its advantages to him.

11. That the child has lived with no other person than [M.D.A.] and [D.A., Jr.] since birth; there has been no other action concerning custody of the child; and there is none now pending in any other state.

12. That, in consideration of all relevant factors including those stated in KRS 403.270(2), (5), a custodial decision retaining the award of the minor child's JOINT CUSTODY to [M.D.A.] and [D.A., Jr.] and designating [D.A., Jr.] as primary residential custodian (with [M.D.A.] having rights of visitation or custodial time), is in the best interest of the minor child, [L.F.A.] (a male, now age nearly five [5] years old, born June 22, 2001).

13. That since entry of the decree (on June 28, 2004), changes have occurred in the circumstances of the child and the parties (in that

[a] [M.D.A.] has had a series of residences, a series of romantic relationships [some with persons of questionable character], and a series of jobs, *whereas*,

[b] [D.A., Jr.] has remarried, taken possession of an adequate dwelling, and acquired suitable employment, all of which tend to enable [D.A., Jr.] to provide a stable home environment for the parties' child),

and the court finds that modification of custody (by designating [D.A., Jr.] as primary residential custodian) is necessary to serve the best interests of the child; see, for example, KRS 403.340(3).

Insufficient Evidence - Criminal Charges

We now consider M.D.A.'s contention that there was insufficient evidence to support the family court's findings that her friends Anthony Mosby and Ronnie Shirley have been charged with drug offenses.

First, we note that M.D.A. does not deny the verity of the finding, only that there was not adequate evidence presented to support the findings.

In response, D.A., Jr., contends that the family court took judicial notice of Mosby and Shirley's drug-related court cases, citing us to Barren Circuit Court Case No. 04-CR-00379 with respect to Mosby, and Barren Circuit Court Case Nos. 06-CR-00026, 06-CR-00027, 06-CR-00028, 06-CR-00032, and 06-CR-00074 with respect to Shirley. These are public records retrievable through the Administrative Office of the Court's CourtNet court record access system.

The trial court was aware of the foregoing, and, as such, we will not disturb its finding that Mosby and Shirley have been involved in drug-related prosecutions.

Insufficient Evidence - Romantic Involvements

Among the family court's findings was a finding that “[M.D.A.] has had a series of romantic relationships, including, but not limited to, relationships with Anthony Mosby, Josh Pedigo, Chad Ritchie, and Shane Vance[.]” While M.D.A. admits to having been romantically involved with Mosby and Vance, she contends that the evidence does not support that she had a romantic relationship with Pedigo and Ritchie. M.D.A. alleges that the evidence demonstrated only that Ritchie was a friend, and that she and Pedigo “were never in a serious relationship.”

Assuming that M.D.A. is correct that the family court overstated the extent of her relationship with Pedigo and Ritchie, we believe the error to be harmless. *See* CR 61.01. In light of the other findings in support of the family court's custody decision, we do not believe findings reflecting that the actual nature of the relationships were as stated by M.D.A. would have changed the outcome of the custody determination. As such, we will not disturb the family court's custody decision based upon its perhaps erroneous characterization of the M.D.A.'s relationship with Pedigo and Ritchie. CR 61.01.

CUSTODY DETERMINATION

In light of the family court's findings as set forth herein, the court did not abuse its discretion in modifying custody to designate D.A., Jr., as the primary residential custodian of L.F.A. *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky.App. 2002).

CONCLUSION

For the foregoing reasons the judgment of the Barren Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John B. Gardner
Glasgow, Kentucky

BRIEF FOR APPELLEE:

Robert M. Alexander
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