

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001924-ME

CHERI ADKINS

APPELLANT

v.

APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE JOHN DAVID MYLES, JUDGE
ACTION NO. 05-CI-00590

JAMES ADKINS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, TAYLOR, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: This is an appeal from the Shelby Circuit Court involving the custody of the parties' son. Based upon the following, we affirm the decision of the trial court.

BACKGROUND INFORMATION

Appellant Cheri Adkins and appellee James Adkins are the parents of Austin. In an order entered in November of 2007, the trial court continued joint custody of Austin with his parents. Austin was to have primary residence with James in Shelby County and Cheri would have parenting time. Cheri moved the court to change Austin's primary residence to her residence in Bowling Green, Kentucky, where he would attend school. She also moved the court for James to have regular visitation time with Austin during the school year and extended visitation during the summer as well as school breaks and holidays.

In support of her motion, Cherie stated the following:

1. James and his current wife are divorcing and he is moving to Lexington with Austin which means removal from the school Austin has been attending;
2. During the past two years, Austin has spent a considerable time with his mother in Bowling Green, enjoys that environment and has briefly attended school in that community;
3. Austin has the benefit of a two parent household and extended family in Bowling Green as well as Cherie's fiancée's mother, who is a former teacher;
4. James's work often requires him to work late in the evenings and on weekends which makes it difficult to supervise Austin;
5. Austin has special medical needs which James does not attend to appropriately including violating court orders regarding Austin's care;
6. Austin does not do well academically in James's care and he has received two truancy letters as well as declining grades.

James stated that he was in the process of divorcing and moving to Lexington; however, he contended that it would still be in Austin's best interest to continue his primary residence with his father.

On September 15, 2009, the trial court entered an order denying Cherie's motion and request for an evidentiary hearing. The court held as follows:

The Court has reviewed the motions, responses, and supporting materials tendered by the parties on this most recent round. It does not appear in the interest of any of the parties, especially Austin's, that this matter be relitigated. James has provided Austin's primary residence since the parties divorced and there does not appear from the most recent submissions to be any reason to change that. It was Cheri's decision to move to Bowling Green and, regardless of whether she would be entitled to more child support if she could convince the Court to allow Austin to reside with her, there is nothing in the record to show that the move would be in Austin's best interests.

Cheri now brings this appeal.

STANDARD OF REVIEW

"Findings 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 Rules of Civil Procedure (CR) 52.01. A judgment is not "clearly erroneous" if it is "supported by substantial evidence." *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Id. Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972).

DISCUSSION

Cheri first contends that the trial court should have conducted a full evidentiary hearing on her motion. Cheri cites the case of *Burchell v. Burchell*, 684 S.W.2d 296 (Ky. App. 1984), in support of her position. In *Burchell*, the Kentucky Court of Appeals defined “joint custody” as “an arrangement whereby both parents share the decision making in major areas concerning their child’s upbringing[.]” *Id.* at 299. When parties are unable to agree on major issues concerning their child’s upbringing, *Burchell* provides that:

the trial court, with its continuing jurisdiction over custody matters, must conduct a hearing to evaluate the circumstances and resolve the issue according to the child’s best interest. Once the parents have abdicated their role as custodians to the trial court, its decision is binding on the parties until it is shown that the decision is detrimental to the child physically or emotionally, or is no longer in his best interest.

Id. at 300. *See also Young v. Holmes*, 295 S.W.3d 144 (Ky. App. 2009)(Trial court held hearing to determine the best interests of the child where parents with joint custody are unable to agree on where child would attend school.)

Cheri contends that James was better able to defend his position since he had access to her motion and supporting affidavits for nearly two weeks while she was served with his documentation at the court appearance on August 12, 2009.

James counters Cheri’s argument by asserting that the trial court had considered the issue of visitation in this action on three separate occasions. He

also argues that most of the information Cheri tendered with her motion had been previously presented to the court. He contends, therefore, that the trial court did not abuse its discretion in either failing to have an evidentiary hearing or in ruling that it was in the child's best interests to have primary residence with his father.

A change in primary residence is a modification of a custody decree. Thus, it is governed by Kentucky Revised Statutes (KRS) 403.350, which provides, in relevant part, that:

A party seeking a temporary custody order or modification of a custody decree shall submit together with his moving papers an affidavit setting forth facts supporting the requested order or modification and shall give notice, together with a copy of his affidavit, to other parties to the proceeding, who may file opposing affidavits. . . . The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted.

In the present action, the family court judge found that, due to the affidavits and the history before him, a change in primary residence was not warranted. Consequently, he did not hold a hearing because there was not "adequate cause" shown for a hearing. We do not find this to be clearly erroneous.

Cheri next argues that a change in residence would have been in the best interest of the child. Specifically, she cites to several of the factors set forth in KRS 403.270. The first she argues is "[t]he wishes of the child's parent or parents[.]" KRS 403.270(2)(a). In the present action, however, one parent believes the child should reside with Cheri while the other believes he should stay

with James. Thus, the family court's ruling on this factor was not clearly erroneous.

Next, Cheri contends that the factor set forth in KRS 403.270(2)(b) should have been held in her favor. This factor is the wishes of the individual child regarding his custodian. In the present action, Cheri filed an affidavit signed by her son which set forth that he wished to reside with his mother. James provided evidence that their son was somewhat coerced into signing the affidavit. Regardless, it was not clearly erroneous for the family court to hold in James's favor on this issue.

Finally, Cheri cites to KRS 403.270(2)(d) which provides: "[t]he child's adjustment to his home, school and community[.]" Either Lexington or Bowling Green, however, will be a "move" for the child. Thus, we find the family court did not err in finding in James's favor on this issue.

For the foregoing reasons, we affirm the decision of the Shelby Circuit Court regarding the primary residence of the child.

ALL CONCUR.

BRIEFS FOR APPELLANT:

James Dean Liebman
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Vic Brizendine
Shelbyville, Kentucky