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Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001408-MR

ANGELA F. GIBSON (now BOOTS) APPELLANT

v. APPEAL FROM MEADE CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
CIVIL ACTION NO. 99-CI-00021

MICHAEL C. ARNOLD APPELLEE

OPINION

VACATING AND REMANDING

** ** ** ** **

BEFORE: EMBERTON, Chief Judge; DYCHE and HUDDLESTON, Judges.

HUDDLESTON, Judge: Angela F. Gibson (now Boots) appeals from a Meade Circuit Court order implicitly overruling her exceptions to the report of the court's domestic relations commissioner (DRC) and adopting his recommendation that Michael C. Arnold be granted custody of the parties' two daughters.

Angela and Michael, who were never married, are the parents of Megan Nicole Arnold, born April 30, 1994, and Michelle Lynn Arnold, born December 15, 1995. On January 28, 1999, Angela filed a petition seeking custody of the children. Subsequently, Angela and Michael agreed to share joint custody of the children

with Angela designated as the primary residential custodian and Michael having standard visitation pursuant to the circuit court's guidelines. The action came before a DRC for a final hearing on April 8, 1999. In a report filed on April 29, 1999, the DRC approved this arrangement, and the circuit court adopted the DRC's recommendation in an order entered on October 12, 1999.

Upon learning that Angela planned to relocate to California, Michael filed a verified motion for custody of the children. On June 26, 2000, the DRC conducted a hearing on the matter. During the pendency of this action, Scheer v. Zeigler[1] was decided by this Court. In light of Scheer, the circuit court granted Michael leave to file two affidavits in support of his motion to modify the custody decree pursuant to Kentucky Revised

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[1] Ky. App., 21 S.W.3d 807 (2000).

Having reviewed and outlined the history of joint custody in Kentucky courts, we concluded that the approach of Benassi v. Havens, Ky. App., 710 S.W.2d 867 (1986), to joint custody was flawed and that it led to the improper threshold requirement of Mennemeyer v. Mennemeyer, Ky. App., 887 S.W.2d 555 (1994). We overruled both cases. Id. at 811. In so doing, we held as follows:

> . . .[J]oint custody is an award of custody which is subject to the custody modification statutes set forth in KRS 403.340 and KRS 403.350 and that there is no threshold requirement for modifying joint custody other than such requirements as may be imposed by the statutes. Our holding today in no way alters or destroys the ability of courts to modify joint custody in situations where the parties are unable to cooperate. Although this court first delineated this authority in Chalupa [v. Chalupa, Ky. App. 830 S.W.2d 391 (1992)] without statutory support, we nonetheless find statutory support by interpreting KRS 403.340(2) (c) and KRS 403.340(3) to cover this situation.

Id. at 814.

Statutes (KRS) 403.340(1),[2] ultimately granting him a new hearing based on those affidavits. However, a new hearing was never held as "the [DRC] was left to determine the facts based upon the hearings previously held, both sides stipulating that he was to avail himself of the facts already introduced in this action."

Citing Scheer and "considering the recent amendment to KRS 403.340,"[3] the DRC, in a report issued on May 23, 2001, found that "it would be in the best interests of the children to have them restored to the condition that existed prior to their removal to California by their mother" and recommended that custody be awarded to Michael. Angela filed objections[4] to the DRC's report

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[2] Although KRS 403.340(1) is now subsection (2), it is substantively unchanged and provides as follows:

> No motion to modify a custody decree shall be made earlier than two (2) years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe that:
>
> (a) The child's present environment may endanger seriously his physical, mental, moral, or emotional health; or
>
> (b) The custodian appointed under the prior decree has placed the child with a de facto custodian.

[3] As observed by this Court in Scheer: "The Benassi court reasoned that KRS 403.340 and KRS 403.350 related only to modification of sole custody awards. Id. at 869. We can only surmise that its interpretation is founded upon the statute's use of the singular term "custodian." KRS 403.340." Id. at 812.

Resolving this ambiguity, KRS 403.340(1) was subsequently amended and now provides as follows: "As used in this section, "custody" means sole or joint custody, whether ordered by a court or agreed to by the parties."

[4] In the instant case and commonly throughout this jurisdiction, the term "exception" or some variation thereof is used to describe the procedure by which a party obtains trial court review of the report of a DRC pursuant to Ky. R. Civ. Proc. (CR) 53.06. In actuality, CR 53.06 does not contain the term

(continued...)

to which Michael responded. Having "reviewed the [m]emoranda of the parties, the cases cited therein, the record of proceedings and the applicable statutes," the circuit court adopted the report of the DRC in an order entered on June 25, 2001, with a visitation schedule for Angela to either be agreed upon by the parties or determined by the court after a hearing upon motion by either party. Arguing that the circuit court erred in modifying the custody decree, Angela appeals from that order.

With the exception of the aforementioned affidavits, however, the record on appeal was initially devoid of evidence. In addition, both parties filed briefs which failed to comply with Kentucky Rules of Civil Procedure (CR) 76.12. Because this case involves an issue of utmost importance, the custody of two little girls, we were unwilling to invoke the penalties available in the event of such deficiencies set forth in CR 76.12(8), opting instead to issue an order requiring Angela to designate as a part of the record on appeal either video recordings or transcripts of all hearings held before the DRC or the court subsequent to December 2, 1999, within ten days following entry of the order. We further ordered Angela to file a supplemental brief in compliance with CR 76.12 (4)(c)(iv) within 15 days following the designation of the record. Likewise, we ordered Michael to file a supplemental brief fully complying with CR 76.12 (4)(d)(iii) within 15 days thereafter. As we are now in possession of the video recording of

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[4] (...continued)
"exception" but rather speaks of "objections." To maintain consistency with the rule, we will use the term "objection" throughout this opinion.

the hearing held before the DRC on June 26, 2000, and the supplemental briefs, the case is now ripe for decision. Unfortunately, however, the supplemental briefs are of no assistance.[5]

Likewise, the DRC's report, set forth below in its entirety, can only be categorized as inadequate:

> The [DRC] has been requested to revisit this action in light of recent developments in the law, specifically rendering of the decision in Scheer v. Zeigler, [] and, also, considering the recent amendment to KRS 403.340.
>
> The Courts are now to consider the best interest of a child in modifying custody.
>
> The [DRC] was left to determine the facts based upon the hearings previously held, both sides stipulating that he was to avail himself of the facts already introduced in this action.
>
> The [DRC] finds that the children were removed from an integrated environment without sufficient cause. They were close to both sides of their families, both

[5] To begin with, neither supplemental brief contains the proper heading, Angela's being referred to as a "supplemental statement of appeal" and Michael's being entitled a "supplemental counter-statement of the case," indicating a lack of understanding of and/or attention to the order issued by this Court. Further indication of this inattention is the length and content of the supplemental briefs — they are two pages and one page in length, respectively, and contain no additional detail or insight to aid in "an understanding of the issues presented by the appeal," merely a brief, repetitive summary of the information already provided which is accompanied by references to the video recording of the hearing designated as part of the record pursuant to our instructions.

paternal and maternal, resident in or near Meade County, and were removed across the continent by their mother following her paramour.

There was evidence that the paramour of [Angela], who is ex-military, exercised strict discipline of the children, including corporal punishment for slight infractions.

There was also evidence that Megan had not been treated in a timely fashion for an injury to her leg.

There was evidence that the children were close to their father and his family, which cannot now be sustained by the distance between the separate residences.

The [DRC] finds and reports to the Court there exists sufficient facts to indicate that serious endangerment was present to support a modification of custody. He further goes on to find, pursuant to the amendment, that it would be in the best interests of the children to have them restored to the condition that existed prior to their removal to California by their mother.

The [DRC], therefore, recommends that [Michael] be granted custody of the two children of the parties.

Noticeably lacking from the DRC's report are factual findings to support his recommendation; "There was evidence . . ." is a conclusory statement, as is "there exists sufficient facts"

absent further elaboration. As the evidence at the hearing before the DRC included testimony from Angela, Michael, Michael's mother, Angela's fiancé (now husband) and Megan, the DRC presumably found Megan's version of the events in question, i.e., frequency and severity of the "strict discipline" allegedly administered by her stepfather, more credible than the account offered by her stepfather given the DRC's ultimate conclusion.[6] However, we cannot fulfill our obligation to conduct a meaningful review based on inference and conjecture, nor are we comfortable attempting to make a decision of such magnitude without sufficient information.

Pursuant to CR 52.01, "to the extent that the court adopts them," the findings of a commissioner "shall be considered as the findings of the court." Our standard of review in this context is well established. "Since this case was tried before the court without a jury, its factual findings 'shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.'"[7] If a factual finding is supported by substantial evidence, it is not clearly erroneous.[8] "Substantial evidence is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. 'It is within the

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[6] While the DRC mentions an alleged delay in seeking treatment for Megan's leg injury, suffice it to say that this issue was not determinative and, in any event, the record reveals that the issue lacks merit as reflected by its omission from Michael's brief.

[7] Cole v. Gilvin, Ky. App., 59 S.W.3d 468, 472 (2001)(emphasis supplied).

[8] Id. at 472-473.

province of the fact-finder to determine the credibility of witnesses and the weight to be given the evidence.'"[9]

More specifically, the Supreme Court has described the respective roles of the circuit court and the DRC as follows:

> A great many circuit courts in Kentucky make use of [DRCs]. The rules relating to such commissioners are found in CR 53.03-53.06, inclusive. Of significance here is CR 53.06 which relates to the report of the commissioner. Subsection (2) of CR 53.06 provides that within ten days after notice of the filing of the report, any party may serve written objections and have a hearing thereon before the circuit court. With respect to the report, the court may adopt, modify or reject it, in whole or in part, and may receive further evidence or may recommit it with instructions. In sum, the trial court has the broadest possible discretion with respect to the use it makes of reports of [DRCs].[10]

A trial court is entitled to reevaluate the evidence and reach a different conclusion than the DRC. "While actions before the court without intervention of a jury are governed by CR 52, et seq., it seems apparent that on matters referred to a commissioner pursuant to CR 53.03, the specific provisions of the rules relating to commissioners prevail."[11] Our function, then, is to ascertain

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[9] Id. at 473.

[10] Eiland v. Ferrell, Ky., 937 S.W.2d 713, 716 (1997).

[11] Id.

whether there is substantial evidence to support the circuit court's factual findings and determine whether the court abused its discretion in finding that the custody decree at issue should be modified so as to grant custody of Megan and Michelle to Michael.

It stands to reason that we cannot determine whether there is substantial evidence to support factual findings that are nonexistent. In accordance with KRS 403.340(3):

> . . . the court shall not modify a prior custody decree unless after hearing 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.[12]

In making this determination, the court must consider certain criteria which, in relevant part, includes: "The factors set forth in KRS 403.270(2)[13] to determine the best interests of

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[12] Emphasis supplied.

[13] The relevant factors include:

> (a) The wishes of the child's parent or parents, and any de facto custodian, 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;

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the child; Whether the child's present environment endangers seriously his physical, mental, moral, or emotional health;" and "Whether the harm likely to be caused by a change of environment is outweighed by its advantages to him[.]"[14]

Although the DRC references the "best interests" standard and finds that "serious endangerment was present to support a modification of custody" in his report and the circuit court may very well have considered these statutorily mandated factors in modifying the decree, in the absence of factual findings, we are unable to make that determination on the record before us. Accordingly, we are compelled to vacate the circuit court's order and remand with instructions that the court make specific factual findings and apply the statutory factors in determining whether a change in custody is in the best interests of Megan and Michelle.

In so doing, the circuit court must also consider whether their current environment seriously endangers their physical, mental, moral or emotional health and whether the harm caused by such a drastic change would be outweighed by its advantages and

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[13] (...continued)
(f) Information, records, and evidence of domestic violence as defined in KRS 403.720;
(g) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;
(h) The intent of the parent or parents in placing the child with a de facto custodian; and
(i) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school.

[14] KRS 403.340(c)(d)(e).

explain the reasoning behind its conclusion. In our estimation, the pivotal issue and only legitimate basis for modifying custody on the current facts (of which we are aware), given the intentionally high threshold, concerns the nature of discipline administered by the children's stepfather, i.e., does it rise to the level of "serious endangerment?" As is often the case with the kind of allegations being made here, the evidence consists of conflicting testimony with inherent reliability issues. In other words, this case presents exactly the type of situation which the Cabinet for Families and Children is uniquely equipped to evaluate and we strongly encourage the circuit court to enlist its services in resolving the instant controversy for the benefit of everyone involved rather than relying solely on evidence that is inconclusive. Hopefully, employing such measures, while having the undesirable side-effect of further delaying the process, will enable those charged with the responsibility of determining whether such a life-altering change is warranted to truly serve Megan and Michelle's "best interests."

To that end, the circuit court's order is vacated and this case is remanded to Meade Circuit Court with directions to conduct further proceedings consistent with this opinion in the expeditious and thorough manner this case demands.

EMBERTON, Chief Judge, CONCURS.

DYCHE, Judge, DISSENTS.

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