

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-001753-ME

TRACIE FARRELL

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE GEORGE DAVIS, JUDGE
ACTION NO. 08-CI-00257

SASHA DEHART AND
TRAVIS HAMILTON

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CLAYTON, MAZE AND TAYLOR, JUDGES.

CLAYTON, JUDGE: Tracie Farrell (maternal grandmother and de facto custodian) appeals the Boyd Circuit Court order of child custody entered August 10, 2011, wherein the trial court granted joint custody of the minor child (hereinafter "T.D.") to Tracie and Sasha Dehart (the mother), designated Sasha as the primary residential custodian, and provided Tracie with visitation on alternate

weekends and holidays as provided by the Boyd County timesharing guidelines.

Tracie maintains that the trial court used the wrong standard in determining child custody and failed to make findings of fact and conclusions of law as required.

After careful consideration, we reverse and remand for the trial court to hold a hearing using the best interests of the child standard and to make written findings of fact and conclusions of law.

FACTUAL AND PROCEDURAL BACKGROUND

T.D. was born on October 14, 2006. The presumed father, Travis Hamilton, has not been involved in the child's life since her birth. He has, however, been served in the current action. Sasha was sixteen, and thus a minor, at the time of T.D.'s birth. Because T.D. was born with methadone in her system, the Cabinet for Health and Family Services ("Cabinet") became involved with Sasha and the child. When the Cabinet would not allow T.D. to be discharged with Sasha, Tracie filed for guardianship of the child on October 27, 2006. Thereafter, Tracie was awarded guardianship and T.D. left the hospital with her. And Sasha entered a drug treatment program from which she was released in mid-November 2006. Then, Sasha went to live with her mother and T.D., and Tracie maintained guardianship of the child.

After Sasha returned home, she helped care for T.D., but in spring 2007, Tracie reported that Sasha started running around and using drugs again. In August 2007, Sasha re-enrolled in high school, but she was caught with drugs at school. In addition to drug charges filed against Sasha, Tracie filed a beyond

control petition, which was merged with the drug charges. Sasha was placed in a juvenile detention facility for approximately two weeks and then released to the care of her paternal grandmother, Connie Dehart.

Over the last several years, this case had a protracted litigation history. The events relevant to our case began on February 22, 2008, when Tracie filed a petition for custody of T.D. in Boyd Circuit Court in which she asserted that she qualified as a de facto custodian. A hearing was held before a domestic relations commissioner on May 5, 2008. Following the hearing, on June 5, 2008, the domestic relations commissioner submitted her recommendations. First, the domestic relations commissioner found, by clear and convincing evidence, that Tracie was a de facto custodian. The commissioner also determined that it was in the child's best interests that Tracie and Sasha have temporary joint custody and that Tracie be named the primary residential custodian. The recommendations also provided Sasha with timesharing as the parties' schedules permitted. On that same day, the trial court entered an order that adopted the recommendations of the commissioner. Shortly thereafter, in July 2008, Tracie moved with T.D. to Pendleton County to seek employment and live closer to her family.

The issues pertinent to this case were revived on July 5, 2011, when Sasha filed a motion for permanent custody and to hold Tracie in contempt. In the motion for contempt, Sasha argued that Tracie had denied her time with the child from January 2011 until late May 2011. To counter, on July 19, 2011, Tracie filed a show cause motion asking that Sasha return the child to Tracie and that she be

held in contempt. Apparently, Sasha, in order to make up for Tracie's alleged failure to provide her parenting time with T.D., decided on her own initiative to remedy the problem by not returning T.D. to Tracie on the agreed date of July 10, 2011. In her motion, Tracie asserted that she was the child's primary residential custodian and, therefore, Sasha must return the child.

Next, on August 3, 2011, Tracie filed a response to Sasha's motion for permanent custody in which she alleged that Sasha used drugs and had an unstable living situation. Furthermore, Tracie wanted the trial court to award her primary custody and not to hold her in contempt. A hearing was set for August 3, 2011.

At the hearing, Sasha, Connie Dehart (Sasha's paternal grandmother), Hubert Dehart, Jr. (Sasha's father), Lewis Farrell and Tyler Dehart (Tracie's sons who were minors), and Tracie testified. Following the testimony of the parties, the trial judge spoke to the parties. The judge analogized the case to one that might appear on a dependency, neglect, and abuse docket in district court. In making his comments, the judge continued that parents have an opportunity to comply with court orders and have the child returned to their custody. Next, he observed that he believed that Sasha should have the opportunity through strict, monitored conditions to have custody of T.D. The judge also observed that the court had Sasha tested for drugs, and although the results were not preserved for the record, she tested positive for methadone and marijuana. He then imposed a set of restrictions and requirements on Sasha.

The trial court entered its order on August 10, 2011, and memorialized the conditions that Sasha must perform in order to remain the primary residential custodian. The order granted joint custody to Tracie and Sasha but appointed Sasha as the primary residential custodian. Additionally, Tracie was provided visitation every other weekend and holiday visitation under the Boyd County guidelines. Moreover, the order made certain stipulations for Sasha. Among other things, she was subject to random drug testing when such tests were requested by the Cabinet for Family and Children or any court-approved agency; required to regularly attend Narcotics Anonymous and Alcoholics Anonymous meetings; obtain a sponsor; live with her paternal grandmother, Connie Dehart; and have no contact with her father, Hubert Dehart, or her boyfriend, Garrett Damron. The trial court also denied both parties' motions for contempt or show cause.

Tracie filed a motion to alter, amend, or vacate the order. Upon consideration of this motion, the trial court on August 29, 2011, entered an order that prohibited Sasha from using any drugs unless prescribed and setting a geographical location for the exchange of the child, which was later changed to another location by agreement of the parties. Tracie appeals the August 10, 2011, order.

STANDARD OF REVIEW

Trial courts are vested with broad discretion in matters concerning custody and visitation. *See Drury v. Drury*, 32 S.W.3d 521, 525 (Ky. App. 2000).

When reviewing a decision in a child custody case, the test is whether the findings of fact of the trial court were clearly erroneous or the decision constitutes an abuse of discretion. *Eviston v. Eviston*, 507 S.W.2d 153 (Ky. 1974). Findings of fact are clearly erroneous if they are “manifestly against the weight of the evidence.” *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky.1967). Further, an appellate court gives “due regard given to the opportunity of the trial judge to view the credibility of the witnesses.” *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986) (citing Kentucky Rules of Civil Procedure (CR) 52.01).

Whereas abuse of discretion implies that the family court’s decision is unreasonable or unfair, a court abuses its discretion when its decision is “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004) (footnote omitted). Lastly, a trial court’s conclusion of law is reviewed under a de novo standard of review. *McClendon v. Hodges*, 272 S.W.3d 188, 190 (Ky. 2008).

Thus, in reviewing a family court decision for abuse of discretion, “the test is not whether the appellate court would have decided it differently, but whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion.” *Coffman v. Rankin*, 260 S.W.3d 767, 770 (Ky. 2008) (footnote omitted).

ANALYSIS

On appeal, Tracie argues that the trial court abused its discretion by using an improper standard in determining the modification of the custody; that the

trial court failed to include findings of fact or conclusions of law to support its order; that the trial court, in making its determination, neglected to provide Tracie with the appropriate “de facto” custodian status; and finally, that the trial court’s designation of Tracie and Sasha as joint custodians was an abuse of discretion because it was not in the best interest of T.D. Sasha counters that the trial court’s order was not clearly erroneous or an abuse of discretion. Moreover, the trial court did make findings of fact and conclusions of law when the order was entered. Further, because Tracie did not make a motion under CR 52.04 for more specific findings, she had waived this matter.

1. Standard for child custody

We begin by addressing whether the trial court used the correct standard in determining the child custody issue. In the instant case, some confusion exists as to whether the parties are requesting a custody determination or modification of child custody or modification of timesharing. Sasha’s motion initiating this action is labeled a “motion for permanent custody.” Tracie’s first motion in this action is entitled “motion to show cause and for return of child.” Later, in her “response to motion to show cause and for custody of child,” Tracie requests that the trial court enter an order that she be granted “permanent primary custody” of T.D. As explained above, the original custody order was temporary and granted joint custody between Tracie and Sasha. Further, the order named Tracie as a de facto custodian and made her the primary residential custodian.

Here, the judge has retained the joint custody but named Sasha as the primary residential custodian.

Guidance is provided by *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008). Therein, the Kentucky Supreme Court noted that whether the action is pre-or post-decree, the modification of custody statute (Kentucky Revised Statutes [KRS] 403.340) is applicable to a modification of a custody decree. *Id.* at 765.

The Court then explains:

By definition, a decree is a final judgment, Black's Law Dictionary 440 (8th ed. 2004), denoted in Kentucky law as being "final or appealable." CR 54.01. Prior to entry of a decree, a court may enter temporary custody orders pursuant to KRS 403.280, and may determine timesharing/visitation pursuant to KRS 403.320, which may be modified whenever it is in the child's best interests to do so. Any such decisions are "pendente lite," "interlocutory" or "non-final." As we have determined in a case that was argued with this one and is being rendered at the same time, *Frances v. Frances*, 266 S.W.3d 754, (Ky. 2008), when the court is making its final and appealable custody decree, it must do so based on KRS 403.270, the best interests standard.

Id. Therefore, because the trial court here was making a final custody decision, its determination is governed by KRS 403.270. The first section of the statute defines de facto custodian, the method for establishing it, and the ramifications of the status. KRS 403.270(1)(a-b).

The next section of the statute explains 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.” KRS 403.270(2). To make such a determination the court must 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.

KRS 403.270(2)(a-i). The remainder of the statute continues with directives regarding domestic violence and de facto custodian status. Since an issue exists here regarding de facto custodianship, the trial court must consider the part of the statute relevant to it; therefore, KRS 403.270(1), (5) and (6) are also applicable.

After an examination of the substance of the order and a review of the hearing on tape, we conclude that the trial court did not apply the proper standard for a determination of custody. The record of the hearing reveals the trial court, while making comments from the bench, compared the case to one that might appear on a dependency, neglect, and abuse docket in district court. In making his remarks, the judge never discussed any of the factors enumerated in KRS 403.270, nor even cited the statute, and only mentioned “best interests” once. In fact, the trial judge’s remarks from the bench were primarily focused on Sasha and giving her a chance to parent the child.

Moreover, the judgment and order of custody does not reflect any findings of fact or conclusion of law but merely issues an order that primarily sets out conditions that Sasha must maintain in order to remain primary residential custodian. Nor is any mention of the best interests of the child contained in the order. Consequently, we hold that the judge abused his discretion by making a child custody decision that was “unsupported by sound legal principles.” *See Eviston*, 507 S.W.2d 153. Therefore, the case is remanded for another hearing wherein the child custody determination shall be made by using the instructive language in KRS 403.270

Before moving on, we are mindful that an earlier court order found by clear and convincing evidence that Tracie was a de facto custodian. In the record of the August 2011 hearing and order, we are unable to discern the trial court’s consideration of Tracie’s de facto custodian status. But at the next hearing, we

caution the court that it must keep her status in mind while evaluating the best interests of the child herein. The statute provides that once a person is deemed to be a de facto custodian, that person has the same standing in custody matters as a parent. KRS 403.270(1)(b).

Having decided that an improper standard was used in the child custody decision, we now review whether a trial court must make written findings of fact or conclusions of law to support a child custody order.

2. Requirement for written findings and conclusions

Tracie claimed in her appeal that the trial court should have made written findings and conclusions, and it erred by not doing so. In 2011, the Supreme Court of Kentucky considered the issue of written findings with respect to cases of child custody. It held that trial courts must apply the factors of KRS 403.270(2) in writing. *Anderson v. Johnson*, 350 S.W.3d 453 (Ky. 2011). The Court began its analysis by observing that in domestic relations cases, post-decree motions concerning visitation and timesharing modifications are “actions tried upon the facts without a jury,” as contemplated in CR 52.01. *Id.* at 454. The rationale behind the requirement for written findings is that CR 52.01 creates a general duty for the trial court to make its findings in writing because these are “actions tried upon the facts without a jury” and, therefore, “CR 52.01 requires that the judge engage in at least a good faith effort at fact-finding and that the found facts be included in a written order.” *Id.* at 458.

The Court then went on to distinguish between CR 52.01 and CR 52.04. It observed that CR 52.04 is applicable when the court has already made findings but not addressed an essential issue. *Id.* “CR 52 embodies a burden on both the court (CR 52.01) and the litigant (CR 52.04). It is further reasonable that the broader burden be on the court whose express duty is to make necessary findings of fact and conclusions of law.” *Id.*

Approximately one month later, the implications of *Anderson* were again highlighted by the Court in *Keifer v. Keifer*, 354 S.W.3d 123 (Ky. 2011). “[W]e state again that compliance with CR 52.01 and the applicable sections of KRS Chapter 403 requires written findings.” *Id.* at 126. The Court emphatically stated that “the trial judge’s duty is not satisfied until the findings have been reduced to writing.” *Id.* In the case at bar, the trial court’s order did not include any findings of fact or conclusions of law. Instead, the court ordered that Tracie and Sasha would have joint custody, that Sasha would be the primary residential parent, that Sasha had certain conditions to meet, that Tracie would have visitation, and never referred to KRS 403.270 or “best interests” in a meaningful fashion.

The Supreme Court also clarified in *Anderson* that:

[A]s a matter of policy, when a court fails to make any kind of factual findings as required, the litigant should not be prohibited from asking an appellate court to require the lower court to make such findings. A trial court should be well aware of the requirements of CR 52.01[.]

Anderson, 350 S.W.3d at 458. Furthermore, the Court stated that failure to make written findings “allows an appellate court to remand the case for findings, even where the complaining party failed to bring the lack of specific findings to the trial court’s attention.” *Id.* Tracie’s appeal, therefore, is properly before this Court because under CR 52.01 a request for findings under CR 52.04 is not necessary for purposes of review. Here, the trial court made orders regarding the custody of the child without providing written findings. This lack of findings of fact and, ultimately, conclusions of law to support this conclusion violates the directive of both CR 52.01 and KRS 403.270(2).

Further, in *Anderson*, the Court acknowledged “that there ha[d] been prior decisions indicating that trial courts did not need to make specific findings of fact and separate conclusions of law on modification motions . . . and that CR 52.04 has sometimes been read as a stand-alone rule.” *Id.* at 459 (citation omitted). But the Court reasoned that those holdings did not fully address the concerns raised by hearings that deal with substantive matters. Because these hearings require evidence and witnesses and, thus, findings of fact before a conclusion of law can be made, the Court said that “[t]o the extent that those cases differ from the holdings in this opinion, they are overruled.” *Id.* In addition, the Court recognized that such concerns are particularly relevant in family law disputes where the court, in essence, has continuing jurisdiction over children until they reach majority or emancipation. *Id.*

Hence, after the hearing, the trial court's findings of fact, which will be based upon the evidence presented at the hearing, and conclusions of law reasonably following the findings, are to be written so as to properly reflect the court's decision.

Tracie also claimed on appeal that the trial court's decision to grant Tracie and Sasha joint custody of T.D. and making Sasha the primary residential custodian were an abuse of discretion. These issues are rendered moot since another hearing will be held.

CONCLUSION

For the reasons stated above, this case is reversed and remanded to the Boyd Circuit Court for another hearing on the issue of child custody using the statutory directives of KRS 403.270 and for the trial court to provide written findings of fact and separate conclusions of law followed by the appropriate judgment.

ALL CONCUR.

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