

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002376-MR

DERON TURSANY

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE WILLIAM J. WEHR, JUDGE
ACTION NO. 97-CI-00890

SHARON EISNER

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: DYCHE, GUIDUGLI AND KNOFF, JUDGES.

GUIDUGLI, JUDGE. Deron Tursany (Tursany) appeals from an order of the Campbell Circuit Court dated September 1, 2000, which denied his motion for physical custody of his minor child. We affirm.

Tursany and Sharon Eisner (Eisner) are the parents of Rhealynn Eisner (Rhealynn), who was born on July 30, 1994. Rhealynn has lived with Eisner since her birth. Pursuant to an order of the trial court entered April 27, 1998, the parties share joint custody of Rhealynn with Eisner as the custodial parent. The order also set forth a schedule for Tursany's visitation with Rhealynn.

On January 31, 2000, less than two years after entry of the joint custody order, Tursany filed a motion seeking physical custody of Rhealynn. In support of the motion, Tursany filed an affidavit in which he alleged that he and Eisner were having disputes regarding his visitation with Rhealynn. Specifically, Tursany alleged that Eisner failed:

to have the child available at the beginning of my visits and to be available at the end of my visits to reclaim our child. [Eisner] regularly refuses to follow through on activities arranged for our daughter when it obliges her to make sure that Rhealynn attends an event that falls during her time with the child.

Tursany also alleged that he was often told to pick up or drop off Rhealynn at the homes of Eisner's relatives, and that Rhealynn told him that she often stays with Eisner's relatives. Tursany indicated that Rhealynn's life had no structure at Eisner's house, and that she and an older half-sibling were occasionally left home alone. The affidavit stated that Eisner often asked him to pick up Rhealynn earlier or drop her off later than the times set forth in the joint custody order.

Aside from the problems with visitation, Tursany alleged in the affidavit that while he and his wife were active in Rhealynn's school, Eisner had not attended any parent-teacher conferences. According to Tursany, Rhealynn was often dressed in dirty clothes and unbathed when he picked her up for visitation. He also alleged that he smelled marijuana in Eisner's home when he dropped Rhealynn off. According to the affidavit, Tursany's wife observed Rhealynn wearing the same clothes to school on Monday that she had on when dropped off on Sunday after

visitation. Tursany also stated that Eisner sent him "a letter in which she insisted that all communications between us concerning our daughter must occur through her attorney."

Tursany also included an affidavit from his wife, Kelly, in which she stated that the allegations contained in his affidavit were accurate. Kelly alleged that Eisner "generally is either confrontational about issues that arise between us concerning the child, or very uncaring with respect to requests we make or concerns we raise with respect to Rhealynn."

A hearing on Tursany's motion was held before a Domestic Relations Commissioner (the DRC). Tursany testified that he generally gets the minimum amount of visitation set forth in the joint custody order. According to Tursany, he gets to spend more time with Rhealynn "if things are going well between Sharon and myself," but when he and Eisner argue "she has stated I will not get [Rhealynn] anymore than my time that is required by law." In regard to the visitation problems, Tursany testified that they have problems with trying to contact Eisner to find out if she is going to pick Rhealynn up or they are going to drop her off. Sometimes Eisner leaves a note on her door telling them where to take Rhealynn. Tursany testified that Eisner currently has no phone in her house but appears to have a cell phone. Tursany stated that Rhealynn calls Eisner's boyfriend "Dad" and calls him "Poppy."

In regard to Rhealynn's health, Tursany stated that when she gets sick Eisner will call and ask him what to do. He further testified that Rhealynn's doctor appointments are usually

made on days when he has her or he takes off work to take her to the doctor.

On cross-examination, Tursany agreed that Rhealynn was healthy and active, that she had good grades, and that her shots were up to date. He also agreed that Eisner had taken Rhealynn to the doctor on several occasions. Tursany further agreed that his motivation in seeking physical custody of Rhealynn was his belief that he and his wife could provide a more stable environment than Eisner. Tursany acknowledged that there have been periods of time when he and Eisner were able to agree on issues concerning Rhealynn, and also agreed that he has occasionally been less than cordial with Eisner. Tursany also agreed that some of their problems could be solved by setting up a set exchange time and place. In his opinion, Eisner does not encourage his relationship with Rhealynn because Rhealynn does not call him "Dad."

Kelly Tursany testified that she volunteers at Rhealynn's school and participates in school activities and functions. In Kelly's opinion, communications with Eisner are good at times and hostile at times. Kelly stated when Tursany and Eisner argue, Tursany's visitation is limited to that provided in the joint custody order, and then when the relationship improves they get to see Rhealynn more often. Like Tursany, Kelly testified that it would be in Rhealynn's best interest to live with them because they can provide a stable and consistent environment. On cross-examination, Kelly agreed that Rhealynn is verbal, inquisitive, healthy, and active. Kelly

agreed that Rhealynn was well-taken care of at Eisner's, but stated that she and Tursany could provide more stability.

In a report dated August 3, 2000, the DRC recommended that Tursany's motion be denied. In so finding, the DRC stated:

Petitioner and Respondent have joint legal custody of Rhealynn. At the time of the hearing in this case, the state of the law as indicated in the case of Mennemeyer v. Mennemeyer, 887 S.W.2d 555 (Ky.App., 1994) established a threshold requirement that the Court find an inability or bad faith refusal to cooperate before a party may proceed to attempt to modify a joint custody decree. In this present case, having heard the testimony of the parties and all witnesses, the Domestic Commissioner finds that Petitioner and Respondent have shown an ability to cooperate regarding decisions effecting the upbringing of their child. In fact, it appears that Petitioner and Respondent have cooperated better than most parents who appear before this Court. This is not to say that the parties have not had disputes and have had occasions when they have not cooperated with each other. However, Petitioner and Respondent have made a joint determination to send their daughter to a parochial school, and on occasions Respondent has contacted Petitioner to obtain Petitioner's opinion regarding an illness or special medical problem with Rhealynn. Another important aspect of the cooperation of these parties is that Petitioner has often requested extra time with his daughter for special events such as birthday parties, and Respondent has usually agreed to this extra time. Petitioner has also asked for extra time when there was no special event, and Respondent usually agreed.

Based upon the requirement in the Mennemeyer case that the Court first find an inability or bad father refusal on the part of one of both parties to cooperate regarding the decisions effecting [sic] the upbringing of the child, the Domestic Commissioner finds that the inability or bad faith refusal to cooperate does not exist in this case, and therefore this threshold has not been met.

Presently, the statue of the Mennemeyer case is unsettled and may be overruled by a recent Court of Appeals case. However, even if Mennemeyer is overruled, and the state of the law reverts back to the status prior to Mennemeyer, the Domestic Commissioner cannot find that the modification of the joint custody arrangement should occur. Both Petitioner and Respondent, and the witnesses that testified at this hearing, all acknowledge that Rhealynn is a happy and healthy child, and that she has done very well in kindergarten. Obviously the joint custody arrangement for Rhealynn has been successful. There have been times when the parties do not get along, but overall the joint custody arrangement for Rhealynn has been successful. It does also appear that Petitioner has the belief that he can provide a better home, a better environment and more stability for Rhealynn, and that Petitioner does not approve of Respondent's life style, living arrangements or her employment. However, even if the Mennemeyer case is overruled, Petitioner filed his motion to modify custody within two years after the Order was entered on April 23, 1998, and this Commissioner cannot find that Rhealynn's present environment may seriously endanger her physical, mental, moral or emotional health.

For the reasons stated above, the Domestic Commission finds that Petitioner's motion to modify custody should be denied, and the joint legal custody arrangement as ordered by this Court on May 23, 1998 shall remain in effect.

The DRC also recommended that the parties be referred to a local mediator to resolve issues regarding custody and the drop off/pick up procedures.

In his objections to the DRC's report, Tursany once again maintained that he and his wife could provide a more stable environment for Rhealynn. Tursany also alleged that Eisner's circumstances had "apparently" changed since the date of the hearing because Eisner and Rhealynn had "virtually" moved in with

Eisner's mother "although there is some back and forth between that residence and their former home." Tursany argued that Eisner's change in residence would have been a factor in the DRC's recommendations had he been aware of it. However, it is interesting to note that Tursany made no attempt to reopen the proceedings before the DRC to place these additional facts before him for consideration. The trial court overruled Tursany's objections and adopted the DRC's report and recommendations in an order entered September 1, 2000. This appeal followed.

Tursany maintains that he presented evidence sufficient to satisfy the standards of both Mennemeyer and Scheer v. Zeigler, Ky.App., 21 S.W.3d 807 (2000), which overruled Mennemeyer. Having reviewed the record on appeal, we disagree.

In order to modify a joint custody order under Mennemeyer, which was the law in effect at the time of hearing, the petitioning party must show "that there has been an inability or bad faith refusal of one or both parties to cooperate." Mennemeyer, 887 S.W.2d at 858. Although the evidence of record shows that the parties have had disputes in the past, there has been no evidence which shows inability or a bad faith refusal to cooperate on Eisner's behalf. Tursany agreed that Eisner allows him the minimum amount of visitation under the joint custody agreement and that he occasionally has visitation with Rhealynn above and beyond the minimum provided by the order. Ongoing arguments about issues surrounding a child are not sufficient to satisfy the Mennemeyer standard absent a showing of inability or

bad faith refusal to cooperate on behalf of the non-petitioning party, this has not been shown.

Nor does the evidence satisfy the Scheer standard for modification. Under Scheer, a party seeking to modify a joint custody order must comply with the custody modification provisions of KRS 403.340 and KRS 403.350. Scheer, 21 S.W.3d at 814. Under KRS 403.340, a party who seeks modification of a custody order before two years have passed since the date of its entry must show that “[t]he child’s present environment may endanger seriously his physical, mental, moral, or emotional health.” KRS 403.340(1)(a).¹ As the evidence shows, both Tursany and his wife agree that Rhealynn is healthy and active and that the sole ground for the motion is their belief that they can provide a more stable environment for her. Although Tursany’s affidavit alluded to the scent of marijuana in Eisner’s home, this was not developed during the hearing. Based on the evidence contained in the record, Tursany has not satisfied KRS 403.340(1)(a).

Finally, Tursany maintains that Eisner’s conditions have changed significantly since the hearing and that the DRC and the trial court refused to take this into account in denying his motion. However, we note that aside from the allegations contained in Tursany’s objections to the DRC’s report, there is no evidence of any change in Eisner’s living arrangement and

¹KRS 403.340(1)(b), which allows for modification of a custody order before the two year period if the child has been placed with a de facto custodian, has no application to this case.

there was no attempt by Tursany to reopen the proceedings before the DRC to address his concerns. Because Tursany failed to move to reopen the matter before the DRC and the trial court for consideration of this evidence, it would not be proper for us to remand this matter with orders to do so.

Having considered the parties' arguments on appeal, the order of the Campbell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Susanne Cassidy
Covington, KY

BRIEF FOR APPELLEE:

Carl Turner
Cold Spring, KY