

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001990-ME

JASON ARBAUGH

APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JASON SHEA FLEMING, JUDGE
ACTION NO. 01-CI-01184

MISTY ARBAUGH (NOW FRENCH)

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND CLAYTON, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: Jason Arbaugh appeals from an order denying his motion to modify custody of a minor child. We affirm.

Jason Arbaugh and Misty Arbaugh (now French) married in 1997.

They have one daughter, Brooke Haley Arbaugh, who was born in 1998. Misty

has another daughter, Faith, from a previous marriage. The parties were divorced

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

in 2002. They were awarded joint custody of Brooke with Misty being the primary residential custodian. Subsequent to the divorce, Misty and Brooke resided in several different locations: in Christian County until August 2002; in Graham, Kentucky, until January 2003; in Greenville, Kentucky until November 2004; in Nicholasville, Kentucky for a short time before moving to Littlefield, Texas, until September 2005. At the time of the commencement of this action, Misty and Brooke lived in Missouri while Jason lived in West Virginia. Issues relating to the custody of Brooke continued to be litigated in Christian Circuit Court.

In September 2005, the trial court entered an order granting Jason temporary custody of Brooke. Following a hearing, the trial court entered an order in March 2006 granting temporary joint custody to the parties with Jason being the primary residential custodian pending the resolution of his motion to modify custody. The trial court held a final evidentiary hearing on March 19, 2007. Subsequently, it was discovered that Jason's then-wife, Tami Arbaugh, presented false and fabricated evidence to the court. A supplemental hearing was held. Ultimately, in an eighteen-page opinion, the trial court ordered that the parties shall retain joint custody with Misty serving as primary residential custodian. This appeal followed.

Jason argues that the trial court's finding that modification of custody was not in Brooke's best interest was clearly erroneous and constituted an abuse of discretion. Kentucky Rules of Civil Procedure (CR) 52.01 applies to custody proceedings. *Reichle v. Reichle*, 719 S.W.2d 442, 445 (Ky. 1986). CR 52.01

“provides in part that findings of fact shall not be set aside unless clearly erroneous with due regard given to the opportunity of the trial judge to view the credibility of the witnesses.” *Id.* On appellate review, “the test is not whether we would have decided differently but whether the findings of the trial judge were clearly erroneous or he abused his discretion.” *Eviston v. Eviston*, 507 S.W.2d 153 (Ky. 1974).

Modifications of joint custody arrangements are governed by KRS 403.340 and KRS 403.270. *Fowler v. Sowers*, 151 S.W.3d 357, 359 (Ky. App. 2004). KRS 403.340(3) states:

If a court of this state has jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act, the 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.

KRS 403.270(2) states:

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 trial court made exhaustive findings of fact in relation to the statutory factors.

While it is clear that both Jason and Misty have Brooke's well-being at heart, neither party is a perfect parent. There is evidence in favor of both sides. It is within the exclusive province of the trial to weigh the evidence and judge the credibility of witnesses. The trial court found that Jason's overall credibility was diminished because of the evidence Tami Arbaugh fabricated. We cannot conclude that its decision was arbitrary in this regard. Moreover, our review of the order reveals that the trial court applied the facts to the statutory factors in a reasoned and evenhanded manner. As the trial court's findings were supported by substantial evidence, they will not be set aside. There was no abuse of discretion.

Accordingly, the order of the Christian Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Julia T. Crenshaw
Hopkinsville, Kentucky

BRIEF FOR APPELLEE:

Katherine Hicks Demps
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