

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001437-ME

NATASHA RENEE DALE (NOW PREWITT)

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 00-CI-00009

BENJAMIN LEE DALE

APPELLEE

OPINION AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** * * * * *

BEFORE: DIXON, LAMBERT, AND WINE, JUDGES.

WINE, JUDGE: Natasha Renee Dale (now Prewitt) appeals from an order of the Montgomery Circuit Court which denied her motion to designate her as the residential custodian of her daughter, and granted the motion by Benjamin Lee Dale to limit Natasha's time-sharing. We find that the trial court did not abuse its discretion by denying her motion. However, while the trial court may have been

justified in limiting Natasha's time-sharing, the court abused its discretion by failing to set out the terms and conditions of Natasha's time-sharing. Hence, we affirm in part, reverse in part, and remand for additional findings and entry of a new order.

Natasha and Benjamin Dale were divorced by a decree of the Montgomery Circuit Court entered on June 6, 2000. Prior to entry of the decree, Natasha and Benjamin entered into a settlement agreement which specified that they were to share joint custody of their daughter, Madisen. The agreement designated Natasha as the primary residential custodian with Benjamin having specified time-sharing. The trial court's decree adopted the parties' agreement.

On August 16, 2005, Benjamin filed a motion to modify the custody arrangement. In support of the motion, Benjamin cited Natasha's disruptive behavior at Madisen's school, Madisen's excessive tardiness and absenteeism at school, Natasha's actions interfering with Madisen's relationship with him, and other allegations of misconduct by Natasha. After a hearing, the trial court found that the allegations were substantiated and justified a modification of custody. Thus, the court directed that the parties would retain joint custody, but designated Benjamin as Madisen's residential custodian. On appeal, this Court affirmed the trial court's decision. *Dale v. Dale*, 2007 WL 1519530 (Ky. App. 2007)(2006-CA-001889-ME).

On April 9, 2009, Benjamin filed a motion to modify Natasha's time-sharing with Madisen. Natasha responded with a motion seeking to be designated

as Madisen's residential custodian. After conducting a hearing on April 29, 2009, the trial court temporarily suspended Natasha's time-sharing with Madisen. The court also directed that Benjamin enroll Madisen in counseling.

The court conducted a further review of time-sharing on May 15, 2009. The court stated that it was too early to make a permanent decision regarding time-sharing. However, the court found that Madisen should have time-sharing with Natasha and Natasha's mother, but only at Benjamin's "reasonable discretion." Following another review on June 19, 2009, the court made this arrangement permanent. The court allowed regular time-sharing to resume, but stated that it would be at Benjamin's discretion and contingent upon good behavior by Madisen. The court also ordered that Madisen should continue in counseling and that all recommendations of the counselor be followed.

On appeal, Natasha first argues that the trial court abused its discretion by refusing to directly interview Madisen, by denying her motion to seal the record, and by denying her motion to order alcohol and drug testing for Benjamin and his wife Joyce. We find no abuse of discretion on any of these matters.

The decision to interview the child is discretionary with the court. Kentucky Revised Statute ("KRS") 403.290(1). In this case, the court determined that an interview with Madisen would not be helpful. Given the evidence, we cannot find that the court abused its discretion. Likewise, the trial court has the discretion to deny access to cases and files. *See Roman Catholic Diocese of*

Lexington v. Noble, 92 S.W.3d 724 (Ky. 2002). Since this case deals with a matter involving a juvenile, the trial court would have been within its discretion to seal the record. But sealing the record is not generally required in custody cases. While we appreciate that Natasha seeks this measure to protect Madisen's privacy, we cannot find that the trial court abused its discretion by denying the motion. Finally, the trial court considered Natasha's allegations about drinking in Benjamin's household and found them to be not credible. Given this finding, the court did not abuse its discretion by denying Natasha's motion to require drug and alcohol testing for Benjamin.

Additionally, Natasha argues that the trial court abused its discretion by giving Benjamin sole discretion on determining whether she receives time-sharing with Madisen. She also argues that the trial court abused its discretion by denying her motion to transfer residential custody to her. A modification of time-sharing generally does not alter the nature of the custody order. Thus, the trial court is not bound by the statutory requirements that must be met for a change of custody. Rather, the court can modify time-sharing based on the best interests of the child as set out in KRS 403.320(3). *Pennington v. Marcum*, 266 S.W.3d 759, 768 (Ky. 2008). Our review of the circuit court's decision to modify time-sharing is limited to determining whether substantial evidence supported the court's findings of fact and whether the court abused its discretion. *Id.* at 769.

Now we turn to the primary issue in this case – Benjamin's motion to restrict Natasha's time-sharing with Madisen and Natasha's responsive motion to

be designated as Madisen's primary residential custodian. The parties have had a number of disputes about their respective approaches to parenting. In the prior action, Benjamin stated that Natasha placed inordinate pressure on Madisen to have an appearance and to engage in activities beyond her maturity level. In his current motion, Benjamin states that the problem is ongoing, and Madisen continues to wear excessive makeup. Benjamin also accuses Natasha of encouraging Madisen's hostile and defiant behavior toward him. Benjamin testified that Madisen's attitude and behavior usually became worse after she spent time with Natasha. He is concerned that Natasha fails to monitor Madisen's use of the internet, and that she encourages Madisen's disrespectful behavior toward him and Joyce. He also testified that Natasha has sent cell phones home with Madisen despite his belief that that Madisen is too young to have a cell phone.

The current dispute over time-sharing arose over Madisen's use of the internet, particularly her maintenance of a page on *myspace.com*. Benjamin is concerned that Madisen represents herself as 16 or 17 years old on the page and that she has a number of male "friends" on her page who are in their late teens, twenties and thirties. Benjamin also objected to a number of pictures which Madisen had posted on her *myspace* page, as well as to the lack of privacy controls on the page.

Benjamin confronted Madisen about her internet use on March 15, 2009, shortly after learning about the *myspace* page. He recorded that confrontation and submitted the video as an exhibit at the hearing. Madisen did

not appreciate Benjamin's concerns about the danger of a twelve-year old posting personal information about herself on a public site. Of greater concern, however, was Madisen's hostile and disrespectful attitude toward her father. In addition, Madisen made several comments in the video about trying to kill herself.

Natasha states that she knew about Madisen's *myspace* page and that she monitors Madisen's use of the internet. She sees no problem with Madisen having a *myspace* page or a cell phone. Natasha also asserts that Madisen attempted to kill herself. She states that she found scratches on Madisen's wrist, and Madisen explained that she had tried to slit her wrist using plastic stars which were decorating her bedroom. Benjamin responded that Madisen received the scratches while playing with a puppy, but in any event he removed the stars from her bedroom.

Natasha complains that Benjamin has failed to continue counseling for Madisen. Benjamin responded that Madisen was seeing a counselor after the prior change in custody, but he discontinued the sessions because Madisen seemed to be doing better. The trial court directed Benjamin to resume counseling for Madisen.

Natasha also alleges that they have failed to care for Madisen's dental or mental health needs. Benjamin states that he has taken Madisen to the dentist, but she was not cooperative during several of the procedures. He admits, however, that he delayed some additional treatment for Madisen after he lost his dental insurance coverage through work.

Natasha next alleges that Benjamin and his wife Joyce drink excessively in front of Madisen. Natasha testified that Madisen has told her that she has seen Benjamin and Joyce drink two cases of beer a day. Benjamin and Joyce denied these allegations, although Benjamin admitted that he drinks beer on a daily basis and Joyce stated that she drinks once or twice a week. Both stated that they do not drink to excess in front of Madisen. The trial court stated that it believed Madisen had made these allegations to Natasha and concluded that they were not credible.

It is clear that Benjamin and Natasha have fundamental disagreements about the best way to parent Madisen. Under these circumstances, it would seem that joint custody may not be the most practical custody arrangement. But since neither party requested a modification of custody, the only question before the trial court was whether time-sharing and residential custody should be modified.

The trial court believed that Natasha was the source of much of the “drama” and disruption in Madisen’s life. The court also found many of Natasha’s allegations not to be credible. It is within the province of the trial court as the fact-finder to determine the credibility of the witnesses and the weight given to the evidence. *See Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008). *See also*, Kentucky Rule of Civil Procedure (“CR”) 52.01. Under the circumstances, we cannot find that the trial court clearly erred in its factual findings, or that it abused its discretion by denying Natasha’s motion to designate her as the residential custodian.

However, the trial court's order limiting Natasha's time-sharing with Madisen is more problematic. We agree with the trial court that the situation with Madisen appears to have devolved to the point that it is threatening to spin out of control. Since Benjamin is the residential custodian, the trial court reasonably found that he needs to have the tools to influence Madisen's behavior. Furthermore, the trial court believed that Natasha was encouraging Madisen's behavior. Thus, the trial court was within its discretion to temporarily suspend Natasha's time-sharing and to subsequently restrict it.

However, KRS 403.320(1) specifies that "[a] parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health." In this case, the trial court severely limited Natasha's time-sharing without making an express finding that time-sharing would seriously endanger Madisen's physical, mental, moral, or emotional health. Even if such a finding may be implied from the court's order, KRS 403.320(1) requires that "[u]pon request of either party, the court shall issue orders which are specific as to the frequency, timing, duration, conditions, and method of scheduling visitation and which reflect the development age of the child."

Here, the trial court did not issue any specific order regarding time-sharing, but simply gave Benjamin the sole discretion to decide when Natasha has time-sharing with Madisen. Although the trial court has considerable discretion to set time-sharing, it may not abrogate that discretion to a standing order or rule.

See Drury v. Drury, 32 S.W.3d 521 (Ky. App. 2000) (a standard time-sharing scheduled should not be controlling to determine reasonable time-sharing).

Likewise, we do not believe that it is appropriate for the court to allow one parent to have complete discretion over the child's time-sharing with the other parent unless there are compelling circumstances which warrant such an arrangement.

Consequently, we must set aside the trial court's order and remand for additional findings and a new order regarding time-sharing. The trial court may require additional evidence to make this determination, including testimony by the parties and recommendations by a custodian evaluator or counselor familiar with the parties and with Madisen. Thereafter, the court must enter a time-sharing order that is specific as to the frequency, timing, duration, conditions and method of scheduling time-sharing and which reflects Madisen's development, age, and needs. Further, the trial court may significantly restrict Natasha's time-sharing if it finds from the evidence that time-sharing would seriously endanger Madisen's physical, mental, moral, or emotional health.

Accordingly, the order of the Montgomery Circuit Court is affirmed in part, reversed in part, and remanded for additional findings and entry of a new order as set forth in this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FILED FOR APPELLEE

Nanci M. House
Winchester, Kentucky