

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001665-MR

THOMAS K. SPEAKER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ELEANORE GARBER, JUDGE
ACTION NO. 96-FC-001828

AMY L. SPEAKER

APPELLEE

OPINION

AFFIRMING

** ** * * * **

BEFORE: EMBERTON, CHIEF JUDGE; BUCKINGHAM AND VANMETER, JUDGES.

EMBERTON, CHIEF JUDGE. This is an appeal from the Jefferson Family Court modifying a joint custody decree and awarding sole custody to the child's mother, Amy Speaker. Thomas Speaker alleges that the court failed to apply the proper legal standards, make the requisite findings for modification of the decree and improperly considered irrelevant evidence. He also maintains that joint custody did not seriously endanger the child's mental or emotional health and that sole custody to Amy

is not in the child's best interest. We find no error and affirm.

Amy and Tom were divorced in March 1996. Incorporated into the decree was a child custody and support agreement pursuant to which the parties were to have joint custody of their minor child, Austin, with Amy designated as the primary residential custodian. Tom was to pay \$1,400 per month in child support and maintain a life insurance policy for Austin's benefit.

During the months immediately following the divorce, Tom did not consistently exercise his visitation with Austin. When he did resume his visitation schedule, the parties' relationship became strained and fraught with disagreement over Austin's care. Austin, who has been diagnosed with allergies and a kidney disease, is required to take daily medication. Amy testified that when visiting Tom, Tom failed to give Austin his medication and that Austin soiled his underwear occasionally and returned smelling of urine. She also testified that Tom has a dog, and during the holiday season a live Christmas tree, to both of which Austin is allergic. During Tom's visitations, Austin has been tardy to school. Tom has had various girlfriends who have spent considerable time at his home and to whom, Tom admitted, Austin became attached only to have them disappear from his life.

On April 28, 1999, Austin, then age five, returned from his visitation with Tom with black and blue marks on his buttocks and legs. On May 1, 1999, Amy took Austin to see Dr. Deborah Blair, a clinical psychologist, who reported the incident to Child Protective Services and the Crimes Against Children Unit. After it was determined that Austin was at further risk for abuse, both Tom and Amy were restricted from using corporal punishment and Tom was ordered to attend anger management classes. Tom admitted that he spanked Austin after he disobeyed and kicked his then girlfriend but denied that he caused the bruising. During a visitation in 2000, Tom's dog bit Austin requiring stitches and Tom failed to notify Amy of the incident. There was evidence that Tom has spanked other children in Austin's presence, and to discipline the family dog, slaps him in the head.

Dr. Edward Berla was appointed by the court as a custodial evaluator and found that joint custody was not a viable option and recommended that Amy be awarded sole custody. Dr. Blair, who continues to treat Austin for behavioral problems, testified that Austin demonstrates both rage and depression. In her opinion, Austin needs the stability offered by Amy with consistent limits and discipline.

In finding that modification of the decree was warranted, the court concluded:

The Court has considered all of the factors set forth in KRS 403.270(2) and determines that the child's present joint custodial arrangement endangers his mental and emotional health, that any harm likely to be caused by modification of custody to sole custody is outweighed by its advantages to Austin. It is hoped that the parties' enduring conflict will be reduced by a clear understanding that while the parties are to consult with each other on all major decision making involving the child, the final decision in the event of disagreement will be Petitioner's. The Court finds that it is in the best interest of the child that joint custody be modified to Petitioner's sole custody.

The prevailing law applicable to a modification of a joint custody order is stated in Scheer v. Zeigler:¹

We hold that joint 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. (Footnote omitted.)

Tom concedes that the modification of a joint custody decree is controlled by KRS 403.340, but argues that the trial court erroneously applied the 2001 version of the statute instead of that in effect in June 2000 when Amy filed her motion for modification for custody. In comparing the two statutes there are two notable differences. The first, and one that has no bearing on the present case, is that the 2001 version

¹ Ky. App., 21 S.W.3d 807, 814 (2000).

requires a hearing while the earlier statute did not explicitly state one was required. A hearing was held in this case and Tom makes no argument based on this change. The second, and perhaps most significant change, is that the earlier version requires that the court "find" the presence of one of four conditions, including that:

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.²

The 2001 version, while listing the identical circumstances in addition to others, lists them as considerations as opposed to mandated findings. Thus, Tom argues, modification of custody under the 2001 statute is easier to obtain than it is under the 2000 statute. There is no need to discuss the legal soundness of Tom's assertion. The family court made specific findings that the joint custodial arrangement endangers Austin's mental and emotional health and it is in Austin's best interest to award Amy sole custody. The findings would support a modification under either statute.

Tom contends that the court was required to find that joint custody "seriously" endangers Austin's emotional and mental health. Although he asserts that the court's omission of the term "seriously" requires reversal, he did not make a

² KRS 403.340(2)(c).

request for more definite findings of fact pursuant to CR³ 52.04. Additionally, there is ample evidence in the record to support a finding that Austin's mental and emotional health are seriously endangered by Tom's violent temper, frequent relationships and their abrupt termination, and his failure to provide for Austin's physical and daily needs. We find no reversible error in the omission of the term "seriously" in the court's extensive findings.

Finally, Tom argues that much of the evidence considered by the court was irrelevant including an incident when, prior to the parties' divorce, he physically assaulted Amy. Although KRS⁴ 403.340(2) states that findings must be based on facts that "have arisen since the prior decree," it further states "or that were unknown to the court at the time of the entry of the prior decree." Tom's violent act was not known nor could it have been known at the time of the entry of the decree that incorporated the parties' agreement. The remaining contentions made by Tom regarding the relevancy of the evidence are without merit. Guided by our rules of evidence, any evidence tending to establish the physical, emotional, or mental effect of a custody arrangement is relevant to aid the court in

³ Kentucky Rules of Civil Procedure.

⁴ Kentucky Revised Statutes.

making what is often a difficult decision and ultimately conclude what is in the best interest of the child.

After review of the record and in accordance with KRS 403.340, we find that the family court did not abuse its discretion.⁵ The judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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⁵ Eviston v. Eviston, Ky., 507 S.W.2d 153 (1974).