

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001010-MR

DONALD TOWNSEND

APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE KRISTI HOGG GOSSETT, JUDGE
ACTION NO. 06-CI-00461

BARBARA S. TOWNSEND

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, MOORE, AND STUMBO, JUDGES.

MOORE, JUDGE: Donald Townsend appeals from the Greenup Circuit Court's order denying his motion to alter, amend, or vacate the court's prior order modifying the parties' custody schedule, as well as from the court's order denying his motion for an award of temporary custody. After a careful review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In June 2004, Donald and Barbara S. Townsend were divorced in the Lawrence County, Ohio, Court of Common Pleas, pursuant to a Dissolution Entry. This Dissolution Entry incorporated by reference the parties' Separation Agreement, which included a plan for shared parenting of their twin sons, Caden Tate Townsend and Colby Braden Townsend, who were born in 1997. The plan for shared parenting provided, in part, that the children would reside with Barbara on Tuesday, Wednesday, and Saturday; they would reside with Donald on Sunday, Monday, and Thursday; and the parties would alternate Fridays.

Both parties subsequently moved in the Ohio court to terminate the shared custody portions of the Ohio Dissolution Entry and obtain sole custody of the children. The Ohio court held that it no longer had jurisdiction over the parties, as they both had moved to Kentucky.¹ Then, in August 2006, Donald moved in Kentucky's Greenup Circuit Court for sole custody of the children. The following month, Barbara also moved to modify the custodial arrangement by asking the court to award her primary physical possession and control of the children under a joint custody arrangement.

The children were interviewed separately by the Circuit Judge in chambers. Caden abruptly began his interview by stating that he wanted to live with his father. He asked if he would get to go home with his father that day, and he was informed that the decision may not be made that day. Caden asked the

¹ Barbara lived in Carter County, Kentucky, and Donald lived in Greenup County, Kentucky.

court not to tell his mother that he wanted to live with his father and he said that he did not want to go home with his mother that day because she would ask him questions and “bug” him. Caden informed the court that he received mostly “A’s” and “B’s” in school, and he sometimes received a “C.” He was in the fourth grade at that time.

Caden testified that the reason he wanted to live with his father was because he had his own room there, he had more friends there, and at his mother’s house, he had to share a room with Braden. Caden said his step-father was nice.

Caden attested that he liked his step-mother a great deal, and that his mother even likes his step-mother, because she is nice to Caden and Braden. He testified that his mother often tells him that she hates his father and she calls him names. Caden also attested that he had received multiple sunburns while in his mother’s custody.

During his testimony, Caden referred once to something that he said his father told him the court would ask him about, concerning an injury Caden sustained while with his mother. Caden attested that he had heard two different versions of the story about how he was kicked in the face by his mother, resulting in a cut that required several stitches. The incident happened when Caden was in the second grade (approximately two years before testifying about it), and Caden could not remember what happened. However, he had heard one story that made it sound like his mother intentionally kicked him, and another story that made it sound like she kicked him by accident.

Caden attested that he had been sunburned eleven times while in his mother's custody, and that his father had taken photographs of all of those sunburns. He testified that he had been lost several times while in Wal-Mart with his mother.

Braden next testified in the Circuit Judge's chambers. He volunteered to the court, without being asked, that he had previously lied to a state trooper by saying that he had not driven his mother's car, when in fact he had driven her car while sitting on her lap. Braden told the court that he wanted to live with his father because he had more fun at his father's house. Braden also volunteered to the court that they ate healthier foods and exercised at his father's house. He informed the court that he and Caden attended Carter Elementary School.

The principal of McKell Elementary School, where Donald wanted the children to attend school so that they could be in separate classes, testified that his school has four fourth grade classes. He attested that the decision of whether to put twins in the same class or separate classes depends on the situation. Some twins do better when they are in the same class, and others do better when they are separated. The principal did not specifically testify as to the impact on the Townsend twins of being in the same classroom.

Barbara testified at the hearing. She attested that her new husband and his thirteen-year-old daughter lived with her. Barbara testified that the children had seen "R-rated" movies containing nudity and sexual content, and played violent video games while in Donald's custody. One of the children

informed Barbara that he had seen pictures of nude women on Donald's computer. Barbara attested that the boys were forced to do all of the cleaning at Donald's house.

On cross-examination, Barbara admitted having told the children that it was Donald's fault they had divorced because he had an affair which led to the divorce. She also admitted having spoken negatively about Donald in the children's presence. Barbara acknowledged that the children had been sunburned badly twice while they were in her custody, and that she sought medical treatment at least once for their sunburns.

At the close of the first day of the custody hearing, the circuit court scolded both parties and told them to begin acting like adults and stop putting the children in the middle of their bitter custody battle. The court noted that Caden, when he was in chambers speaking privately with the court, was nervous because he said that his mom would be angry at him for saying that he wanted to live with his dad, and that when he went home, she would punish him for saying so by taking away his toys. The court also stated that Caden informed the court that his father had told him during a break in the court proceedings that his mother was crazy and that she was in the courtroom talking about a "truth helmet."²

On the second day of the custody hearing, Donald testified that he is concerned about the children being in the same classroom because Braden tends to "live in Caden's shadow." Donald also stated that Braden copies off of Caden

² The children were not in the courtroom during the custody hearing.

when they are in the same class. Donald testified that he is concerned about Caden's weight because Caden gained twenty-to-twenty-five pounds in the previous four or five months.

Donald attested that he and his wife, Elizabeth, began focusing on healthy eating at their house, and that the boys were beginning to eat healthier while at their house. Additionally, the boys would sometimes ride a stationary bicycle that Donald had in his family room. The boys had chores at Donald's house, which included one boy using a "Swiffer" on the hardwood floors, and the other boy vacuuming the carpet. If there were special projects that needed to be done around the house, like taking winter clothes out of boxes and putting summer clothes in boxes, the boys were offered a silver dollar for their help. He attested that the boys did not do all of the housework at his house.³

Donald testified that another boy, who is Elizabeth's nephew, lives with them. The boy was sixteen years old at the time of the hearing, and Donald testified that the boy had a "big brother" relationship with Caden and Braden. Donald attested that Elizabeth communicates with the children and that the children enjoy spending time with her.

Donald testified that Braden had been sunburned eleven times, and Caden had been sunburned ten times, all of which occurred in the previous three years and while the children were in Barbara's custody. Donald admitted to having spanked the boys in the past, and to having put a clean bar of soap in

³ Elizabeth also testified that the boys did not do all of the housework at the house she shared with Donald.

Braden's mouth for ten to fifteen minutes once after Braden got in trouble at school and the teacher asked Donald to "do something about" him. Donald asserted that before putting the bar of soap in Braden's mouth, he called the doctor's office to find out what type of soap to use, and that after having the soap in his mouth, Braden did not have any burns or blisters in his mouth as a result of the soap.

The circuit court found that Barbara is a librarian who earns approximately \$60,000 per year, and that she lives in a triple wide mobile home with her husband and her step-daughter, who is thirteen years old. The court noted that Caden and Braden like their step-father. The court found that when the boys are in Barbara's custody, they ride the bus to and from school, and spend approximately thirty minutes on the bus each way.

The court noted that Donald owns a video rental store, he lives with his wife and his wife's sixteen-year-old nephew, and they live in a home that borders the 500-acre farm owned by Donald's in-laws. When Donald has custody of Braden and Caden, he drives them to and from school. Both boys have a good relationship with Donald's wife, Elizabeth, and Barbara acknowledged this good relationship.

The court noted that it interviewed both Caden and Braden, and that both children

expressed a preference for living with their father. Caden was visibly upset upon entering the undersigned's chambers for private interview (recorded) and

immediately asked very nervously i[f] this was when he was supposed to tell the undersigned that he wanted to live with his dad. The boys were interviewed separately and both gave similar reasons for wanting to live with their father including the fact that their father's household was more fun and that they were very close to their stepmother Elizabeth. Caden placed great emphasis on the fact that his mother would ask him a lot of questions and would want to know everything that was said in chambers. Caden asked the undersigned if he could go home with his father on this date and when advised that he would not be able to do so as the ruling would take some time, was very upset. The flow of information from Caden seemed unnatural in that he said words to the effect of, "I have had 11 sunburns and all of them have been with my mom and my dad has pictures of all of them. My mom has lost me three or four times in Wal-Mart. How many people [lose] their kids in Wal-Mart? My dad asks other people with kids if they have ever lost their kids in Wal-Mart." The Court is of the opinion that there has been a great deal of coaching and bad mouthing by Donald against Barbara in the presence of the children. The Court also believes[,] however[,] that Barbara has unnecessarily involved the children in the pending litigation.

The court stated that Donald wanted the children to attend McKell Elementary School in Greenup County so that the children could be enrolled in separate classes, "as he believes that Caden dominates Braden." The court also noted that Barbara "requested that the children remain at Carter Elementary," where they were in the same class. The court heard testimony from various educators about whether it is typically beneficial for twins to be in the same or separate classes, but not one of them "presented any evidence . . . about what would be more appropriate for Braden and Caden."

Two different school teachers from the Ironton school system [where the boys attended second grade] testified at the hearing and advised the Court that they could tell (with reference to the rotational time-sharing plan) what home the boys had been in the day prior. Both teachers testified that when the boys were with their mother that their homework was neater, was completed, was organized, and further that the boys were prepared, rested and ready for school. The same was not true when the boys had been in the physical possession of their father. Furthermore both teachers advised that Barbara participated in all parent/teacher conferences and maintained frequent communication with the educators by email.

The court continued, finding as follows:

Barbara has alleged that Donald has been physically abusive of the children,^[4] and Donald has alleged that Barbara has been neglectful of the children and that said neglect has resulted in multiple sunburns and the children getting lost at Wal-Mart. The results in the ongoing claims has resulted in the involvement of social services in more than one county, and law enforcement officials. The children have been interviewed by these persons on multiple occasions. None of the allegations have persuaded the Court in any way regarding the question at hand, that being custody and time-sharing of the children, and finds that there is little if any merit to them and that they were made for the purpose of either harassment and/or positioning in the legal proceeding.

As for Caden's weight issue, the court stated that the parties "should meet with Caden's pediatrician and that both should follow recommendations from the pediatrician regarding this issue." The court also believed that the issues concerning "the maturity level of the entertainment to which the children have

⁴ Barbara submitted evidence, in the form of nude photographs of one of the children after Donald had allegedly whipped the child with a belt. The photographs showed red marks on the boy's arm and buttocks.

been exposed” and the allegation that “Donald had exposed the children to pornography on his computer” should be addressed.

The court ordered the parties to communicate with each other concerning “healthcare matters, educational issues and extracurricular events, to enable the other parent to be involved and have input into the activities,” and if they were “unable to communicate in person, they [should] do so in writing, utilizing a notebook to exchange information.” The court directed that “[t]he parties should continue to have shared custody of the minor children with no designation of primary residential parent, however the time-sharing arrangement should be modified as both parents acknowledged that it is unworkable and hard on the children.” Thus, the court concluded that

Barbara should have physical possession of the children every Sunday beginning at 6:00 p.m. through the following Wednesday after school. Donald should have physical possession of the children every Wednesday from the time school ends through the following Friday at 6:00 p.m. The parties should alternate weekend time with their children with weekends to begin on Fridays at 6:00 p.m. and conclude on Sundays at 6:00 p.m. . . . A split and/or alternating holiday schedule should be negotiated between counsel with input from the parents and each parent should be granted two seven day uninterrupted vacation weeks annually.

The court stated that “the parents should utilize a parenting coordinator on an as needed basis and prior to further court involvement,” to address, *inter alia*, issues concerning parenting schedules and contact, as well as changing education and/or extracurricular activities for the children. The court

ordered the parents, when both present “at the boys’ school and for extracurricular activities, . . . [to] sit separately and ensure that the children have the opportunity to interact with the other parent without interference for up to 10 minutes.” It also ordered the parents to utilize the parenting coordinator to determine where the children should attend school the following year, but that the children should complete the present school year at Carter Elementary. Finally, the court ordered that the children should “not be exposed to ‘R’ or ‘Mature’ rated video games or movies.”

Donald moved to alter, amend or vacate the court’s order and also moved for an award of temporary custody, arguing that the court should grant him custody of the children or, in the alternative, that the court should not have modified the total amount of custody time per week, but only the days of the week that the parties had possession of the children. Donald contended that the court had failed to consider, as required by KRS 403.270, the best interests of the children, and he noted that Caden had gained twenty-five pounds recently, yet Barbara showed little interest or concern about it. Donald asserted that the court incorrectly found that the children had good grades, when “[t]he majority of the grades the children [received were] failing marks.” He argued that Barbara continued to “bad-mouth” him in front of the children, even after the court ordered the parents to cease doing so. Donald again alleged that Barbara had been neglectful, as evidenced by the sunburns sustained by the children. He argued that the children wanted to live with him.

Regarding Donald's motion for an award of temporary custody, he supported the motion with his own affidavit that stated that in April 2008, Barbara "was transporting the children . . . wherein she was involved in an automobile accident. Pursuant to the . . . accident report, neither child was properly restrained in the vehicle. Based upon their lack of wearing seat restraints, both children were injured and will require day to day care."⁵ Donald also attested that, as a result of injuries she sustained in the accident, Barbara required surgery.

The circuit court denied Donald's motion to alter, amend, or vacate the court's prior order, as well as his motion for temporary custody. The court did, however, order Barbara to "properly restrain the children at all time[s] that they are in a motor vehicle."

Donald now appeals, contending that: (1) the circuit court erred when it failed to consider the factors set forth in KRS 403.340(3) in considering the motion to modify custody; (2) the circuit court failed to consider the danger posed to the children in Barbara's home; and (3) the circuit court erred in failing to keep the exhibits until the circuit court reviewed the matter for an order.

II. STANDARD OF REVIEW

In child custody cases, this Court's scope of review is very limited. We will not overturn a trial court's factual findings unless they are clearly erroneous. *See Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Factual

⁵ Donald failed to explain what such "day to day care" entailed.

findings are clearly erroneous if they are “manifestly against the weight of [the] evidence.” *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967) (internal quotation marks omitted). A “reviewing court should not substitute findings of fact for those of the trial court where they were not clearly erroneous.” *Reichle*, 719 S.W.2d at 444. We will not disturb a trial court’s custody determination unless there was an abuse of discretion. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). “Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.” *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994) (internal quotation marks omitted). With this standard in mind, Donald has a very high benchmark to meet to convince this Court that we should find error with the circuit court’s decision.

The parties’ conduct prior to and during the hearing, and in their briefs before this Court, illustrate an openly contentious relationship and that they have sadly put their children in the middle of their dispute. Being constrained by abuse of discretion and clearly erroneous standards, we rely on the trial court’s credibility findings, which we believe to be highly relevant in this matter. As this opinion develops, the province of the trial court regarding credibility becomes obvious.

III. ANALYSIS

A. CLAIM THAT CIRCUIT COURT FAILED TO CONSIDER KRS 403.340(3) FACTORS

Donald first contends that the circuit court erred in failing to consider the factors set forth in KRS 403.340(3) while considering the cross-motions to modify custody. Pursuant to KRS 403.340(3),

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.

Donald specifically argues that the circuit court failed to consider the factors set forth in KRS 403.270(2) concerning the best interests of the children.

That statute states that:

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; [and]
- (f) Information, records, and evidence of domestic violence as defined in KRS 403.720

KRS 403.270(2).

Although the children expressed their desire to live with their father, the circuit court found that the children had been coached by their father regarding the answers that they gave to the court's questions. This being a credibility issue, we are constrained by the trial court's analysis of it, regardless of whether we would have come to a different conclusion. We pause to note the wretchedness of the possibility that the heart's desire of Caden and Braden truly was to live with their father, in light of the appearance that they had been coached in what to say to the circuit court. Indeed, these situations put the children and the courts in a most difficult position. The aspiration when attempting to reconcile what the children's desires are is simply: what do the children want, without influence or pressure being placed on them?

Consequently, with the circuit court's having found that the children were coached and this Court's hands-off standard on credibility issues, the children's ultimate wishes sadly cannot otherwise be determined. Thus, if they really wanted to live with their father, their mother may have gained more time

with them by default and not in accord with what Caden and Braden wanted. In other words, had the children not been coached, the circuit court may have made a different decision. On the other hand, if the children wanted to keep the present arrangement, *i.e.*, spending more time with their mother, the father's manipulation of the children placed the children in the middle. Certainly, the courts look forward to a time (illusory as it may nonetheless be) when parents will work together, jointly placing the best interests of their children above all.

Despite the inability of the parents to work together, the children are fortunate to have good relationships with their parents, step-parents, and others living in both their mother and father's homes. The court heard testimony from various educators and found that none of the testimony proved that the children would have more success in school if the children were in separate classes. The court noted that Caden had gained weight recently, so the court directed the parents to talk with Caden's pediatrician about this and abide by the pediatrician's recommendations.

Based on the foregoing, we cannot say that Donald has shown the circuit court's factual findings were clearly erroneous. Furthermore, it appears that the circuit court considered the provisions of KRS 403.270(2) and KRS 403.340(3) in arriving at its conclusions. Therefore, Donald has failed to show that the circuit court abused its discretion by modifying the custody order as it did.

B. CLAIM THAT THE CIRCUIT COURT FAILED TO CONSIDER THE DANGER TO THE CHILDREN

Donald next contends that the circuit court failed to consider the danger posed to the children in Barbara's home. Specifically, he alleges: that the court should have focused more on the sunburns the children have received while in Barbara's custody; that after the circuit court entered its decision modifying custody, the children were in a vehicle accident while not wearing their seat belts at a time when Barbara had custody of them; that the children lied to a police officer about Barbara allowing them to drive her car; and that Barbara was not attempting to help remedy Caden's weight problem.

The circuit court did note the multiple sunburns the children had received, and advised the parties to meet with Caden's pediatrician concerning his weight gain and to follow the pediatrician's recommendations about it. The court also noted that social services and law enforcement officials had interviewed the children previously on multiple occasions, and the court found that none of the allegations were persuasive to the court, as they had "little if any merit to them [because] they were made for the purpose of either harassment and/or positioning in the legal proceeding." As for Donald's accusation concerning the children being in a vehicle accident without wearing their seatbelts, the circuit court denied his motion for temporary custody based on this allegation and ordered Barbara to "properly restrain the children at all time[s] that they are a passenger in a motor vehicle."

Therefore, upon review of the circuit court's orders, it is apparent that the circuit court did consider the alleged danger to the children, but the court did

not find Donald's allegations sufficient or credible enough to justify modifying custody in his favor. As previously mentioned, the circuit court's factual findings were not clearly erroneous, and the court did not abuse its discretion when it modified the custody award.

C. CLAIM THAT THE CIRCUIT COURT ERRED IN FAILING TO KEEP EXHIBITS

Finally, Donald contends that the circuit court erred in failing to retain certain exhibits until the circuit court entered its order. Specifically, Donald argues that at the hearing,

the trial court did not have the exhibits for review or consideration during the testimony. The exhibits had already been sent to the Greenup Circuit Court [Clerk]. In particular, during questioning there was a request for the pictures so that Donald could testify as to a picture from an alleged spanking, in response to which [the court] stated that the records had already been forwarded to the Greenup Circuit Court [Clerk]. . . . Therefore, one has to question as to how the trial court can adequately review the records if the records were not available for review.

Donald does not assert that the circuit court never saw the exhibits. Rather, he alleges only that the court should have retained the exhibits until the court entered its order, in the event that the court wished to review the exhibits again before entering that order. We assume that, if the court wanted to review the exhibits again before entering its order, the court could have requested the exhibits to be sent to it from the court clerk. Donald does not allege otherwise.

Regarding the sunburn exhibits, several people testified about the children's sunburns, and Donald does not contend that the court never saw the photographs taken of the sunburns. Therefore, he is unable to show that the circuit court erred by sending the photos to the clerk prior to entering the order.

As for the photographs that allegedly showed red marks on one of the boy's bodies after Donald spanked him, the circuit court noted that Barbara contended that Donald was "physically abusive of the children," and that social services and law enforcement officials had interviewed the children about these incidents. Regardless, the court held that

[n]one of the allegations [had] persuaded the Court in any way regarding the question at hand, that being custody and time-sharing of the children, and [the court found] that there [was] little if any merit to them and that they were made for the purpose of either harassment and/or positioning in the legal proceeding.

Therefore, Donald is unable to show that the court erred by sending the exhibits back to the court clerk prior to entering the court's order in this matter.

D. CONCLUSION

Accordingly, the order of the Greenup Circuit Court is affirmed. We pause to advise the parties to put their differences aside and begin to work together jointly parenting their children, as this would be in Caden and Braden's best interests. A divided front from parents frequently proves disastrous to their children's futures.

ALL CONCUR.

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BRIEF FOR APPELLEE:

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