

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002317-MR

MICHAEL PATRICK DIER

APPELLANT

v. APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NOS. 97-CI-00034 AND 97-CI-00976

LAURA SAMPLES

APPELLEE

OPINION

REVERSING AND REMANDING

** ** * * * * *

BEFORE: EMBERTON, CHIEF JUDGE, BUCKINGHAM AND BARBER, JUDGES.
BUCKINGHAM, JUDGE: Michael Patrick Dier appeals from an order of the Floyd Circuit Court, entered September 4, 2002, that awarded his ex-wife, Laura Samples, custody of the parties' minor daughter, Samantha. The trial court entered this order modifying custody of Samantha after determining that Dier and Samples had orally modified a custody order, entered August 9, 1999, that had granted custody of Samantha to Dier. After reviewing the record, the arguments presented by the parties

herein, and the applicable law, we reverse the trial court's order of September 4, 2002, and remand this matter for further proceedings.

During the weekend of May 10, 2002, through May 12, 2002, Samples, her sister, and her boyfriend exercised visitation with Samantha at a motel¹. During this visit, Samples discovered that Samantha's hair was infested with lice. Samples then contacted the offices of child protective services and informed the on-call social worker that Samantha had been infested with head lice and that Dier had refused to treat her for this condition. Samples also told the on-call worker that she believed Dier had recently abused Samantha. Social worker Paula Ratliff was dispatched to investigate the allegations.

On May 11, 2002, Ratliff interviewed Samples, Dier, and Samantha at the offices of the Department for Community Based Services in Paintsville, Kentucky. During these interviews, Samantha told Ratliff that Dier had choked her and had picked her up by her neck on one occasion. Samantha further asserted that she was afraid of her father and did not want to return to his custody. After speaking with Samantha, Ratliff explained to Dier that, if Samantha remained in his custody, she would open a child protection case to monitor this situation, file a juvenile petition in the Johnson District Court, and

¹ At all times material and relevant to these proceedings, Samples was a resident of Ohio.

insist that Samantha speak with a mental health expert to determine if she had been emotionally or mentally abused while in his custody.

At this point, Dier, in the presence of Ratliff, Samples, and Paintsville Police Officer Danny Smith, asked Samantha if she wanted to live with her mother in Ohio. Samantha informed her father that she wished to do so. According to testimony from Samples, Officer Smith, and Ratliff, Dier agreed to allow Samantha to live with her mother by informing Samantha to "pack your stuff and you can go." After this agreement was reached, Dier returned to his residence to obtain Samantha's clothes and personal belongings.

While Dier was obtaining Samantha's belongings, Ratliff drafted a document that read as follows:

Michael Dier told his daughter Samantha Dier to pack her bags and go live with her mother, Laura M. Samples. Mr. Michael Dier stated that his daughter, Samantha Dier could return to Ohio with her mother to live with her at her residence.

Upon Dier's return from his residence, Ratliff, Officer Smith, Samples, and another Paintsville police officer signed this document to memorialize their understanding of the agreement reached between Dier and Samples. Ratliff then presented the document to Dier, who, after consulting with his attorney, refused to sign it. Despite his refusal to execute

Ratliff's handwritten document, Dier, who now asserts that he believed Samantha would stay with Samples only for the summer, allowed Samantha to leave Kentucky and go to Ohio with Samples².

Despite the manner in which Samantha left Kentucky, Dier and Samantha maintained telephone contact throughout the summer. During these telephone conversations, Dier informed Samantha that she would have to return to Kentucky at the end of the summer so that she could return to school. When the summer ended, however, Samples, without making any motion to modify the 1999 custody order, refused to return Samantha to Dier's custody. In response, Dier filed a Verified Motion for Immediate Possession of Minor Child and Motion to Reconsider Order Withholding Enforcement of Child Support Obligation with the Floyd Circuit Court.

After holding a two-day hearing concerning Dier's motions, the trial court held that Samantha would remain in her mother's custody. In making this finding, the trial court determined that Dier and Samples had orally modified the original child custody agreement. Dier's timely filed motion to alter, amend, or vacate the order was denied by the trial court. This appeal followed.

On appeal, Dier argues that the trial court erred by failing to enforce the August 1999 custody order in the absence

² The parties' other child, Michael, was not subject to this agreement and remained in Dier's custody.

of any motion by Samples to change or modify custody. We are compelled to agree.

In reviewing a child custody determination, the standard of review is whether the factual findings of the trial court are clearly erroneous. CR³ 52.01; Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986). Findings of fact are clearly erroneous if they are manifestly against the weight of the evidence. Wells v. Wells, Ky., 412 S.W.2d 568, 570 (1967). Since the trial court is in the best position to evaluate the testimony and to weigh the evidence, an appellate court should not substitute its own opinion for that of the trial court. Reichle, 719 S.W.2d 442. Ultimately, a trial court's decision regarding custody will not be disturbed absent an abuse of discretion. Cherry v. Cherry, Ky., 634 S.W.2d 423, 425 (1982). Abuse of discretion implies that the trial court's decision is unreasonable or unfair. Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994). In reviewing the decision of the trial court, therefore, the test is not whether the appellate court would have decided it differently, but whether the findings of the trial judge were clearly erroneous or that he abused his discretion. Cherry, 634 S.W.2d 423.

³ Kentucky Rules of Civil Procedure.

Any modification of child custody is subject to the custody modification statutes contained in KRS⁴ Chapter 403. KRS 403.340(2) states:

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.

Additionally, KRS 403.350 requires:

A party seeking a temporary custody order or modification of a custody decree shall submit together with his moving papers an affidavit setting forth facts supporting the requested order or modification and shall give notice, together with a copy of his affidavit, to other parties to the proceeding, who may file opposing affidavits. If a court determines that a child is in the custody of a de facto custodian, the court shall make the de facto custodian a party to the proceeding. The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted.

⁴ Kentucky Revised Statutes.

In interpreting these statutes, the Kentucky Supreme Court held that a motion to modify a prior custody decree must be accompanied by at least one affidavit, and if the motion is made earlier than two years after its date, it must be accompanied by at least two affidavits. Petrey v Cain, Ky., 987 S.W.2d 786 (1999). If the motion and supporting affidavits are not filed, the trial court cannot exercise subject matter jurisdiction and subsequently modify a custody agreement. Id.

Here, it is undisputed that Samples never filed a motion to modify custody or any affidavits supporting any such motion. Since Samples filed no motion or affidavits with the trial court to modify the 1999 custody order, the trial court had no issues to consider concerning the custody of Samantha except for Dier's motion for immediate possession of his daughter. Given the absence of any motion to modify custody, the trial court effectively modified custody of Samantha on its own motion.

Kentucky law prohibits a trial court from modifying a custody order on its own when neither the child's mother nor father brings a motion to modify the court's previous custody order. Chandler v. Chandler, Ky., 535 S.W.2d 71 (1975). Accordingly, Dier correctly asserts that the Floyd Circuit Court did not possess any legal authority to transfer custody of Samantha from him to Samples. Therefore, the trial court's

September 4, 2002, order granting custody of Samantha to Samples must be reversed and the matter remanded to the Floyd Circuit Court with directions that it grant Dier's motion. In the absence of a motion by Samples to modify custody or in the absence of a custody order to the contrary, Dier was entitled to the possession of his child.

Our review of the record has also brought another issue to our attention. Even if Samples properly filed a motion to modify custody with the trial court, the September 4, 2002, order is deficient. When deciding issues concerning the modification of child custody, the trial court is required to consider the factors listed in KRS 403.340(3). KRS 403.340(3) provides in part as follows:

[T]he 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. When determining if a change has occurred and whether a modification of custody is in the best interests of the child, the court shall consider the following:

- (a) Whether the custodian agrees to the modification;
- (b) Whether the child has been integrated into the family of the petitioner with consent of the custodian;

- (c) The factors set forth in KRS 403.270(2) to determine the best interests of the child;
- (d) Whether the child's present environment endangers seriously his physical, mental, moral, or emotional health;
- (e) Whether the harm likely to be caused by a change of environment is outweighed by its advantages to him; and
- (f) Whether the custodian has placed the child with a de facto custodian.

The best interests of the child standard are codified in KRS 403.270(2). This statute states in pertinent part:

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

- (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;

- (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.

In its September 4, 2002, order, the trial court determined that the sole issue before it was whether these parties entered into an oral modification of the 1999 child custody order. After considering the evidence presented during the August 2002 hearings, the trial court found that the parties herein orally modified the 1999 custody order because "there is clear and convincing evidence that the Petitioner in fact told his daughter that she could reside wither mother." The trial court never determined on the record whether any modification of custody was in Samantha's best interests. Accordingly, the trial court abused its discretion by modifying custody over

Samantha without applying or considering the standards listed in KRS 403.340(3) and KRS 403.270(2). Therefore, the trial court's September 4, 2002, order has no support under Kentucky law because "[a] prior custody decree may not be modified absent a finding of changed circumstances that necessitate the modification." Holt v. Chenault, Ky., 722 S.W.2d 897, 899 (1987).

Dier also contends that the trial court erred in staying the enforcement of an order directing Samples to pay him child support. On March 2, 2001, the court ordered that all motions for child support, health insurance, and contempt for failure to pay child support be held in abeyance until the original appeal was final. According to Samples, that appeal became final when the Kentucky Supreme Court denied her motion for discretionary review on May 15, 2003.

"[E]ach installment of child support becomes a lump sum judgment, unchangeable by the trial court when it becomes due and is unpaid." Stewart v. Raikes, Ky., 627 S.W.2d 586, 589 (1982). As such, we know of no reason why Dier could not compel Samples to comply with the child support order. Further, we know of no authority that would permit the court to thwart Dier's efforts to force Samples' compliance with her child support obligation, and Samples has not cited us to any such authority. Thus, we conclude that the court also erred in this

regard, and we reverse and remand with directions to the court to enter an order lifting its prior order staying enforcement of the prior child support order.

For the aforementioned reasons, the September 4, 2002 order of the Floyd Circuit Court is reversed, and this matter is remanded to that court for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Clyde F. Johnson
Prestonsburg, Kentucky

BRIEF FOR APPELLEE:

John Harlan Callis, III
Prestonsburg, Kentucky