

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002495-ME

DELORES ANN LOESCH
(N/K/A FREEMAN)

APPELLANT

v. APPEAL FROM McCracken Circuit Court
HONORABLE CYNTHIA E. SANDERSON, JUDGE
CIVIL ACTION NO. 96-CI-00276

WAYNE MICHAEL LOESCH

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER AND VANMETER, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

HUDDLESTON, SENIOR JUDGE: Delores Ann Loesch appeals from a McCracken Family Court order that granted her ex-husband's motion to modify custody of their son. Delores argues that the family court erred in failing to make a record of a private interview it conducted with the child, and in determining that

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

it was in the child's best interest for the father to assume the role of primary custodian.

Delores and Wayne Michael Loesch's marriage was dissolved in 1996. Shane, the child who is the subject of this appeal, was born in 1991. Under the terms of the decree of dissolution, Delores was granted sole custody of Shane, while Wayne was granted liberal visitation rights. At some point following the dissolution, Delores informed Wayne that she and Shane were moving to Florida. Wayne relocated to Midway, Alabama, in order to be closer to Shane. About three months later, however, Delores and Shane moved back to Kentucky. Wayne, who has remarried, still lives in Alabama, approximately a sixteen-hour drive from McCracken County. He works as a truck driver and is at home only on weekends.

Delores also remarried. Her relationship with her second husband, David Freeman, was troubled. She and Shane moved at least nine times, and Shane attended four different schools during a seven-year period. On one occasion, Freeman "kicked them out" of his mobile home. The marriage to Freeman eventually ended in divorce. Shane experienced serious academic and disciplinary problems at school. He was also involved in fights with other children on the school bus and at the mobile home park where he lived with his mother. Delores contacted Wayne to discuss having Shane evaluated for attention deficit

hyperactivity disorder during Shane's summer visit with his father. Wayne agreed, and Delores delivered Shane's school records to him. Wayne claimed to be shocked by what he found in the school records. In August 2003, Wayne filed a motion to modify custody of Shane.

The case came before the family court for a hearing on October 20, 2003. On September 30, 2003, Delores had filed a "Motion to Interview Child in Chambers" in which she asked the court to interview Shane "to ascertain his wishes as to any modification of the current custody arrangement." At the conclusion of the October 20 hearing, Delores repeated her request for an interview. The judge accordingly spoke with Shane in chambers for approximately five minutes. Neither party nor their attorneys were present at the interview. When the interview was over, the judge reported that she had asked Shane about domestic violence in his home. In prior testimony Delores had stated that Shane had heard verbal abuse during the course of her relationship with Freeman. The judge said that Shane had told her he had also witnessed domestic violence between Delores and Freeman. Delores then acknowledged that she had been pushed or shoved by Freeman. The judge also reported that the only other information she could glean from Shane was that his mother was nice to him and that he did not want a change in custody.

An order was entered on October 24, 2003, granting Delores and Wayne joint custody of Shane. Wayne was designated as the primary and residential custodian. Delores was granted secondary custody and liberal visitation rights. This appeal followed.

Delores contends that the court's failure to record the interview with Shane was reversible error under Kentucky Revised Statutes (KRS) 403.290(1), which states that in child custody proceedings,

[t]he court may interview the child in chambers to ascertain the child's wishes as to his custodian and as to visitation. The court may permit counsel to be present at the interview. The court shall cause a record of the interview to be made and to be part of the record in the case.

Although we agree that the court should have recorded the interview with Shane, we do not agree that the failure to do so was an error that merits reversal of the custody order. Our decision is based on two considerations: first, the detailed account provided by the court of the interview with Shane was sufficient to meet the statutory requirement that it be recorded; and second, the interview with Shane was not the principal factor underlying the court's decision to modify the custody arrangements.

The record shows that the judge immediately reported the contents of her brief conversation with Shane to the parties upon her return to the courtroom. Delores made no request at any time for a mechanical recording of the interview, nor did she challenge what Shane said in the interview. Under our case law, the record of the interview thus provided by the court was sufficient to fulfill the requirements of the statute. It is clearly distinguishable from the situation in Schwartz v. Schwartz,² a case that predates the statute, and in which the only account in the record of an *in camera* interview with the children was "[a]t this time the Judge sees the Schwartz children in his chambers."³ The Schwartz court stressed that if the testimony of the children was used at least in part as a basis for the court's decision regarding custody, the testimony should be reported in order to preserve it for appellate review.⁴ In this case, the judge's account of the interview was sufficiently detailed and thorough to preserve its contents for our review.

Furthermore, the court did not rely primarily on the interview with Shane in making its custody modification decision. In Holt v. Chenault,⁵ the Kentucky Supreme Court held that it was impermissible for a court to modify a prior custody

² 382 S.W.2d 851 (Ky. 1964).

³ Id. at 853.

⁴ Id.

⁵ 722 S.W.3d 897 (Ky. 1987).

decree based primarily on the wishes of the child that were disclosed during a sealed *in camera* interview.⁶ Shane's wishes were not the primary factor underlying the court's decision in this case; indeed, Shane expressed the desire to remain with his mother.

The Kentucky Supreme Court recently summarized the reasons underlying the requirement that such interviews with children be recorded:

In an action concerning custody or visitation, any procedure whereby the trial court prohibits disclosure of the transcript of a child's interview to the parties raises significant due process questions. The parties are entitled to know what evidence is used or relied upon by the trial court, and have the right generally to present rebutting evidence or to cross-examine unless such right is waived. If a trial court accepts and acts upon statements made by the child during the *in camera* interview, it is manifestly unfair not to record and disclose the contents of the interview in order to provide an opportunity for rebuttal.⁷

The contents of the interview with Shane were fully disclosed, and Delores was provided an opportunity to rebut his remarks, which she could not. She instead admitted that her

⁶ *Id.* at 898.

⁷ *Couch v. Couch*, 146 S.W.3d 923, 925 (Ky. 2004).

prior testimony had been incomplete in regard to the issue of domestic violence.

We conclude that the family court's failure to record by mechanical means the interview with Shane was not a material procedural error,⁸ and therefore does not warrant reversal of the court's decision.

Delores' second argument concerns Wayne's employment as an over-the-road trucker who is only at home on weekends. Delores contends that Wayne's wife, Shane's stepmother, will be her son's primary custodian on weekdays, and that the court order has effectively placed Shane in the custody of a non-parent.

Our standard when reviewing a child custody determination is whether the trial court's findings of fact are clearly erroneous.⁹ Findings of fact are clearly erroneous if they are manifestly against the weight of the evidence.¹⁰ A trial court's decision regarding custody will not be disturbed

⁸ Ky. R. Civ. Proc. (CR) 61.01 provides, in relevant part, that: "[N]o error or defect in any ruling or order or in anything done or omitted by the court . . . is ground for granting a new trial or for . . . vacating, modifying or otherwise disturbing [an] order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error which does not affect the substantial rights of the parties."

⁹ See CR 52.01; Reichle v. Reichle, 719 S.W.2d 442, 444 (Ky. 1986).

¹⁰ Wells v. Wells, 412 S.W.2d 568, 570 (Ky. 1967).

absent an abuse of discretion.¹¹ Abuse of discretion implies that the trial court's decision is unreasonable or unfair.¹²

On the issue of Wayne's work schedule, the court order noted as follows:

The Court has heard nothing to indicate the child would not be in a better environment to live with his father. Although the father is an over-the-road truck driver, he will be home every weekend, and he can influence the child, as the child will be living in his household even when he is out of town.

We have reviewed the record and have determined that these findings by the court are not manifestly against the weight of the evidence and therefore are not clearly erroneous. Substantial evidence was offered to show that Shane was exhibiting severe social and academic problems while in Delores' custody. These included poor grades, physical violence directed at other children, particularly younger girls, and disciplinary infractions at school that were serious enough to merit suspension. Based on the evidence, the court's decision that the benefits of placing Shane in his father's primary residential custody outweigh the effects of his father's absence during the week was neither unfair nor unreasonable.

¹¹ Cherry v. Cherry, 634 S.W.2d 423, 425 (Ky. 1982).

¹² Kuprion v. Fitzgerald, 888 S.W.2d 679, 684 (Ky. 1994).

For the foregoing reasons, the custody order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeffery P. Alford
Paducah, Kentucky

BRIEF FOR APPELLEE:

John T. Reed
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