

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000954-MR

BARBARA M. TALWAR (NOW EBEL)

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ELEANORE N. GARBER, JUDGE
ACTION NO. 93-FD-003105

SUNEEL S. TALWAR

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: COMBS, GUIDUGLI, AND MILLER, JUDGES.

MILLER, JUDGE: Barbara M. Talwar (now Ebel) brings this appeal from a March 17, 2000, judgment of the Jefferson Circuit Court. We affirm.

Appellant, Barbara M. Talwar (now Ebel), and appellee, Suneel S. Talwar, were married in 1973. Two children were born of the marriage, Justin, born January 8, 1988, and Brendan, born July 23, 1990. The marriage was dissolved September 8, 1994. At that time, appellant was awarded sole custody of the children and appellee was awarded visitation by order entered November 20, 1995. On September 3, 1998, visitation was modified, giving appellee nearly equal time with the children.

At some point in 1997 or 1998, appellant decided to relocate herself and the children to Florida. Accordingly, on June 17, 1999, while appellee and the children were out of town, appellant petitioned the court to restructure the visitation schedule pending her imminent move. After his return, appellee responded by moving for a temporary restraining order against relocation of the children. He simultaneously petitioned the court for joint custody with appellee as primary custodian, or in the alternative, sole custody of the minor children. On July 23, 1999, the court granted appellee's temporary restraining order which prohibited appellant from relocating the children to Florida pending a trial on the motion for modification of custody. Appellant moved to dissolve the temporary restraining order. Appellee countered with a motion for temporary injunction. Appellant's motion to dissolve the restraining order was overruled by the circuit court. Appellee's motion for temporary injunction was granted. Ultimately, the circuit court granted appellee's motion for modification of custody and awarded joint custody of the minor children to appellant and appellee with the children's primary residence being with appellee in Kentucky. This appeal follows.

Appellant first asserts the circuit court erred in granting the restraining order and temporary injunction. The motion to dissolve the restraining order was overruled on August 4, 1999. Ky. R. Civ. P. (CR) 65.03(5) provides, in pertinent part, as follows:

Unless it provides an earlier termination date, a restraining order shall remain in

force until, and not after, (a) the time set for a hearing on a motion to dissolve the restraining order unless there is then pending a motion for a temporary injunction, or (b) the entry of an order on a motion for a temporary injunction, or (c) the entry of a final judgment, whichever is earlier.

An order granting temporary injunction was entered on August 13, 1999, and a final judgment entered March 17, 2000. As such, the restraining order terminated at the very latest March 17, 2000.

The proper procedure for relief from a temporary injunction is by motion to the Court of Appeals within twenty days after entry thereof. CR 65.07. Cf. Wyatt, Tarrant & Combs v. Williams, Ky., 892 S.W.2d 584 (1995). In any event, the circuit court has entered final judgment in favor of appellee. As such, this assignment of error is also moot.

Appellant next asserts that the circuit court's decision to modify her sole custody to joint custody was an abuse of discretion and clearly erroneous. CR 52.01. Modification of a custody decree is controlled by statute. Kentucky Revised Statute (KRS) 403.340(2) provides in pertinent part:

(2) If a court of this state has jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act, the court shall not modify a prior custody decree unless 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. In applying these standards, the court shall retain the custodian appointed pursuant to the prior decree unless:

. . . .

- (c) The child's present environment **endangers seriously his physical, mental, moral, or emotional health**, and the harm likely to be caused by a **change of environment** is outweighed by its advantages to him. (Emphases added.)

A trial judge has broad discretion in determining the best interests of children when making a determination of custody. See Krug v. Krug, Ky., 647 S.W.2d 790 (1983). In the case *sub judice*, the court found that both children wanted more time with their father. As a result, both children preferred to remain in Louisville and were seriously upset by the prospect of relocating to Florida. This upset was manifested in the older child by panic attacks and evidence of potential self harm. The younger child responded by acting and by withdrawing. As such, the court found the forced move would seriously endanger the health of both children.¹ The court concluded that the children's fear of losing their father is "genuine, deep-rooted and serious." The court further noted that appellant had consistently exercised sole custody in a manner that has been a major factor causing this serious disruption and emotional turmoil for both boys. The court then determined the resulting threat to the children's emotional health, warranted modification of custody.

In arriving at the findings and conclusions included in a detailed twenty-six-page opinion, the court relied on testimony from no fewer than six experts. Among those experts were a court

¹Additionally, the court evinced a concern for the boys' relationship with their mother by noting that the boys' perception that the mother was keeping them from their dad would estrange them from her.

appointed custodial evaluator, a certified child psychologist, and a licensed clinical psychologist engaged by appellant. These experts were consistent in noting the children's fear of losing contact with their father. There is similar consistency with respect to the seriousness of the fear and resulting adverse consequences on the children's health. Significantly, the court also relied on the court's own interview with both children separately in chambers without the parents or counsel present. In these interviews, the court found that both children were adamant in their desires to remain with their father. Indeed, the court was impressed with the emotional response of the elder child when discussing the prospective move.

Upon the whole, we are of the opinion that the circuit court's modification of custody was in conformity with KRS 403.340(2). Simply stated, we do not perceive abuse of discretion by the circuit court, nor do we perceive any findings of fact to be clearly erroneous.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Susan M. Meschler
Louisville, Kentucky

BRIEF FOR APPELLEE:

Thomas M. Denbow
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