

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001264-MR

SHIRLEY DAVIS

APPELLANT

V. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 00-CI-00078

JASON MICHAEL DAVIS; KYLEY¹
DAVIS; JAMIE MOSES; DARRELL
MOSES; and DEPARTMENT FOR
COMMUNITY BASED SERVICES,
CABINET FOR FAMILIES AND
CHILDREN

APPELLEES

OPINION AFFIRMING

* * * * *

BEFORE: GUDGEL, JOHNSON, and McANULTY, Judges.

GUDGEL, JUDGE: This is an appeal from an order entered by the Whitley Circuit Court in a custody dispute between nonparents. The court awarded custody to Jamie Moses and Darrell Moses, who are the children's maternal aunt and uncle (hereinafter referred to as appellees), rather than to appellant, who is the paternal grandmother. On appeal, appellant contends (1) that the court abused its discretion by reassigning the trial of the action, without cause, from the domestic relations commissioner (DRC) to

¹Although the notice of appeal and appellate briefs spell appellee's name as "Kyle" Davis, our review of the record shows that her name was spelled as "Kyley" in the majority of the Circuit Court records.

himself, and (2) that the court's findings are not sufficient to support the judgment. We disagree with both contentions. Hence, we affirm.

Appellees acquired custody of Jason and Kyley Davis's two children shortly after each child was born. More specifically, at the parents' request the Cabinet for Families and Children (Cabinet) placed Aaliyah Davis with appellees shortly after her birth on May 6, 1999. Kyle Davis, who was born on July 26, 2000, was also placed with appellees and, except for a one-month period, both children remained in appellees' custody until January 9, 2001, when the Cabinet removed them due to appellees' alleged failure to comply with a certain safety plan.

Meantime, in February 2000 appellant filed a custody action seeking custody of Aaliyah. Over objection, appellees were allowed to intervene in that action, and the case was assigned to the court's DRC. When a hearing was finally conducted in February 2001, the DRC recommended that appellant's petition should be amended to allow her to also seek custody of Kyle, who was born after the original petition was filed. The DRC also directed that a home evaluation should be conducted and that the hearing should be concluded once the evaluation report was filed. Appellees in turn filed a motion for emergency custody of Aaliyah, served notice that the motion would be heard before the circuit judge, and filed an amended pleading seeking custody of both children.

On March 8, 2001, the court set aside the order referring the case to the DRC, and the matter was set for trial

before the court on March 28. After that hearing the court rendered findings and awarded appellees sole custody of both children. This appeal followed.

First, appellant contends that the trial court abused its discretion by reassigning the matter without cause from the DRC to himself. We disagree.

Although CR 53.03(3) provides that a court may order custody matters to be heard by its DRC, the court is not mandated to refer all such matters to the commissioner. Moreover, any recommendations which a DRC makes to the court may be rejected or changed at a subsequent hearing on exceptions. Thus, the court clearly retains the ultimate authority to make a final decision in a custody dispute referred to a DRC. Given the fact that a DRC referral is discretionary with the trial court, and that the trial court has the authority to make the final decision in any custody matter referred to its DRC, we fail to perceive that the trial court herein exceeded its authority or abused its considerable discretion by electing to reassign this case to itself, and by thereafter conducting a trial and rendering findings resolving the dispute.

Next, appellant contends that the trial court's findings and conclusions were neither supported by sufficient credible evidence nor consistent with the law. We disagree.

Having reviewed the transcript of the evidence, we cannot say that the court clearly erred by awarding custody to appellees. The proof shows that the children have spent almost their entire lives in appellees' custody, and that they have

bonded with appellees and their family. Appellant, by contrast, has had limited contact with the children. Further, the only complaint regarding appellees and their care of the children concerns the allegation that, on one occasion, they violated an alleged safety plan by permitting Kyle to spend the night with his maternal grandmother without providing the required advance notice to the Cabinet. However, the proof regarding the alleged violation was based upon hearsay statements made to one of the testifying social workers, and appellees denied that the incident occurred. Further, even if the incident occurred, there was no proof that the child was at any risk of harm during the visit. Given appellees' prior history with the children, the evidence adduced at the hearing, and the questionable proof as to the alleged violation of the safety plan, we simply cannot say that the court's findings were clearly erroneous or that there was any abuse of discretion in the award of custody to appellees.

Finally, we decline to address appellant's vague references to alleged possible misconduct arising out of the court's alleged favoritism for a particular attorney who represented appellees, as these accusations have no support or basis in the record. Indeed, as far as we can ascertain, such references are totally frivolous and unfounded.

The court's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jane R. Butcher
Williamsburg, KY

BRIEF FOR APPELLEES:

Larry E. Conley
Corbin, KY

Don R. Moses
Williamsburg, KY