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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001783-ME

B.S.G. APPELLANT

v. APPEAL FROM MERCER CIRCUIT COURT
HONORABLE O. REED RHORER, JUDGE
ACTION NO. 06-CI-00023

J.E.F. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CAPERTON, AND TAYLOR, JUDGES.

CLAYTON, JUDGE: This is an appeal from a decision of the Mercer Circuit Family Court denying the Appellant's Motion for Emergency Custody of his daughter. Based upon the following, we will affirm the decision of the trial court.

BACKGROUND INFORMATION

S.E.G. is the minor child of the Appellant and Appellee. She is currently seven years old. When S.E.G. was two months old, the parents filed an action to determine how custody would be shared. On January 10, 2008, a custody hearing was held and, due to the Appellant's history of drug and alcohol abuse as well as the contentious manner of the parenting between the parties, Judge Reed Rhorer awarded sole custody to the mother with visitation to the father.

On August 2, 2012, Appellant filed a motion for emergency custody. This motion arose out of the actions of S.F., the half brother of S.E.G. Appellee has sole custody of S.F.; S.F.'s father is deceased. It was brought to the attention of authorities that S.F. had been sending sexual text messages to minor girls in his neighborhood. The Appellee was aware of the allegations against S.F. and the inquiry into the incidents.

In his motion, the Appellant contended that he was concerned for S.E.G.'s safety due to the lack of supervision when S.E.G. was with S.F. He was also concerned that S.E.G. was allowed to sleep in the same bed with S.F. The Appellant also sought to introduce affidavits of neighbors who stated that the Appellee did not adequately supervise her children.

Judge Rhorer conducted a hearing on the motion on August 17, 2012. He limited the hearing to that evidence which was relevant to the motion for emergency custody. This evidence included testimony from law enforcement

officials regarding the investigation into S.F.'s sexually explicit text messages and testimony from the parent of the girl to whom the messages were sent.

After the hearing, the trial court found that there had been no change in circumstances which would warrant a modification of the custody order already entered. On September 12, 2012, Judge Rhorer denied the motion for emergency custody. The Appellant then filed a motion to alter, amend or vacate the court's order, which the court denied. The Appellant then brought this appeal.

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 the opportunity of the trial court to judge the credibility of 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). Substantial 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).

In determining whether the court erred in granting or denying custody, the appellate court must determine whether the findings of the court were clearly erroneous or whether there was an abuse of discretion. *Eviston v. Eviston*, 507 S.W.2d 153 (Ky. 1974). With these standards in mind, we review the court's decisions.

DISCUSSION

The Appellant first contends that the court abused its discretion in failing to apply the best interest of the child as the applicable standard to a motion for modification of custody made more than two years after a custody decree. He argues that, since his motion for modification of custody was brought more than two years after the original custody decree, Kentucky Revised Statutes (KRS) 403.340(3) should apply. Under this statute, the court must determine whether "a change has occurred in the circumstances of the child or his custodian, and [whether a] modification is necessary to serve the best interests of the child." *Id*. The Appellee argued that the statute has two thresholds which must be met in order to modify a child's custody. First, there must be a change in the circumstances, then the best interest of the child must be examined.

In denying the motion for emergency custody, the trial court found that there was no change in circumstances which required a modification of custody. In *Pennington v. Marcum*, 266 S.W.3d 759, 766 (Ky. 2008), the Kentucky Supreme Court held that in actions to modify custody which were brought more than two years after the initial entry of a custody order, the court should look at the bests interests of the child in determining whether a change in custody was necessary.

In this action, the trial court found that there was nothing which now indicated the Appellee was no longer a fit person to have custody of the child. The trial court acknowledged that there should be a further investigation into the

actions of S.F. and how they affected S.E.G. It also opined that the Appellee should continue with the Safety Plan put in place wherein S.F. and S.E.G. would not be alone together during the investigation. KRS 403.340(3) requires a two prong analysis. First, the court must determine if a change has occurred. The trial court considered the relevant factors for this inquiry and determined that a change in circumstances had not occurred. Second, the court must decide that modification is necessary to serve the best interest of the child. We can discern that the court was considering the child's best interest. The trial court found that modification was not necessary. However, the court did not need to reach that second prong. Further, the Appellant was clearly seeking emergency custody pending the investigation. This was a hearing limited to the risks to S.E.G. based upon S.F.'s actions. Appellant's counsel acknowledged that limitation when, after the court issued its ruling, he stated that he was going to file a motion for change of custody. VR 4:29:39 8/17/12. Therefore these findings of the court were sufficient under the statute in denying a change in custody.

The Appellant alleged in his motion for emergency custody that S.E.G. was in danger from S.F. Based upon these allegations, the trial court held a hearing and heard testimony from witnesses regarding the investigation into the actions of S.F. and how the Appellee was dealing with interaction between S.F. and S.E.G. After listening to testimony, the trial court determined that the Safety Plan in affect was sufficient to keep S.E.G. safe and that nothing indicated that the

Appellee would not continue with the Safety Plan. We find that such was not an abuse of discretion.

While the Appellant contends that the trial court should have set forth specific findings regarding the best interests of S.E.G., we agree with the Appellee that the motion for emergency custody dealt with a specific issue, i.e., the possibility of sexual abuse from S.F. Based upon this issue, the trial court held a hearing at which this possibility was examined. It then made a finding that S.E.G. was safe with the Appellee and that sufficient guidelines had been imposed to insure her safety. We find that this is sufficient under the statute.

Next, the Appellant asserts that the court abused its discretion in failing and refusing to hear and consider all evidence relevant and material to the best interests of S.E.G. In filing his motion to alter, amend or vacate, the Appellant attached affidavits of neighbors of the Appellee. The affidavits did not address the issue of the sexual text messages, but went to the assertions that Appellee was not an attentive parent in general. The trial court did not use the affidavits in making its decision, holding that they were not relevant to the issue set forth in the motion for emergency custody. We agree.

As stated above, the motion for emergency custody dealt with the sexual text messages that S.F. allegedly sent to neighborhood girls and the possibility that S.E.G. was not safe around him. There is nothing in the affidavits which further the investigation into this issue. We find, therefore, that the trial court did not err in holding them irrelevant to the motion for emergency custody.

The Appellant's final argument is that, as a matter of law, on proof that a minor child is at serious risk of physical harm it could never be in the best interest of the child to leave her in the environment where those risks are present, and the court's decision to the contrary was unreasonable. In this case, however, there was no finding that there was a serious risk of physical harm to S.E.G. from S.F. The sexual text messages were sent to neighborhood girls, not S.E.G. There was no finding that S.F. had approached S.E.G. in any way or harmed her in any way. As set forth above, there was an approved Safety Plan in place wherein S.E.G. and S.F. would not be alone together during the investigation into the allegations against S.F. Thus, we find the trial court did not err in denying the motion for emergency custody filed by the Appellant.

We, therefore, affirm the decision of the Mercer Circuit Court.

CAPERTON, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

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