

RENDERED: SEPTEMBER 29, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-002401-ME

JULIA (SNOWDEN) HOUSEHOLDER

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE JEAN CHENAULT LOGUE, SPECIAL JUDGE
ACTION NO. 97-CI-00003

HAROLD EUGENE SNOWDEN, JR.

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND JOHNSON, JUDGES.

GUIDUGLI, JUDGE: Julia Snowden Householder appeals from the decision of the Jessamine Circuit Court modifying custody, granting her ex-husband, Harold Eugene Snowden, Jr., sole custody of the parties' child, Will. Julia argues on appeal that the court's decision was clearly erroneous and against the weight of the evidence. We disagree and affirm.

Harold moved for a modification of custody after a review of claimed medical expenses incurred by Julia on behalf of the child, the parties' then 12-year-old son. Harold had

moved for reimbursement of medical expenses as required by the parties' separation agreement, and the family court ordered the parties to exchange documentation of medical expenses. Julia failed to appear at the hearing on January 6, 2005. The court granted Harold's motion for expenses and also ordered more detailed documentation be filed by Julia. These records were sent to the court but not to Harold as the order required, and Harold, after reviewing the records, filed a motion to modify custody.

At the hearing on the motion to modify custody, Harold presented expert testimony from the child's psychologist and physician, as well as records obtained from the child's school. The child had been prescribed Adderall for attention deficit disorder, which he was supposed to take every morning before school to help him concentrate. The dosage instructions also allotted one additional dose per day to be taken as needed. The prescription, however, was for three pills per day. Records showed that the prescription was filled every 30 days, as if every pill had been taken, even on weekends and during vacation and summer break. Julia was not able to explain the discrepancy between the instructed dose and the apparent use of the pills to the court's satisfaction, and invoked her Fifth Amendment right against self-incrimination on more than one occasion in response to direct questions about what became of the pills. Medical

records showed that Julia had represented that the child was having great difficulty at school, but those claims were not supported by the child's school records for the same time period. Based on the testimony heard, the court granted the motion to modify custody and awarded Harold sole custody of the child. This appeal followed.

In order to succeed in a motion to modify custody, the party seeking modification must demonstrate that the child's circumstances have changed, and that the child's best interests necessitate a modification of custody. KRS 403.340(3). A reviewing court may not disturb a trial court's findings unless they are clearly erroneous. *Largent v. Largent*, 643 S.W.2d 261 (Ky. 1982), *Eviston v. Eviston*, 507 S.W.2d 153, 154 (Ky. 1974). There is ample evidence in the record, largely unchallenged by Julia, that suggests a serious discrepancy between the child's condition and the medication delivered, and an inadequate explanation of what became of the extra pills. Julia's argument that her alleged conduct was not shown to affect her relationship with the child is not persuasive. It is true that parental conduct outside the relationship with the child is not an adequate basis for modifying custody. Here, the trial court believed that a parent's apparent diversion of a child's medication, as well as apparent efforts to continue obtaining

that medication, does in fact affect the parent's relationship with the child, and we agree.

We disagree that the court's findings are inadequate to support a change of custody. Specifically, Julia argues that the child's wishes for things to remain as they are were not given adequate consideration, and the findings of fact do not mention the child's wishes. By statute, the child's wishes are only one factor to be considered; the court may regard another factor as compelling a change in custody even in the presence of another factor that tends to weigh against a change. Likewise, we reject Julia's contention that the trial court's findings are inadequate with respect to its consideration of Harold's fitness as a parent. Harold's fitness was not placed in issue by Julia; so the court was not obligated to make findings about his fitness.

Julia takes exception to the trial court's characterization of her testimony as "disjointed and combative." She contends that she has a well-documented history of anxiety in the presence of her former husband and that the court did not make itself familiar enough with the prior record to take notice of that fact. A trial court operating as finder of fact has extremely broad discretion with respect to testimony presented, and may choose to believe or disbelieve any part of it. A trial court is entitled to make its own decisions regarding the

demeanor and truthfulness of witnesses, and a reviewing court is not permitted, in the absence of an abuse of discretion, to substitute its judgment for that of a trial court. We perceive no abuse of discretion.

Julia also contends that the court's order significantly reduces her time with Will. She contends that "Will has been predominantly in [her] care since birth and the timesharing ordered by the trial court is not enough to serve the best interests of the child." She further alleges that "the drastic departure from his routine and environment ordered by the trial court on October 17, 2005, endangers Will's emotional, physical, social and mental health." The court order concluded that Julia should have reasonable and frequent visitation consistent with the health and welfare of the child. It then went on to order specific visitation covering normal weeks, holidays and summer vacation. A trial court's ruling on visitation enjoys broad discretion and will only be reversed upon a showing of abuse of discretion. Considering the specific findings made by the court in its October 17, 2005, order, which led it to conclude that a change of custody was necessary, we find no abuse of discretion in limiting Julia's visitation with Will at this time.

Finally, Julia contends the court erred by refusing to grant her a continuance when she did not receive the guardian *ad*

litem's report until the day before the trial. The guardian's report was a very thorough sixteen-page report that ultimately recommended a change in custody to sole custody to Harold. Julia relies on KRS 403.300(3) that requires that investigative reports filed by the "friend of the court or any other agency as the court may select" be mailed to the parties at least 10 days prior to the hearing. However, we do not believe the statute to be applicable to guardians. The trial court's determination whether to grant or deny a motion for a continuance is reviewed under an abuse of discretion standard. In this case, there was no abuse of discretion by the court. The motion for change of custody was pending for some time and counsel had every opportunity to discuss the case with the guardian throughout the process. Additionally, Julia had the opportunity to call the guardian as a witness to question the report but chose not to. While the report of the guardian was considered by the court in its determination on this matter, questions concerning Will's medication and Julia's ability to meet Will's educational and medical needs were the primary basis for the court's ruling. We find no abuse of discretion in the court's refusal to grant a continuance.

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

ALL CONCUR.

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