

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000965-ME

PETER SHELLEY MILLS

APPELLANT

v. APPEAL FROM SCOTT FAMILY COURT
HONORABLE TAMRA GORMLEY, JUDGE
ACTION NO. 99-CI-00251

CHERIE ANN MILLS

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: CAPERTON AND TAYLOR, JUDGES; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Peter Shelley Mills appeals the April 24, 2009,
findings of fact, conclusions of law, and final order of the Scott Family Court.

That order gave sole custody of Peter's three minor children to their mother and his
ex-wife, Cherie Ann Mills, and continued to prohibit all contact between Peter and

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

the children until several conditions had been fulfilled. Because we hold that the trial court improperly entered an order modifying custody of the parties *sua sponte* and also entered findings that are unsupported by substantial evidence, we reverse and remand.

The parties were divorced on January 24, 2001. A final decree was entered which granted joint custody of the parties' children, designated Cherie as the primary residential custodian, and created a timesharing schedule for Peter. On February 15, 2007, Peter filed a motion to enforce the timesharing agreement, alleging that Cherie had ceased visitation without explanation. At that time, the children's ages were seven, nine, and ten. On February 16, 2007, Cherie filed a motion to terminate visitation and alleged that Peter had neglected and abused the children. In sum, Cherie alleged that Peter had left the children alone without supervision, had physically abused all three of the children, and had sexually abused the nine-year-old daughter.

After multiple delays, the matter was heard on July 30, 2008. During the interim, Peter had not been allowed any contact with the children. The Cabinet for Health and Family Services (CHFS) had completed a report finding that the allegations of abuse were unsubstantiated and the Scott County Grand Jury failed to indict Peter for any of the criminal charges stemming from the allegations. The CHFS report stated:

The finding of neglect, physical abuse, and sexual abuse in regards to [the children] is UNSUBSTANTIATED, and no case will be opened. The finding is based on

interviews with the children, as well as inconsistencies with their statements, and not being able to give details. It is also based on interviews with Peter Mills, him passing a lie detector test, the CAC unsubstantiating the sexual abuse, and the grand jury handing the indictment back as a no true bill.

(Emphasis in original).

In the meantime, Cherie had begun taking the children to Dr. Cheryl Pearson for treatment of physical and sexual abuse. Dr. Pearson was deposed and testified that her treatment of the children was based entirely upon Cherie's allegations of abuse and not upon Dr. Pearson's own conclusions that abuse had taken place. Dr. Pearson also testified that she was biased against Peter, that she could not make an impartial recommendation as to custody or visitation, and that to do so would be acting outside her role as a therapist. She testified that she had no idea what was required in order to make a determination of sexual abuse in a custody case and that Dr. Feinberg was the "go-to" person for making such determinations.

By the time of the hearing, Cherie, Peter, and the children had all been evaluated by Dr. David L. Feinberg, at the request of the court. Dr. Feinberg submitted a report to the court, which concluded:

The results of this evaluation did not yield clear evidence that [daughter] had been sexually abused or that the children have suffered from physical abuse. The children related substantially different versions of their father's behavior. A clear pattern of questionable parental behavior on his part was indicated but not at the level of physical or sexual abuse.

Dr. Feinberg made the following recommendations:

It is strongly recommended that Cherie return to long-term individual counseling It is strongly recommended that Peter participate in long-term individual counseling It is recommended that Peter and Cherie share permanent joint custody of the children. Because there has been a long period of no contact between Peter and the children, reestablishing the parent-child relationship should occur gradually and under the supervision and guidance of a mental health professional. Therefore, it is recommended that Peter and the children participate in reconciliation therapy with a licensed therapist experienced in relational or family therapy. Once reconciliation therapy has been ongoing for a period of three months, additional unsupervised timesharing could begin to take place.

To ease any anxiety the children may experience as visitation resumes in a more normalized fashion, daytime only, unsupervised visitation should take place for three months. At the end of the six-month transition period, if the reconciliation therapist deems appropriate, it is recommended that Peter resume having regular, unsupervised timesharing with the children according to the previously established timesharing plan.

It was further recommended that a Guardian *ad litem* be appointed for the children and that Peter and Cherie both enlist parenting coaches to assist with parenting instruction and address specific parenting issues.

After some time passed with no ruling from the trial court, Peter filed a motion for a ruling September 12, 2008. The motion was heard on October 1, 2008, and continued. Again, several months passed with no ruling, and on January 9, 2009, Peter filed a petition for a writ of mandamus with this Court. On April 14, 2009, that petition was granted and the trial court was ordered to issue a ruling on

the pending visitation order within ten days.² On April 24, 2009, the trial court entered its findings of fact and conclusions of law and final order. In that order, the trial court modified the joint custody arrangement of the parties and awarded sole custody to Cherie. It was also ordered that all contact between Peter and the children should cease until certain conditions set by the court were met. It is from this order that Peter appeals.

We begin our analysis by first noting that the trial court entered an order modifying custody of the parties *sua sponte*. It is clearly established that custody may not be modified unless a party has filed both a motion to do so and a supporting affidavit. KRS 403.350. A court may not modify custody without both of these. *Petrey v. Cain*, 987 S.W.2d 786 (Ky. 1999). In the present action, Cherie filed a motion to modify timesharing, not custody. Accordingly, the trial court's order is reversed and remanded with instructions to hold a hearing on the issue of timesharing alone and not custody.

Peter argues that the trial court's findings of fact are clearly erroneous and that its legal conclusions constitute an abuse of discretion. Typically, because we are already reversing the trial court's order on other grounds, it would not be necessary for us to address this issue. However, because the trial court's order also ceased contact between Peter and the children, we presume that its findings of fact may reappear after a hearing for timesharing modification. For that reason, we believe a review of the trial court's findings is warranted.

² See *Mills v. Gormley*, 2009-CA-000061-OA (order entered 04-14-09; finality 06-04-09).

This Court will not disturb a trial court's findings of fact unless we hold that they are clearly erroneous. CR³ 52.01.

A factual finding is not clearly erroneous if it is supported by substantial evidence. "Substantial evidence" is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. 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. 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. The exercise of discretion must be legally sound.

Sherfey v. Sherfey, 74 S.W.3d 777, 782-3 (Ky. App. 2002) (citations omitted) (overruled on other grounds by *Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008)).

Peter challenges the trial court's findings as a whole, but points to several specific findings. The first of these reads as follows:

Finally, Dr. Pearson recognized that [Cherie]'s opinion of [Peter] was having an alienating effect in the children but did not believe it was causing the children to fabricate the abuses upon them by [Peter].

This is supported by Dr. Feinberg, the forensic psychologist retained by the parties to provide a custodial evaluation. Dr. Feinberg reports that "[the children] are at-risk children." While Dr. Feinberg did not label [Peter]'s conduct sexual or physical abuse, he does conclude that the children "believe that [(Peter)] has been abusive.

³ Kentucky Rules of Civil Procedure.

(Quotations in original). After reviewing the testimony of Dr. Pearson and the report of Dr. Feinberg, it appears that the trial court's findings of fact are made wholly out of context, are comprised of select portions of the doctors' testimony and report, and as such are clearly erroneous. Dr. Pearson specifically stated that she could not make a determination as to whether the children had been abused. Furthermore, nowhere in Dr. Feinberg's report can we find a conclusion that the children have or have not fabricated the allegations against their father, for *any* reason. What Dr. Feinberg does say is:

Cherie has an extremely negative view of Peter that she has shared with the children. Counseling should also enable Cherie to be appropriately supportive of the children's relationship with their father. *The children continue to act out her distrust and dislike of Peter.*

(Emphasis added). This conclusion of Dr. Feinberg is in contrast to the above finding of the trial court, a finding which is therefore unsupported by substantial evidence.

The next trial court finding that Peter challenges reads: "Dr. Pearson is qualified to render opinions regarding the children's statements of abuse and to provide this Court with unbiased recommendations on how best to help these children now and in the future." Given Dr. Pearson's statements that she was biased against Peter, that she could *not* make impartial recommendations, and that to do so exceeded her role as the children's therapist, we find ourselves completely perplexed as to the evidentiary basis of this finding and, thus, find that it is also unsupported by substantial evidence.

Lastly, Peter challenges the following specific finding of the trial

court:

More concerning to this Court is that when Dr. Feinberg asked [the daughter] what does FATHER “do wrong,” [she] never referred to the sexual contact. Implying she may believe, wrongly, that this is not wrong or normal contact between a parent and child.

(Capitalization and quotations in original). In short, the trial judge draws her own psychological conclusions from Dr. Feinberg’s evaluation, conclusions which she is not trained to do. Furthermore, this statement makes it clear that the trial judge has already ascertained that the sexual abuse has taken place and that the daughter’s failure to mention it as something “wrong” is an indication of the daughter’s distorted frame of mind, not a lack of evidence of the actual abuse. In short, it appears to us that the trial court has hand-selected statements of both Dr. Pearson and Dr. Feinberg in order to reach a foregone conclusion. We are further persuaded of this by the trial court’s conclusion that it is going to “err on the side of caution” when continuing to prohibit all contact between the children and Peter, a standard of proof which has absolutely no legal basis. As there is a legally, and socially, recognized interest in children maintaining relationships with both parents, erring on the side of caution would be supervised visitation, as recommended by Dr. Feinberg. However, the trial court completely ignores this interest as well as the harm that could result from the continued prevention of contact between Peter and his children.

For the foregoing reasons, the April 24, 2009, findings of fact, conclusions of law, and final order of the Scott Family Court is reversed and remanded with instructions to hold a hearing on the issue of timesharing alone. Further, due to the circumstances of this case, the trial judge is seriously encouraged to consider whether at this point in the litigation the hearing should be assigned to another judge on remand.

ALL CONCUR.

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