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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002027-ME

WILLIAM LISLE EDWARDS — APPELLANT

v.

APPEAL FROM FAYETTE FAMILY COURT
HONORABLE JO ANN WISE, JUDGE
ACTION NO. 04-CI-01283

LENA DAGHESTANI EDWARDS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, KELLER AND VANMETER, JUDGES.

DIXON, JUDGE: Appellant, William "Bill" Edwards, appeals from an order of the Fayette Family Court modifying a prior joint custody agreement and awarding sole custody of the parties' minor son to Appellee, Lena Edwards.

Bill and Lena Edwards were divorced by a decree of dissolution entered in the Fayette Family Court on August 25, 2004. Pursuant to the decree, the parties were awarded joint custody of their son, Taylor, born February 15, 2002, with

equal timesharing between the parties. No activity occurred in the family court concerning the parties until October 12, 2009, when Lena filed a motion to establish specific parenting time and medical decision-making authority, as well as to determine various financial issues. An agreed order was subsequently entered in November 2009, resolving the issues related to parental time-sharing and medical decisions. The financial issues, which were reserved for a hearing, are not relative to this appeal and will not be discussed herein.

In March 2010, Lena filed a verified motion to modify custody. Therein, Lena claimed that the parties' ability to communicate had substantially deteriorated since the entry of the November 2009 agreed order, and that Bill was not adequately participating in the care and decision-making with respect to Taylor. On April 21, 2010, the family court entered an order finding that Lena had met her burden under KRS 403.340 for an evidentiary hearing on the motion. The family court thereafter appointed David Feinberg, Ph.D., to perform a custody evaluation.

A hearing was conducted on August 10, 2010, wherein both parties, as well as Dr. Feinberg by deposition, testified. At the conclusion of the hearing, the family court ruled that it was in Taylor's best interest that custody be modified to grant Lena sole custody. Written findings of fact and conclusions of law were entered accordingly. Bill's motion to alter, amend or vacate was subsequently denied and this appeal ensued.

Bill argues to this Court that the family court erred in finding that there was no agreement between the parties as to joint custody or as to the use of a parenting

coordinator. Further, Bill contends that it was an abuse of discretion to modify custody as it was not in Taylor's best interest and there was no change of circumstances justifying the modification.

As a general rule, a family court has broad discretion when determining matters pertaining to custody of children. *Futrell v. Futrell*, 346 S.W.2d 39 (Ky. 1961). *See also Squires v. Squires*, 854 S.W.2d 765, 769 (Ky. 1993); *Krug v. Krug*, 647 S.W.2d 790, 793 (Ky. 1983). On appellate review of a child custody determination, a family court's findings of fact shall not be set aside unless the factual findings are clearly erroneous. *Allen v. Devine*, 178 S.W.3d 517, 524 (Ky. App. 2005); *Eviston v. Eviston*, 507 S.W.2d 153 (Ky. 1974). The family court's findings of fact are not clearly erroneous if supported by substantial evidence of probative value. *Black Motor Co. v. Greene*, 385 S.W.2d 954, 956 (Ky. 1964). Substantial evidence is evidence that has sufficient probative value to induce conviction in the mind of a reasonable person when taken alone or in light of all the evidence. *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005). Finally, "[an appellate court] must bear in mind that in reviewing the decision of a [family] court the test is not whether [it] would have decided it differently, but whether the findings of the family court were clearly erroneous or that [it] abused [its] discretion." *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). Mere doubts regarding the correctness of the family court's decision are not sufficient grounds for reversal. *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967).

The family court correctly determined that custody modification in this case is governed by KRS 403.340(3), which provides in relevant part:

> [T]he court shall not modify a prior custody decree unless after hearing it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree, that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interests of the child. When determining if a change has occurred and whether a modification of custody is in the best interests of the child, the court shall consider the following:
>
> (a) Whether the custodian agrees to the modification;
>
> (b) Whether the child has been integrated into the family of the petitioner with consent of the custodian;
>
> (c) The factors set forth in KRS 403.270(2) to determine the best interests of the child;
>
> (d) Whether the child's present environment endangers seriously his physical, mental, moral, or emotional health;
>
> (e) Whether the harm likely to be caused by a change of environment is outweighed by its advantages to him; and
> (f) Whether the custodian has placed the child with a de facto custodian.
> . . .

Further, pursuant to KRS 403.270(2), the family court "shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian." Relevant factors include:

> (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;
>
> (b) The wishes of the child as to his custodian;

> (c) 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;
>
> (d) The child's adjustment to his home, school, and community;
>
> (e) The mental and physical health of all individuals involved;
> . . .

Bill claims that contrary to the family court's findings, he and Lena agreed to follow Dr. Feinberg's recommendation to maintain joint custody and employ the services of a parenting coordinator. During the hearing, Dr. Feinberg testified that he believed it was in Taylor's best interest that Bill and Lena retain joint custody since Taylor had a significant attachment and relationship with both of them. Dr. Feinberg recommended that the parties employ the services of a parenting coordinator, who would assist with the communication and scheduling issues.

Indeed Lena testified during the hearing that she would accept Dr. Feinberg's recommendations in whole, including keeping joint custody, if that was what he believed was in Taylor's best interest. However, there clearly was no "agreement" between the parties as Bill argues, because if such was the case, the hearing would necessarily not have been required.

Bill next contends that the family court failed to give any consideration to the parties' testimony or Dr. Feinberg's recommendation in making the best interests determination. Further, Bill complains that the family

court erred by only relying on certain excerpts of Dr. Feinberg's testimony in concluding that sole custody was warranted.

In discussing the requirements of joint custody, the family court cited *Pennington v. Marcum*, 266 S.W.3d 759, 764 (Ky. 2008), wherein our Supreme Court noted,

> Joint custody as a legal concept has several defining characteristics. Both parents have responsibility for and authority over their children at all times. Equal time residing with each parent is not required, but a flexible division of physical custody of the children is necessary. A significant and unique aspect of full joint custody is that both parents possess the rights, privileges, and responsibilities associated with parenting and are expected to consult and participate equally in the child's upbringing.

Relying on the above language, the family court herein concluded that joint custody was no longer a viable option in this case:

> These parents do not communicate well. Early on after the divorce they had better communication. However, since the child has become older his medical issues have become more known and explained. Since he has started school and extracurricular activities, communication is either non-existent or extremely dysfunctional. Father admits he does not know if Mother and Father will ever be able to get back to that level of communication of years ago. Dr. Feinberg recommends and the parties both agree that there can be no flexibility in the timesharing arrangement and it must be strictly set. Mother is the parent primarily responsible for making appointments and attending appointments for the child's medical needs, psychological needs and tutoring needs.

The family court concluded that because Taylor had been "caught in the crossfire" of the parties inability to communicate and work with each other, it was in his best

interest to have "a primary home so that he is not caught in the middle." Further, the family court rejected the notion of a parenting coordinator, stating that there was no precedent in Kentucky for authorizing such.[1] Regardless, the family court noted that a parenting coordinator costs both parents money that could be better spent on the child, and that parents must be able to co-parent themselves to have joint custody.

A court may modify joint custody where the parties are unable to cooperate so long as the lack of cooperation by one or both parties rises to the statutory level required for modification of custody under KRS 403.340. *See Scheer v. Zeigler*, 21 S.W.3d 807, 814 (Ky. App. 2000). The family court herein evaluated the testimony of all witnesses and concluded that a change in circumstances had occurred such that it was in Taylor's best interest that Lena be awarded sole custody. In making that determination, the family court was not required to accept all or any of the recommendations of Dr. Feinberg. While this Court may have decided the matter differently, we simply cannot conclude that the family court's decision was clearly erroneous or not supported by substantial evidence. The simple truth is that there was evidence to support both parties' positions. It was the duty and function of the family court to evaluate the evidence

[1] Actually, in the unpublished decision in *Telek v. Bucher*, 2008-CA-002149 (April 2, 2010), a panel of this Court noted that pursuant to KRS 403.330(2), a family court may order parents to work with a parenting coordinator. "A parenting coordinator is assigned to help the parties work together . . . . In instances where the parties are unable to agree, the parenting coordinator will make a decision that is in compliance with the family court's orders. If either party should disagree with the parenting coordinator's determination, they may turn to the family court for a final determination." Slip op. p. 5. Further, Rule 6.1 of Kentucky's new Family Court Rules of Procedure and Practice (FCRPP), effective January 1, 2011, appears sufficiently broad so as to grant the Family Court the authority to order a parenting coordinator.

and decide what was in Taylor's best interest given the totality of the circumstances. This court cannot find that the family court erred in its determination.

The Fayette Family Court's findings of fact and conclusions of law are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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