

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002409-MR

JAKE NORMAN YEAGER

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE T. STEVEN BLAND, JUDGE
ACTION NO. 96-CI-00659

SHEILA MACHELLE YEAGER

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, JOHNSON, AND KNOPF, JUDGES.

KNOPF, JUDGE. This is an appeal by Jake Norman Yeager (Jake) from an order of the Hardin Circuit Court denying his motion to transfer primary residential custody of the parties' child from the appellee Sheila Machelles Yeager (Machelle) to Jake. Jake maintains that while the child is in Sheila's custody, he does not receive proper nourishment and medical care. We find that the trial court's finding to the contrary was supported by substantial evidence. Hence, we affirm.

The parties were married on October 9, 1993. One child was born of the marriage: Jake Dakota (Dakota), on October 18, 1994. On April 26, 1996, Jake filed a petition for dissolution

of the marriage. On April 1, 1997, the trial court entered an order dissolving the marriage. All other issues were reserved until further determination by the trial court, and the case was referred to the Domestic Relations Commissioner (Commissioner). On September 4, 1997, the Commissioner filed a report recommending, among other things, that the parties be awarded joint custody of Dakota, with Machelles being designated as the primary residential custodian. On December 11, 1997, the trial court entered an order adopting the Commissioner's recommendation as to child custody.

Extensive litigation concerning Dakota occurred post-decree. On January 6, 1999, Jake filed a motion to modify custody to designate him as the primary residential custodian of the child. The motion was based upon an allegation that Dakota was neglected and received inadequate nourishment when under Machelles care. Machelles responded with a motion that she be awarded sole custody of Dakota. A hearing on the matter was held before the Commissioner.

On August 6, 1999, the Commissioner filed a report recommending that Jake's motion be denied and that Machelles remain the primary residential custodian of Dakota. Jake filed exceptions to the Commissioner's report, and on September 17, 1999, the trial court entered an order adopting the Commissioner's report. This appeal followed.

Jake contends that the trial court erred in denying his motion to change custody and designate him as the primary residential custodian of Dakota. Jake's argument is supported

primarily by the medical opinions and testimony of Dr. Marquita Hanna Ball, M.D. On December 2, 1998, Dr. Ball issued a memorandum addressed to "Whom It May Concern." The memorandum stated as follows:

I have been regularly following Dakota Yeager in my pediatric practice since July 12, 1997. He is a small child in both weight and height which I believe to be partially dictated by genetics. However, I have been watching his growth closely.

In October 1998 he was diagnosed with an iron deficiency anemia. This was concerning to me because I felt it was due to poor nutrition. I then began to follow his weight more closely. In Dakota's chart I have documented that he loses weight when he stays with his mother but gains weight when he stays a week or more with his father.

I have also checked his growth hormone levels which are sensitive to malnourishment. The levels are low after staying with his mother but significantly rise after one week with his father. Therefore, I believe this child is poorly nourished and neglected by his mother.

I have also been concerned about the medical care his mother provides when he is in her care. Thus, based on Dakota's medical information and neglect, I would recommend his custody be given to his father.

In her deposition testimony, Dr. Ball testified that Dakota's malnourishment and iron deficiency could have "physical as well as mental implications to [Dakota] in a long-term manner," and that she believed that Dakota was an abused and neglected child pursuant to the statutory definition as set forth in KRS 620.020.

Jake further contends that Machele was not providing Dakota with proper medical care as demonstrated by his having to

take Dakota to Dr. Ball for treatment for ringworm four times, one time for rash, and five times for illnesses such as congestion and ear infections.

At the time Jake filed his motion to modify custody, and at the time the trial court entered its order denying Jake's motion, modification of joint custody was controlled by Mennemeyer v. Mennemeyer, Ky. App., 887 S.W.2d 555, 556 (1994). Under Mennemeyer, in order to modify joint custody, it was necessary for the trial court to make a threshold finding that there was an inability or bad faith refusal to cooperate in decisions concerning custody of the child. However, prior to the filing of Jake's motion, this Court rendered Briggs v. Clemons, Ky. App., 3 S.W.3d 760 (1999).¹ Briggs expanded Mennemeyer to permit a change in custody, even in the absence of an inability to cooperate, if the child's physical, mental, moral, or emotional health was endangered as set forth in KRS 403.340(2)(c).² While the Commissioner's report cites Mennemeyer, its requirement that there be a threshold finding of an inability to cooperate, followed by a de novo custody hearing, is substantially ignored. The focus of the litigation, and the Commissioner's report, was on Jake's allegation that Dakota was malnourished and received inadequate medical care while in Mabelle's custody. The hearing was unquestionably not de novo.

¹Briggs was rendered on February 26, 1999, and became final on November 15, 1999.

²The inability to cooperate and de novo hearing requirements of Mennemeyer have since been overruled in their entirety. See Scheer v. Ziegler Ky. App. _____ S.W.3d _____ (2000). Final, July 28, 2000.

In his September 17, 1999, order, the trial court stated, "The Court agrees that if the evidence were to show that the child is in danger, clearly custody could be modified irregardless of Mennemeyer v. Mennemeyer[" Further, in her brief, Machelles states that she "does not dispute the Trial Court's authority to modify joint custody . . . [and] agrees with the Trial Judge that the 'bad faith' standard in Mennemeyer v. Mennemeyer . . . is not applicable in cases where the child is in danger, without a finding of 'bad faith'."

We disagree with the trial court's statements regarding the applicability of Mennemeyer. At the time this case was litigated, Mennemeyer required a threshold finding of an inability to cooperate³ and a de novo custody determination. However, in light of the subsequent authority and the parties' approach to the litigation, we perceive any failure to follow Mennemeyer as either harmless error or waived by the parties.⁴ We review this case in light of Briggs and Scheer. Hence, the crux of this case is whether under KRS 403.340(2)(c), the trial court erred in failing to modify custody upon the basis that Dakota was, or is, physically, mentally, morally, or emotionally endangered while in Machelles' care.

The Commissioner's report was adopted without modification by the trial court. The report included the following discussion and findings:

³Of course if a parent fails to cooperate in the physical care and nourishment of a child, this requirement is satisfied.

⁴We note that Machelles did not raise Mennemeyer as a defense to Jake's motion.

Jake filed complaints with both the Hardin County and Meade County Attorney's offices and with the Cabinet for Families and Children against Machelles for neglect of the child. Lisa Parker, a social worker and investigator for Cabinet for Families and Services investigated Jake's allegations of neglect of Dakota. Ms. Parker consulted with Dr. Nguyen, Dakota's pediatrician, and questioned Machelles about her feeding habits for Dakota. It was Ms. Parker's findings that Dakota is not a neglected child and her recommendation will be that Jake's claim of neglect be unsubstantiated. Ms. Parker also testified that Meade County will defer to the jurisdiction of the Hardin Circuit Court concerning the custody of this child.

Machelles argues that she is a small-boned person and her two children inherited that trait from her. She also contends that she had a separate bottle of iron supplement that she dispensed to Dakota. Machelles also maintains that Dakota is a finicky eater and it is difficult to get him to eat on some occasions.

Sharon Sanders owns Kiddie Lane Day Care Center where Dakota attends and where Machelles works. Her facility is regularly monitored by the State. The applicable rules require that all children in attendance consume food from each of the basic food groups. From her experience with children, she does not believe that Dakota is malnourished and she knows he has proper nutrition when attending her day care facility.

Ruby Sandra Fleming, Machelles's sister, and Jeff Thompson, Machelles's former husband and father of Felicia (Machelles's other child), both testified that Machelles is a good mother. They confirmed that both of Machelles's children are small and that Felicia also had an iron deficiency.

Independent testimony was presented by . . . Dr. Pamela Clark, who specializes in pediatric endocrinology.

. . . .

Dr. Pamela Clark is a certified pediatric endocrinologist. She examined Dakota on March 11, 1999. Dr. Clark relied upon the medical records of Dr. Nguyen, Dakota's doctor since birth, and Dr. Ball's records when making her diagnosis. After a physical exam of Dakota, Dr. Clark found that he was a normal child. He is at a 5th percentile which is defined by 95% of children are larger and 5% are smaller at his age. Test results showed normal thyroid studies, two IGF-1 levels were in normal range and a bone age x-ray revealed a one-year delay. It is Dr. Clark's opinion that the accuracy of the insulin-like growth tests depend upon the circumstances surrounding the time they were performed. For example, if the child was ill, the results could vary. Dr. Clark maintains that the two readings from these tests were in the normal range for a child Dakota's size. It is Dr. Clark's opinion that the child is completely normal and appeared well-proportioned.

In reviewing a child custody determination, we may disturb the factual findings of the trial court only if they are clearly erroneous. Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986); Largent v. Largent, Ky., 643 S.W.2d 261, 263 (1982); CR 52.01. Findings of fact are clearly erroneous if they are manifestly against the weight of the evidence. Wells v. Wells, Ky, 412 S.W.2d 568, 571 (1967). A trial court's legal decision on modification will not be reversed absent an abuse of discretion. Dudgeon v. Dudgeon, Ky., 458 S.W.2d 159, 161 (1970); Gates v. Gates, Ky., 412 S.W.2d 223, 224 (1967). The trial court is in the best position to evaluate the testimony and weigh the evidence, so an appellate court should not substitute its own opinion for that of the trial court. See Reichle, 719 S.W.2d at 444; Bickel v. Bickel, Ky. 442 S.W.2d 575, 576 (1969). Where the evidence is conflicting, we must defer to the judgment of the

trial court unless the factual findings are clearly erroneous or the trial court abused its discretion. Gates, 412 S.W.2d at 224.

There was substantive testimony supporting the trial court's findings of fact, and its findings were not clearly erroneous. Dr. Clark's testimony refuted Dr. Ball's testimony that Dakota's weight changes indicate malnutrition while in Machelles care. Dr. Clark's testimony further indicated that the various test readings on Dakota were within the normal range. Social Worker Lisa Parker investigated and determined that Dakota was not a neglected child. Various other witnesses also supported Machelles position that she is a good mother and provides proper care for Dakota.

We cannot say that the trial court was clearly erroneous in rejecting Jake's contention that Machelles neglected Dakota. It follows that the trial court did not abuse its discretion by denying Jake's motion to designate him as Dakota's primary residential custodian.

For the foregoing reasons, the order denying Jake's motion to modify the primary residential custody of the parties' child is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dwight Preston
Lewis & Preston
Elizabethtown, Kentucky

BRIEF FOR APPELLEE:

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