

Commonwealth Of Kentucky

Court Of Appeals

1998-CA-000616-MR

HEIDI LYNN GIARRATANO

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN WHITE, JUDGE
ACTION NO. 94-CI-0941 & 96-0182

SCOTT PHILLIP GIARRATANO

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, GUIDUGLI AND HUDDLESTON, JUDGES.

GUIDUGLI, JUDGE. Heidi Lynn Giarratano (Heidi) appeals from an order of the Christian County Circuit Court denying her motion to modify child custody. She moved the circuit court to change physical possession of her son from her former husband, Scott P. Giarratano (Scott), to herself. After reviewing the record, the arguments of counsel, and the applicable law, we affirm.

The parties were married in 1986. They have two children, Heather, born in 1982, and Andrew, born in 1989. They divorced in 1995. The parties agreed to joint custody with Scott having primary physical possession. In 1996, Heidi moved to modify joint custody by asking for physical custody. The circuit

court denied the motion after a hearing. This Court affirmed in an opinion rendered September 5, 1997.

While the first appeal was pending, Heather developed troubles living with her father. Scott, a serviceman with the United States Army stationed in Korea, agreed to send Heather to Kentucky in March 1997. The circuit court entered an agreed order acknowledging this change in June 1997. The following month, Heidi moved for custody of both children or, in the alternative, physical possession. Scott responded through counsel by requesting a stay under the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. Appx. §§ 501-593. In a report entered August 25, 1997, the domestic relations commissioner recommended that the proceedings be stayed until Scott could get leave. Both parties filed exceptions, which the circuit court overruled. Heidi moved to alter, vacate, or amend this order, and requested findings. By order entered February 12, 1998, the court denied Heidi's motion without further findings. This appeal followed.

Heidi argues that she presented sufficient evidence for a hearing on the merits of her motion to modify custody. We will not disturb the circuit court's ruling on this issue.

In order to modify an award of joint custody, the court must first find that there has been an inability or bad faith refusal of one or both parties to cooperate. If that finding has been made, the court decides custody in light of the best interest of the child, deciding custody de novo under KRS

403.270. Mennemeyer v. Mennemeyer, Ky. App., 887 S.W.2d 555, 558 (1994). The circuit court's findings of fact in a domestic relations case shall not be set aside unless clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01; Aton v. Aton, Ky. App., 911 S.W.2d 612, 615 (1995).

In support of her motion to modify custody, Heidi submitted affidavits from herself and Heather. In her affidavit, Heather described the circumstances leading up to her moving from her father's to her mother's home. Heather swore that while she lived with her father in Korea her grades slipped, that she was hospitalized due to a drug overdose, and that her father struck her in the face during an argument. She also stated that her father insulted her mother, and Heather expressed the opinion that her brother should be with her and their mother. Heidi's affidavit referred to the incidents Heather described and stated that Scott was unable to care for Andrew.

Scott argued that because he was stationed in Korea he could not attend a custody hearing and he could not adequately defend the charges against him and present his case. Heidi filed a supplemental affidavit stating that Scott refused to communicate with her from Korea, and did not contact her when Heather was hospitalized for the overdose.

The domestic relations commissioner heard arguments on the motions. During the hearing, she specifically found that Heidi had presented sufficient grounds for a hearing on modification of custody. Scott filed exceptions to the

commissioner's conclusion that an evidentiary hearing was proper, and Heidi filed exceptions regarding the stay of proceedings. The circuit court implicitly overruled the exceptions in a docket entry. It denied the motion to change custody of Andrew because it found "no basis presented to re-open or change custody." Heidi moved to alter, vacate, or amend this order, or in the alternative requested findings as to whether there was an inability or bad faith of the parties to cooperate, and whether there was reason to believe that Andrew's present environment seriously endangered his health. The court denied Heidi's motion without further findings.

Stinnett v. Stinnett, Ky. App., 915 S.W.2d 323 (1996), explained that Mennemeyer's requirement of "an inability or bad faith refusal of one or both parties to cooperate" refers to a "willingness to rationally participate in decisions affecting the upbringing of the child." Id. at 324, quoting Squires v. Squires, Ky., 854 S.W.2d 765, 769 (1993). "[T]his threshold requirement may be met in a wide variety of situations ranging from . . . mere visitation disputes to . . . child neglect or abuse." Stinnett, supra, at 324.

Most of Heidi's allegations concern Scott's relationship with Heather, not Andrew. Heidi questions Scott's ability to care for Andrew because of what happened with Heather, and alleges that Scott is uncommunicative. However, Heidi did not identify any areas of real dispute over the upbringing of

Andrew. The evidence supports the circuit court's decision and we find no clear error. Aton, supra.

Heidi also argues that she presented sufficient evidence of serious endangerment to warrant a custody hearing. This standard applies to modification of sole custody under KRS 403.340. We need not decide whether or not a showing sufficient for a hearing on modification of sole custody would always be enough for a hearing on modification of joint custody. The proof Heidi presented did not demonstrate that Andrew was seriously endangered. We find no abuse of discretion in the circuit court's decision.

Heidi further argues that it is the "law of the case" that Heather and Andrew should remain in the same home. We disagree.

The parties agreed that Heather would primarily reside with Heidi. They thus waived the procedural prerequisite to modifying custody regarding Heather. The question of whether keeping the children together is in their best interests can only be reached by considering custody de novo under KRS 403.270. Since we have approved of the court's decision not to modify custody, this question is not properly before us.

Heidi next argues that Scott failed to demonstrate justification for a stay of proceedings under the Soldiers' and Sailors' Civil Relief Act. We agree with Scott that this issue is moot. The commissioner recommended the evidentiary hearing concerning modification of joint custody be stayed. The circuit

court found that this hearing was not justified, and we are affirming that decision.

For the foregoing reasons, the decision of the circuit court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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