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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-003183-MR

BOOSTER LAVERNE KINSEY

APPELLANT

v.

APPEAL FROM BUTLER CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NOS. 96-CI-00142 & 96-CI-00144

PATRICIA FIELDS KINSEY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: HUDDLESTON, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: Booster Laverne Kinsey appeals from an order of the Butler Circuit Court denying him custody of his two children.¹ Having concluded that the trial court was correct as a matter of law on the issue of jurisdiction and that the trial court's findings of fact were not clearly erroneous and that it did not abuse its discretion as to custody, we affirm.

¹This appeal concerns issues related to custody of the parties' children from two separate actions that were consolidated.

This case has a long and tortuous procedural history that must be reviewed in some detail before we address the legal issues. Booster and Patricia Fields Kinsey began dating sometime in 1990. Their first child, Carl Fields Kinsey, was born on March 6, 1993, and they married in Kentucky on December 25, 1993. Their second son, Casey Fields Kinsey, was born on September 25, 1995. The couple maintained a home in Georgia both prior to their marriage and after the marriage.

On June 17, 1996, Patricia left Georgia with the children and moved to Kentucky, where she had family. After failed attempts at reconciliation, Booster and Patricia separated on July 1, 1996. On September 19, 1996, Patricia filed a petition for an Emergency Protective Order in the Butler District Court, and an EPO was granted on that date.²

On October 4, 1996, Booster filed a complaint for divorce in the Superior Court of Camden County, Georgia. On October 9, 1996, Patricia was served with a summons, and on October 17 a hearing was held in the matter. The Georgia

²The EPO contained a provision granting Patricia temporary custody of the children. However, on November 6, 1996, the Butler District Court entered another order setting aside this temporary custody order, stating "that this Court does not have jurisdiction to enter a child custody order under the Uniform Child Custody [A]ct as contained in the Kentucky Revised Statutes. The children have not resided in Butler County, Kentucky for six months, nor is there any other basis for jurisdiction. Georgia, which has been the marital residence, appears to be the home state of the children for the entry of orders under the U.C.C.J.A." While the District Court's ruling is of no consequence to our ruling, for the record we note that under KRS 403.420(1)(c) and 403.725 a District Court has jurisdiction to protect children in an emergency situation.

Superior Court entered a temporary order on October 31, 1996, and an amended temporary order on November 14, 1996, granting temporary custody to Booster.

Patricia filed her own petition for custody on November 14, 1996, in Kentucky in the Butler Circuit Court (96-CI-00142). On November 19, 1996, Booster filed a separate complaint in the Butler Circuit Court (96-CI-00144), seeking to register the Georgia amended temporary order that had awarded him custody. The Butler Circuit Court entered an order on January 27, 1997, denying Booster's motion to dismiss Patricia's petition for custody. This interlocutory, non-final order also included a ruling that Butler Circuit Court had jurisdiction over the case. On April 9, 1997, the two Butler Circuit Court actions were consolidated.

On September 16, 1997, the Georgia Superior Court entered an order summarizing the case to that date. The order, which was signed by Judge E. M. Wilkes, III, indicated that Georgia Superior Court Judge Robert L. Scoggin had spoken with Judge Ronnie C. Dortch of the Butler Circuit Court concerning the jurisdiction question. In that order Judge Wilkes ruled that it was in the children's best interests to have the custody case tried in Kentucky. The order vacated the Georgia court's previous custody order in favor of Booster and stayed the

litigation in Georgia pending the results of the litigation in Kentucky.³

On October 6, 1997, the Butler Circuit Court entered a supplemental order which pursuant to KRS 403.420(1)(b) and (c) asserted jurisdiction in the custody dispute and denied Booster's motion to register and enforce the Georgia custody order.⁴ On March 26, 1998, the Butler Circuit Court entered an order approving and adopting as its own the recommendations from the Domestic Relations Commissioner's Report as to the issue of custody. The order granted the parties joint custody, with Patricia as residential custodian.⁵ On August 31, 1998, an "amended order" was entered by the Butler Circuit Court which held Patricia in contempt for failing to comply with the court's visitation order and which denied Booster's "Motion for Change of Custody." This order contained language that it "is a final and

³The Georgia Superior Court noted that Booster's attempt to obtain a writ of prohibition in Kentucky against Judge Dortch had been denied by the Court of Appeals (1997-CA-000261) (petition denied on April 14, 1997).

⁴This order was appealed to this Court in 1997-CA-002634-MR, but the appeal was dismissed on December 22, 1997, as being from a non-final order that was not appealable.

⁵The order¹ contained the following language that misstated the relationship between the Circuit Court and the Commissioner: "This Court cannot find that the Commissioner abused his discretion in his Report nor was he clearly erroneous in his findings." See Eiland v. Ferrell, Ky., 937 S.W.2d 713, 716 (1997).

¹Booster filed an appeal from this order on April 24, 1998 in this Court. (1998-CA-001039-MR). This appeal was dismissed on June 17, 1998 as being from a non-final order that was not appealable.

appealable order and there is no just reason for delay." Booster timely filed a CR⁶ 59 motion to alter, amend or vacate on September 10, 1998. On December 2, 1998, the Circuit Court entered a final order denying the CR 59 motion and ruling on other pending motions concerning visitation and payment of a medical bill. This appeal followed.

Booster sets forth his three arguments on appeal as follows: (1) "The Butler Circuit Court denied appellant his constitutional rights under the Full Faith and Credit Clause of the United States Constitution and the Uniform Child Custody Jurisdiction Act"; (2) "The Commissioner failed to give equal consideration to both parents and failed to consider the harm the mother's actions have caused the children"; and (3) "The trial court erred and abused its discretion in not awarding residential custody to the father after the mother denied him visitation and fled with the children; the trial court did not apply the correct legal standard."

We will first address the issue concerning jurisdiction. Booster argues that since he had a custody proceeding in process in Georgia when Patricia filed for custody in Kentucky, the Butler Circuit Court erred in not giving the proper constitutionally required recognition to the Georgia proceeding and in asserting jurisdiction in Kentucky.

⁶Kentucky Rules of Civil Procedure.

The United States Constitution, Article IV, Section One, the Full Faith and Credit Clause, provides:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Simply put, each state is required by the Constitution to recognize a sister state's judicial proceedings.

Kentucky has codified the Uniform Child Custody Jurisdiction Act at KRS 403.400-403.620. KRS 403.420(1)(d) reads in pertinent part as follows:

A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if: . . .

It appears that . . . another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and it is in the best interest of the child that this court assume jurisdiction.

KRS 403.450 addresses the appropriate action that a Kentucky court should take when there is a simultaneous proceeding in another state:

A court of this state shall not exercise its jurisdiction under KRS 403.420 to 403.620 if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with KRS 403.420 to 403.620, unless the proceeding is stayed by the court

of the other state because this state is a more appropriate forum or for other reasons.

In the case sub judice, the Georgia custody order that Booster sought to have registered in Kentucky was from a Georgia proceeding that was in process at the time Patricia filed her custody petition in the Butler Circuit Court. Pursuant to KRS 403.450, the judge of the Butler Circuit Court conferred with the judge of the Georgia Superior Court concerning the question of jurisdiction. In the Georgia Superior Court order dated September 16, 1997, Judge Wilkes stated:

Under the Act, when Courts in more than one state are attempting to exercise jurisdiction in a custody dispute, the proper procedure is for the presiding Judges to communicate and exchange information relevant to that issue. O.C.G.A. §19-9-47(d). The Order entered by the Judge in the Kentucky Circuit Court action noted the jurisdictional dispute had been discussed by telephone with Judge Robert L. Scoggin, who had entered the aforementioned amended Temporary Order herein. The Kentucky Order stated that Judge Scoggin had not objected to relinquishing jurisdiction to the Kentucky courts. The undersigned has consulted Judge Scoggin, who confirms that is what occurred during his telephone conference with the Judge of the Kentucky Circuit Court. . . . Pursuant to Judge Scoggin's determination Kentucky is a more appropriate forum to litigate the issue of custody, the amended Temporary Order entered on October 31, 1996, is VACATED, and proceedings herein are STAYED pending the outcome of the litigation between the parties in the state [emphasis added].

It is clear from the above that after the judges from the two states conferred, the judge from Georgia believed that Kentucky was the more appropriate of the two states to hear this

action. Thus, the Georgia Superior Court stayed the action before it and vacated the temporary order it had previously entered. The Butler Circuit Court unquestionably has general jurisdiction to hear child custody cases; and more specifically, had jurisdiction to hear this case by the authority of KRS 403.420(1)(d), since the Georgia Superior Court declined jurisdiction in light of Kentucky being the more appropriate forum.

Furthermore, the simultaneous proceedings rule was not violated since the Butler Circuit Court acted in the case after the out-of-state court proceedings had been stayed pending the Kentucky litigation. The judges in both states followed the Act's purpose of exchanging information and promoting cooperation between the courts.⁷ Since the Butler Circuit Court acted in conformity with the U.C.C.J.A., we find nothing to support Booster's claim that his constitutional rights were compromised. The Butler Circuit Court refused to give full faith and credit to the Georgia Superior Court order only after the order had been vacated and after the Georgia court had stayed its proceedings and declined to exercise jurisdiction over the matter.

Having concluded that jurisdiction properly lies in the Butler Circuit Court, we will now address the adequacy of the Circuit Court's findings of fact and whether it abused its discretion. Kentucky law affords the circuit court broad

⁷KRS 403.400(1)(h).

discretion in deciding matters pertaining to child custody.⁸ In large part this is so because decisions related to child custody often turn on the determination of subtle, complex facts, and, of course, the circuit court is the fact-finder.⁹ In general, findings of fact of a trial court shall not be set aside unless they are clearly erroneous, and due regard shall be given to the opportunity of the trial court to view the credibility of the witnesses.¹⁰ In reviewing the decision of a trial court, the test is not whether the appellate court would have decided differently, but whether the findings of a trial court were clearly erroneous or whether it abused its discretion.¹¹

The following quote from Dudgeon v. Dudgeon,¹² appropriately expresses our empathy for trial judges faced with the responsibility of deciding custody cases: “[C]ourts, both trial and appellate, are presented with no problem of greater complexity than the delicate and awesome responsibility of adjudicating the custody of children.” Further, Dudgeon clearly expresses the limitations of our appellate review:

The (custody) issue must be resolved by careful and conscientious trial judges who

⁸KRS 403.270; Squires v. Squires, Ky., 854 S.W.2d 765 (1993).

⁹CR 52.01.

¹⁰Reichle, supra at 444; CR 52.01.

¹¹Cherry v. Cherry, Ky., 634 S.W.2d 423, 425 (1982) (citing Eviston v. Eviston, Ky., 507 S.W.2d 153 (1974)).

¹²Ky., 458 S.W.2d 159, 160 (1970).

weigh all relevant factors; make a difficult decision; then are available and vigilant to supervise the result. This is simply the best we can do with the means available. Appellate review must confine itself in changing determination of the custody of infants in divorce cases to those situations where there is a clear and substantial showing that the manifest error was committed.¹³

In rendering child custody decisions the trial court is bound by the "best interests" standard set out in KRS 403.270(1):

The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent. The court shall consider all relevant factors including:

- (a) The wishes of the child's parent or parents 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; and
- (f) Information, records, and evidence of domestic violence as defined in KRS 403.720.

"In child custody cases, the trial court must consider all relevant factors including those specifically enumerated in KRS 403.270(1) in determining the best 'interests of the child.' In so doing, it is mandatory under CR 52.01 that the facts be so

¹³Id. at 162.

found specifically" [emphasis original].¹⁴ However, the appellate court may look to the entire record to determine whether the factual findings are clearly erroneous or the trial judge abused his discretion.¹⁵

Booster claims that either he should have been granted sole custody, or if joint custody is to be awarded, then he should be the resident custodian. The following excerpts from Booster's brief summarize his argument:

The Commissioner's ultimate conclusion that the parties share joint custody, with Patricia Fields-Kinsey as primary custodian, is an abuse of discretion and evidences he did not give equal consideration to each party as required by K.R.S. 403.270. The Kentucky Legislature abolished the tender years presumption in 1978 to include the language that "equal consideration shall be given to each parent", K.R.S. 403.270(1). Patricia Fields-Kinsey is the party that took these children from Georgia and their father and travelled with them to Kentucky. She misused the Court process, the social workers, made allegations of false physical and sexual abuse, and deprived the children of contact with their father. These were emotionally damaging to the children because they were deprived of contact with their father. The Court awarded the instigator of the abuse to be [sic] the residential custodian.

. . .

The Commissioner found that Patricia Kinsey's accusations [that Booster looked into her apartment window] were false. He found that the Respondent was a "devoted and loving father". The Commissioner found that

¹⁴McFarland v. McFarland, Ky.App., 804 S.W.2d 17 (1991).

¹⁵Cherry, supra at 425.

Patricia Kinsey was overly protective of her son, Carl, and suspects everyone of abusing him [citation to record omitted][emphasis original]. In light of all factors, it is Patricia Fields-Kinsey who has caused harm to these two children by depriving them of contact with their father, living in numerous residences without adequate necessities, and subjecting Carl to numerous psychological and physical examinations in a thinly-veiled attempt to "document" sexual abuse by Booster Kinsey.

. . .

Patricia Kinsey has misused the Butler Circuit Court and has duped the Social Services system. The two children, Carl and Casey, have been subjected to emotional damage based upon Mrs. Kinsey's false accusations. The Commissioner did not give equal consideration between Booster and Patricia as to who would be the better parent; notwithstanding that during the approximate year and one-half that this case has been pending, Booster's only contact with his children has been through supervised visitation.

Based upon the above, Booster Kinsey would submit that the trial court erred based upon the finding that he is a loving father and the finding that the accusations of abuse are false, that Booster Kinsey should be designated as the primary custodian of the children, or be granted sole custody.

Booster also argues as a separate issue that "[t]he trial court did not apply the correct legal standard" in denying his motion to modify custody. In his brief, he stated:

It is without question that the Appellant met the standards set forth in Mennemeyer v. Mennemeyer, Ky. App., 887 S.W.2d 555 (1994), by proving that the parties have been unable to cooperate or have in bad faith refused to cooperate in making decisions regarding the children. The Court should have applied a "de novo" determination

under K.R.S. 403.270. See Jacobs v. Edelstein, Ky. App., 959 S.W.2d 781 (1998). By placing complete emphasis upon the mother's refusal to follow the visitation Orders, the Court failed to follow the statutory criteria and case law, which would require a "de novo" hearing [emphasis original]. The other factors which should have been considered included: the mother's mental status of being paranoid and showing neurotic thinking, unsanitary living conditions, the poor economic conditions to which the mother had exposed her children, the mother's false accusations against the father in regard to the abuse of the children, the great number of mental health practitioners that have seen the children, the attempts to block telephone visitation, the dangerousness of the attempt to flee, and other evidence presented to the Court.

The flaw in Booster's "modification" argument is that the trial court's previous custody orders were interlocutory and not final. Thus, there was no final order that was subject to the modification requirements. Accordingly, our review of the trial court's final custody order concerns the trial court's initial award of custody, not a modification of custody.

This case is confusing in part because there are multiple interlocutory orders addressing custody. Since the order appealed from relates back to and incorporates the previous interlocutory orders, our review of the adequacy of the trial court's findings and its exercise of its discretion must involve consideration of all of these orders collectively. Patricia's argument in support of the trial court's ruling is represented by the following discussion from her brief:

Patricia respectfully submits that
Booster has misconstrued the Commissioner's

comments, and that he has also failed to demonstrate that the trial court committed error, reversible or otherwise. First of all, Booster fails to recognize that the Commissioner's favorable comments regarding his relationship with the children is not a criticism of Patricia. To the contrary, the Commissioner found that Patricia was very protective of the boys. Furthermore, the Commissioner prefaced his favorable comments of Booster by using the word "likewise", confirming that he found the same favorable attributes in Patricia's relationship with the children.

Unfortunately, Patricia's brief also addresses Booster's third argument concerning the legal standard the trial court applied in denying Booster's motion to change custody as a question of the appropriate legal standard for a "modification." As stated previously, the previous custody orders were interlocutory and not final. Thus, the final order appealed from was the initial custody order and not a ruling on a motion for modification of a previous final order.

We will now address the merits of that custody determination. It appears from the record that the Domestic Relations Commissioner heard considerable evidence before he made his recommendations to the trial judge. The Commissioner's Report filed on November 10, 1997, consisted of approximately six pages and discussed the procedural history of the case and evaluated the evidence presented by the parties. We believe the following excerpts are significant in addressing the adequacy of the trial court's findings:

Through five (5) days of hearings in this case, the Commissioner finds that both

parties have made judgments and taken actions which could certainly have been improved upon. The testimony in the case indicates that the Respondent, Booster Laverne Kinsey, had attempted suicide in 1990 and again at the time of separation in June of 1996. Each party convinced the Commissioner that the other had experimented with drugs or marijuana or both during their marriage. [Booster] demonstrated poor judgment in mailing out a packet including some explicitly vivid sexual activity on behalf of [Patricia] to everyone he could think of, the list consisting of about three (3) pages single-spaced. [Patricia] accused [Booster] of sexually abusing the older boy, but no evidence was demonstrated to back this up except a counselor in Bowling Green that engaged in play therapy to reach her conclusions.

. . .

[The Counselor's conclusions] seem[] to be completely ridiculous conclusions to indicate any sexual abuse.

. . .

The Commissioner finds that [Patricia] is overly protective of the son, Carl, and suspects everyone of abusing him.

The Commissioner likewise finds that [Booster] is a very devoted and loving father, demonstrating this in videos of playing with the children, as well as his visits with the children. The Commissioner also finds [Booster] as somewhat paranoid as questioning the supervision that went into his visits from one of the supervisors.

Both parties filed exceptions to the Commissioner's Report. However, with the exception of a matter related to Booster's summer visitation rights, the trial court entered an order on March 26, 1998, wherein it approved and adopted the report as its own. However, the order approving the report did

not include finality language, and the parties continued to file motions litigating matters related to custody and visitation.

On July 9, 1998, Booster filed a motion for sole custody, wherein he alleged that the children "had been placed in physical, mental, and emotional danger" by Patricia. Apparently, Patricia had moved with the children from Butler County to Louisville without notifying Booster or the trial court of her whereabouts. The trial court, without referring the matter back to the Commissioner, heard additional evidence on this motion. In an order entered on August 31, 1998, the trial court ruled that joint custody should continue with Patricia as the resident custodian and with Booster receiving additional visitation. The trial court stated:

IT IS FURTHER ORDERED AND ADJUDGED that this court finds that both parties are good and caring parents and love their children. Both have exercised poor judgment at times when dealing with each other concerning the children. But for the incident on June 27, 1998, the motion for change of custody would not have been filed or considered. That is the only substantial fact or change in circumstance that was brought before the court since the last hearing and ruling in October 1997. Therefore, standing alone, that incident is nonsufficient to warrant a change of custody. In other words, the best interest of the children will not be advanced by awarding Mr. Kinsey sole custody or the primary residential custodianship of the children. Therefore, the Motion for Change of Custody is DENIED and the visitation with the father is altered as outlined above.

This is a final and appealable order and there is no just reason for delay.¹⁶

As discussed previously, the final order awarding custody in this matter that was entered on August 31, 1998, also incorporated previous interlocutory orders of the trial court. While we believe the trial court's orders regarding child custody could have made more direct reference to the elements of KRS 403.270, we also believe that the trial court's findings previously set forth herein properly addressed the issue of the best interests of the children. The trial court found that while both parents had made mistakes, they both loved and cared for the children and were fit to have custody. Most importantly, the trial court awarded joint custody with Patricia as the resident custodian based on what it determined to be in the best interests of the children.

Even though the trial court could have better observed the elements of KRS 403.270, the various relevant findings of fact that were set forth above are supported by the evidence of record, and thus, we cannot hold them to be clearly erroneous; and the joint custody award with Patricia as the resident custodian was not an abuse of the trial court's discretion.¹⁷

¹⁶Following the entry of this final order, Booster filed a CR 59 motion to alter, amend or vacate. On December 2, 1998, the trial court denied Booster's CR 59 motion as to the custody issue, but altered the previous orders as to visitation.

¹⁷In Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994), our Supreme Court stated that an abuse of discretion "implies arbitrary or capricious disposition under the circumstances, at
(continued...)

Accordingly, the judgment of the Butler Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Pamela C. Bratcher
Bowling Green, KY

BRIEF FOR APPELLEE:

Steven O. Thornton
Kenneth P. O'Brien
Bowling Green, KY

¹⁷(...continued)
least an unreasonable and unfair decision.”