

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000541-ME

ERICA K. DRAFFEN

APPELLANT

v. APPEAL FROM CARLISLE CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
ACTION NO. 08-CI-00045

JOHNNIE B. DRAFFEN

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

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

CLAYTON, JUDGE: This is an appeal of a decision of the Carlisle Circuit Court regarding custody and visitation. For the reasons that follow, we will reverse the trial court's order based upon appellant, Erica Draffen's (Erica) motion to alter,

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

amend or vacate and remand to the trial court for further findings and conclusions consistent with this opinion.

BACKGROUND INFORMATION

The parties were married and are parents of a minor child. After their divorce, Erica met a man, became engaged to him and is now married to him. The man to whom Erica is now married resides in Missouri. His home is about two hours away from Erica's home. Upon hearing of Erica's decision to marry and move away with their minor daughter, Johnnie Draffen (Johnnie) moved the trial court for custody to keep the move from happening.

After a hearing, the trial judge made the following supplemental conclusions of law:

2. That it is in the best interest of the minor child that JOHNNIE have possession of the minor child during the 14 days he is off from work and that ERICA have possession of the minor child on the 14 days that JOHNNIE does work. ERICA will further have the minor child every Sunday from 8:00 am to 8:00 pm. The pick-up and drop-off place will be at the maternal grandmother's home. This will be a shared custody arrangement where neither party is designated as primary residential custodian. However, if ERICA moves out of state or moves a distance from the marital home that interferes with the child's ability to attend the Carlisle County School System, then JOHNNIE will be designated as primary residential custodian. If this happens then ERICA'S mother, Larinda Lambert, would stand in place for ERICA and would be the primary caregiver for the minor child while JOHNNIE is working.

In February of 2009, Erica brought a motion to alter, amend or vacate the trial court's prior custody order. She argued in her motion that it was in the best interest of her child for Erica to be the primary residential custodian. She also asked the trial court to enter an order allowing for a home study of her new husband's household which the trial judge had agreed to at a prior hearing.

The trial judge appeared to become angered at Erica's counsel's synopsis of his prior order as violating her rights by making her choose between living in Carlisle County with her daughter and in Missouri with her husband. Without using the best interests of the child as a guideline, the trial judge took custody away from Erica so she would no longer have to make the choice. For the reasons that follow, we find this to have been clearly erroneous as it was not supported by substantial evidence.

STANDARD OF REVIEW

Kentucky Rules of Civil Procedure (CR) 52.01 provides that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." A judgment is not "clearly erroneous" if it is "supported by substantial evidence." *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). "[S]ubstantial evidence [is] evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Id. Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972). With this standard in mind, we will address the issues before us.

DISCUSSION

In Kentucky, the decision of how custody is divided between the child's parents depends upon the best interests of the child. KRS 403.270 provides, in relevant part, that:

(2) 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;

In his original findings of fact and conclusions of law, the trial judge decided that it was in the best interests of the Draffens' child to remain in Carlisle County, Kentucky, rather than relocate to Missouri. He used as his basis the fact

that the child had more relatives in Carlisle County (maternal grandmother and father) and that her residence had been there for her entire life. The trial judge also chastised Erica for a relationship with a man she had “met through the internet” and had only known for five months.

Erica’s motion to alter, amend or vacate was denied without the criteria set forth in KRS 403.270 being considered, which was an abuse of discretion by the trial judge. Erica has now married and is interested in remaining both a custodial parent with her child and also a spouse to her husband. She is willing to have a home study performed through the state of Missouri to show the fitness of the new home and we believe it is in the child’s best interest to have this home study performed.

In reversing this case, we also remand it for a hearing at which Erica be allowed to present evidence regarding her new husband and their home in Missouri. Until new findings and conclusions are made, we reinstate the original custody order in which Erica and Johnnie share joint residential custody of their child.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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