

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000878-MR
AND
NO. 2005-CA-001439-MR

MEGAN RAE COLLADO

APPELLANT

v.

APPEALS FROM HARDIN CIRCUIT COURT
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 04-CI-01778

DRAPER CAVE

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DYCHE AND GUIDUGLI, JUDGES; BUCKINGHAM, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: Megan Rae Collado (hereinafter "Megan") has appealed from the April 28, 2005, judgment of the Hardin Circuit Court awarding her and Draper Cave (hereinafter "Draper") joint custody of their minor child, Ocean Shane Burke, and naming Draper the primary physical custodian. She has also appealed

¹ Senior Judge David C. Buckingham, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

from the July 1, 2005, order denying her motion to set aside the earlier judgment. We affirm.

Megan and Draper are the biological parents of Ocean, born January 1, 1996. They were never married, and paternity was established by an Agreed Order entered in the Hardin District Court later that year. Pursuant to the Agreed Order, Draper was to pay child support in the amount of \$142 per month.

On September 16, 2004, Draper filed a Petition for Custody in Hardin Circuit Court, requesting full custody of Ocean and child support. In support, he attached his own affidavit as well as affidavits of his mother, Deborah Cave (Ocean's paternal grandmother); his sister, Tosha Cave (Ocean's paternal aunt); and his father, Jerry Cave (Ocean's paternal grandfather). These affidavits described in great detail the problems related to Megan's upbringing of Ocean, and indicated that it would be in Ocean's best interest for Draper to be awarded custody. A week later, Draper moved the circuit court to award him temporary custody. The circuit court denied this motion, noting that Megan had not yet been served, but ordered home evaluations. On October 26, 2004, after holding a brief hearing, the circuit court awarded Megan and Draper joint custody during the pendency of the action, with Draper awarded primary possession and Megan awarded visitation. The circuit court also suspended Draper's child support obligation.

Additionally, the circuit court ordered the parties to mediate the matter, which was ultimately unsuccessful.

The matter proceeded to a final hearing on February 11, 2005. The circuit court heard testimony from Draper and Megan, as well as from Deborah, Tosha, and Megan's sister, Mara Dickerson. The Cabinet for Health and Family Services had also filed reports of its home evaluations conducted in the fall of 2004. The home evaluation of Draper resulted in the recommendation that he be given the opportunity to care for Ocean. Megan's home evaluation resulted in the recommendation that Ocean be returned to her care and that Draper be afforded visitation rights, but that Deborah not be permitted to visit with Ocean. It was also recommended that Ocean receive counseling and a physical evaluation, and that Megan obtain a stable residence.

The circuit court entered its Findings of Fact, Conclusions of Law, Decree and Order on April 28, 2005.² After providing lengthy findings of fact, the circuit court looked to the factors enumerated in KRS 403.270(2) in making its decision on custody:

These are a few factors under this statute which the Court must consider in awarding custody. All of these factors are designed to determine what is in the best

² It appears that the judgment was signed on March 31, 2005, but not entered by the clerk until April 28, 2005.

interest of the minor child. Here, the Court believes that both parties, as well as other individuals in the family, love Ocean and ultimately desire what is in his best interest. The Court also believes that both [Draper] and [Megan], to varying degrees, have tried to provide a loving home to Ocean. However, for reasons previously indicated, the Court believes that [Megan] has simply not provided Ocean a stable home environment consistently since his birth. Therefore, the Court believes from the evidence that Ocean has more stability with [Draper] than [Megan]. Although [Draper] has in the past not adequately provided the care and nurturing for Ocean, he has attempted to do so recently. Upon hearing the evidence as a whole, the Court believes that [Draper] will provide the more stable home life for the parties' minor child, Ocean.

The circuit court then awarded Megan and Draper joint custody of Ocean, named Draper the primary physical custodian, and awarded Megan visitation. In addition, the circuit court ordered Draper to undergo drug and alcohol counseling, Megan to obtain individual counseling, both Draper and Megan to attend parenting class, and Draper to enroll Ocean in counseling. Finally, Megan was ordered to pay child support in the amount of \$199.50 per month. It is from this judgment that Megan's first appeal was taken.

On June 8, 2005, Megan moved the circuit court to set aside its previous order, asserting that it had considered evidence outside of the record and had engaged in ex parte communication with Deborah. The first item is based on the

existence of a "post-it" note on Megan's home evaluation, which read, "Make sure to read Marie's notes on this. May need to take them out of file so parties do not see." The circuit court conducted a hearing on this motion on June 14, 2005. During the hearing, Judge Addington took the opportunity to explain the circumstances of the "post-it" note in the record and indicated that she had never spoken to anyone about the case, although Deborah had contacted her staff prior to the filing of the Petition and during the pendency of the case regarding Ocean's medical card. Megan's motion to set aside was denied on July 1, 2005, and this second appeal followed.³

Megan presents two arguments to this Court, namely:

1) that the circuit court erred by granting primary custody to Draper, and 2) that the circuit court erred by considering evidence not in the record. On the other hand, Draper asserts that the circuit court properly awarded custody to him and did not consider evidence outside of the record.

The applicable standard of review is set forth in CR 52.01:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment. . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard

³ This Court consolidated the two appeals by order entered August 10, 2005.

shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

In Moore v. Asente,⁴ the Supreme Court of Kentucky addressed this standard, and held that a reviewing court may set aside findings of fact,

only if those findings are clearly erroneous. And, the dispositive question that we must answer, therefore, is whether the trial court's findings of fact are clearly erroneous, i.e., whether or not those findings are supported by substantial evidence. "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence. (Citations omitted.)

With this standard in mind, we shall review the circuit court's decisions.

⁴ 110 S.W.3d 336, 354 (Ky. 2003).

Megan first argues that the circuit court erred in designating Draper as the primary physical custodian. She addressed each of the best interest factors set forth in KRS 403.270(2). She argues that the circuit court did not properly take into account that Megan had been Ocean's primary caretaker from birth until the action was filed or that she had adequately provided for him. Furthermore, she asserts that the circuit court did not give any consideration to the negative impact his paternal grandmother had on him, and the lack of relationship Ocean had with his father prior to the filing of the petition. Lastly, she points out that no consideration was given to his adjustment to his school or Draper's criminal record, but that the circuit court placed too much emphasis on domestic violence related to Caesar Collado, Megan's ex-husband. Draper counters each of Megan's points in her brief. He also argues that Megan's assertions that Deborah was the driving force behind his bid for custody supports a finding that Deborah had been a de facto custodian of Ocean.

In KRS 403.270(2), the Legislature specifically listed the factors a trial court must consider in determining the best interest of the child when ruling on custody:

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.

The circuit court in this case entered extensive findings of fact, relying upon the reports of the home evaluations, the affidavits filed with the Petition, and testimony from the hearing. With the standards of KRS 403.270(2) in mind, the circuit court determined that although Megan loved her child, she "has simply not had the ability to consistently provide Ocean with a stable home environment." Although noting that neither parent appeared to have been the best of parents early on, the circuit court cited to several factors militating against placing custody with Megan. Those factors included Ocean's exposure to episodes of domestic violence, his inadequately addressed psychological and emotional issues, and his lack of basic fundamental health and dental care for several years. While the circuit court did not explicitly address each and every factor in the judgment, the circuit court nevertheless addressed those factors in concluding that it would be in Ocean's best interest to award Draper primary physical custody. This determination is supported by substantial evidence contained in the record, and is therefore not erroneous. We note that Megan also presented evidence that conflicts with that presented by Draper. However, the circuit court chose to believe and rely upon the evidence Draper

presented, and it is not in the province of this Court to substitute our judgment for that of the fact-finding circuit court.⁵

The subject of Megan's second appeal relates to the denial of her motion to vacate pursuant to CR 60.02. On June 8, 2005, Megan moved the circuit court to vacate its judgment, alleging that it considered evidence outside of the record and that it engaged in ex parte communication with Deborah. At the hearing on the motion, Megan indicated that she had discovered the "post-it" note in the file and was concerned that the circuit court had considered some evidence on a document that had been removed from the record. In support, she pointed out a finding of fact on page 2 of the judgment relating to Ocean being suicidal and the Cabinet recommending therapy as far back as 2002, information she claimed was nowhere to be found in the record.⁶ Regarding the ex parte communication, Megan's mother, Lynn, stated that Deborah told her she had spoken to the judge when no one else was present.

During the June 14, 2005, hearing, the circuit court itself addressed the concerns Megan raised in her motion. Judge Addington stated that she had not communicated with anyone about

⁵ Wells v. Wells, 412 S.W.2d 568, 571 (Ky. 1967).

⁶ We agree with Draper's assertion in his brief that Megan should be precluded from raising an issue regarding the first finding of fact Megan listed in her brief (that Ocean would come home to an empty house) as she did not point out and preserve that particular finding either in her motion or during the hearing.

this case, although she stated that Deborah might have contacted staff members prior to the filing of the Petition, when she would have been told to contact an attorney, and during the pendency of the case regarding Ocean's insurance/medical card. In neither instance were the merits of the case discussed. Regarding the "post-it" note, Judge Addington stated that it by happenstance was affixed to the home evaluation report, and was merely communication from a staff member that she had followed her directions to refer the case to the Cabinet for an investigation.

Based upon the record of the hearing, we cannot hold that the circuit court abused its discretion in denying Megan's motion to vacate. Megan did not establish sufficient grounds to justify vacating the original judgment.

For the foregoing reasons, the judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Phyllis K. Lonneman
Dawn Lonneman Blair
Elizabethtown, Kentucky

BRIEF FOR APPELLEE:

C. Wesley Durham
Radcliff, Kentucky