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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000100-ME

CHAD GERTLER — APPELLANT

v.

APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JUDY D. VANCE, JUDGE
ACTION NO. 07-CI-00277

JOANN GERTLER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND KRAMER, JUDGES.

ACREE, CHIEF JUDGE: The issue before us is whether the Casey Circuit Court abused its discretion when it denied Appellant Chad Gertler's motion to modify custody. We find no abuse, and affirm.

I. Facts and Procedure

Chad and Joann married in 1996. Four children were born of the marriage. During their marriage, the parties adopted a "non-worldly" lifestyle modeled, according to Chad, after the lifestyle of the Amish. They lived in a house with no electricity or hot water and embraced the belief that a wife should submit to the authority of her husband, who would make all decisions for the family.

All four children were born at home. Joann stayed at home, raising the children, homeschooling them, keeping house, and even making the family's simple clothes. Chad decided that his wife and daughters would wear dresses and cover their heads at all times. All of the family members wore long-sleeved clothes year-round. The family avoided medical treatment, including preventive care, and the children never visited a dentist.

Joann left the marital home with the children in 2007 and filed a petition to divorce Chad. Joann ultimately requested sole custody of the children on grounds that she and Chad were unable to agree on the education, religious training, and healthcare of the children. The result was a bitter custody battle.

Following a lengthy evidentiary hearing, the circuit court concluded that joint custody was not in the best interests of the children. The court's reluctance to award joint custody was based, in part, on the circuit court's inability to reasonably foresee a future in which Chad would cooperate with Joann in making decisions regarding their children. Joann was awarded sole custody and Chad was granted reasonable visitation.

Chad appealed to this Court. We affirmed, finding the circuit court's factual conclusion that Chad would attempt to dominate Joann and that he would not be able to cooperate in making joint decisions affecting their children was supported by substantial evidence and justified awarding Joann sole custody. *Gertler v. Gertler*, 303 S.W.3d 131 (Ky. App. 2010).

Meanwhile, the circuit court offered that, upon either party's request, it would enter an order providing the terms and conditions of visitation. Neither party made such a request. Instead, for five years they operated under a verbal visitation schedule: Joann kept the children during the week, and Chad had visitation every weekend.

In May 2013, Chad filed a motion to modify custody and/or visitation. As grounds, he declared he had been relegated to the role of bystander in his children's lives; he and Joann had been able to amicably discuss issues related to the children; and the children's numerous sports and extracurricular activities made weekend visitation unworkable.[1] Joann opposed a change in custody, but agreed that Chad's visitation privileges should be specifically defined.

An extensive evidentiary hearing was held. The circuit court heard from the parties and others, and interviewed the children in chambers. Chad testified he desired more time with the children, and more involvement in their lives. He painted Joann as a vindictive and hostile custodian who enrolled the children in an

[1] The parties' son plays football, each of the three daughters plays basketball and softball, and one daughter also plays volleyball.

unwieldy number of sports simply to alienate them from their father and to deprive him of all meaningful parenting time.

Joann testified that Chad has not changed. In her view, Chad is still controlling and will attempt to overpower her as he had during their marriage. According to Joann, the parties continue to entertain completely different lifestyles, thoughts, and attitudes. Joann testified that Chad: still forces the girls to wear homespun skirts and dresses while at his house; told the children immunizations are poison and allergy shots are unnecessary; and told one child she did not need to wear glasses. The children confirmed much of this. Joann asserted that she and Chad are still unable to have a conversation without arguing, and she feared joint custody would lead to more arguing, thereby causing the children emotional stress.

Neither claimed, however, that the other is a bad parent.

The circuit court found no change in the circumstances of the children or the custodial arrangement necessitating modification, and found that the children's best interests would be served by allowing Joann to continue to exercise sole custody. However, the circuit court granted Chad's motion to modify visitation and ordered that the 29th Judicial Circuit Standard Visitation Guidelines apply.

Chad filed a CR[2] 59.05 motion to alter, amend, or vacate that ruling, and a CR 52.04 motion requesting additional facts. The circuit court denied Chad's

[2] Kentucky Rules of Civil Procedure.

motions. However, at the post-judgment hearing, Joann inquired as to the applicability of a provision of the 29th Judicial Circuit Code of Conduct, which is attached to and precedes the Standard Visitation Guidelines. The particular provision at issue states neither parent shall "schedule or enroll child(ren) in activities which will affect parenting time without first consulting or obtaining written consent of the other parent." The circuit court clarified that the Code of Conduct does not differentiate between joint and sole custody, and concluded this particular provision is not appropriate in a sole custody scenario. Chad appealed.

II. Standard of Review

"[T]he change of custody motion or modification of visitation/timesharing must be decided in the sound discretion of the trial court." *Pennington v. Marcum*, 266 S.W.3d 759, 769 (Ky. 2008). We defer substantially to the trial court's decision. *Id.* Only an abuse of discretion or clearly erroneous factual findings will necessitate intervention by this Court. *See id.*; CR 52.01. An abuse of discretion occurs if the court's decision is "unreasonable, unfair, arbitrary or capricious." *Caudill v. Caudill*, 318 S.W.3d 112, 115 (Ky. App. 2010). Whether this Court would have come to a different conclusion is immaterial. *Maxwell v. Maxwell*, 382 S.W.3d 892, 895 (Ky. App. 2012).

III. Analysis

Chad presents four arguments, two pertaining to custody and two pertaining to visitation. Because we need only address the visitation arguments if we uphold the circuit court's custody determination, we will address custody first.

A. Modification of Custody

Chad contends an abuse of discretion is evident because the family court: (1) issued vague and incomplete findings of fact; and (2) failed to recognize there has been a change in circumstances justifying modification, and that modification is in the children's best interest.

KRS[3] 403.340 governs a motion for custody modification. This statute authorizes a child-custody adjustment if:

> after [a] hearing [the family court] 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[ren].

KRS 403.340(3). The best interests of the children are paramount. *Pennington*, 266 S.W.3d at 769 (When considering a motion to modify custody filed more than two years after the date of the custody decree, the family court must evaluate whether a change of custody is in the child's best interest).

When determining if a change has occurred and whether a modification of custody is in the children's best interest, the family court must consider the following, to the extent relevant:

> (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;

[3] Kentucky Revised Statutes.

> (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 403.340(3). Other factors pertinent to the best-interest determination include: (a) the parents' wishes as to custody; (b) the children's wishes as to their custodian; (c) the children's relationship and interaction with their parents, siblings, and other persons who may affect their best interests; (d) the children's "adjustment to [their] home, school, and community"; (e) "[t]he mental and physical health of all individuals involved"; (f) evidence of domestic violence; and (g) evidence the children have been placed with and cared for by a *de facto* custodian. KRS 403.270(2); KRS 403.340(3)(c).

Further, "in custody matters, the [family court's factual] findings must be in writing." *Hicks v. Halsey*, 402 S.W.3d 79, 84 (Ky. App. 2013). At a minimum, "the family court [should] engage in a good faith effort at fact-finding and . . . include those facts in a written order." *Murry v. Murry*, 418 S.W.3d 432, 435 (Ky. App. 2014); CR 52.01.

Chad declares the circuit court's factual findings inadequate. Citing *Anderson v. Johnson*, 350 S.W.3d 453 (Ky. 2011), he contends the circuit court's

findings are so deficient it is impossible to know which facts it relied on, and he faults the circuit court for "not making extensive findings of fact." (Appellant's Brief at 17).

Anderson, *supra*, provides valuable guidance. There, our Supreme Court considered the issue of written findings with respect to cases of child custody. The Court reaffirmed that the family court has an obligation to "make findings of fact and conclusions of law, and [to] enter the appropriate order of judgment when hearing modification motions." *Anderson*, 350 S.W.3d at 457. The Supreme Court explains why:

> The basis for a modification decision is thus fact-driven rather than law-driven, because the legal standard is whether [modification] is in the best interests of the child, which is stated plainly in the statute. To review the judge's decision on appeal, it is important to know what facts the judge relied on in order to determine whether he has made a mistake of fact, or to even determine if he is right at law, but for the wrong facts. If a judge must choose between facts, it is clearly relevant which facts supported his opinion.

Id. at 455.

Unlike *Anderson*, where the trial court failed to include written findings in support of its custody determination, the circuit court in this case did make the requisite findings of fact to support its order. It recounted portions of Chad's and Joann's testimony, including Chad's desire to spend more time with the children, his perception of Joann's parenting decisions, and his complaints, as well as Joann's concerns and her devotion to the children. The circuit court also

found that the children are being well cared for by Joann, and their medical, educational, and emotional needs were being met.

Chad complains the circuit court neither recounted nor commented on every witness's testimony and credibility. It was not obligated to do so. Instead, the circuit court need only identify the factual basis for its decision. *Anderson*, 350 S.W.3d at 457. Here, the factual basis for the circuit court's decision is not a mystery. It issued written findings of fact summarizing the testimony before the court and written conclusions of law identifying the rationale behind its decision. This satisfies CR 52.01 and *Anderson*.

Chad also contends the circuit court abused its discretion in finding there was no change in circumstances justifying modification. He argues Joann's admitted hostility toward Chad is a change in circumstances that warrants modifying custody. It seems to us that Joann's animosity toward Chad is certainly not a new or "changed" circumstance but, in fact, part of the basis for their divorce in the first place. Nevertheless, accepting his claim as true does not justify the relief he seeks.

The statute authorizes modification if the family court finds changed circumstances "***and*** that the modification is necessary to serve the best interests of the child[ren]." KRS 403.340(3) (emphasis added). Entitlement to modification requires satisfaction of both prongs. Here, assuming for argument's sake that the first factor – changed circumstances – had been met, the circuit court made it clear,

upon consideration of the relevant statutory factors, that modification from sole to joint custody would not serve the best interest of these children. It reasoned that:

> . . . even if such a change had occurred, all of the factors contained in KRS 403.340(3) would favor a finding that the best interests of the children do not require modification. The custodian does not agree to the modification; there has been no additional integration of the children into [Chad's] family; the factors set forth in KRS 403.270(2) suggest that the best interest of the children will be served by continuing sole custody with [Joann]; the children's present environment does not endanger seriously their physical, mental, moral, or emotional health; it does not appear that any advantages would be gained by changing the children's current environment; and the custodian has not placed the children with a *de facto* custodian.

The circuit court further noted that the children, while in Joann's care and custody, have performed extremely well in school, remained actively involved in sports and other activities, received adequate medical care, have been properly disciplined, and have been provided a good home. Additionally, while not specifically relied upon by the circuit court, we are cognizant that at least two of the four children expressed their desire for Joann to retain all decision-making authority.[4] KRS 403.270(2)(b). While Chad perhaps disagrees with some of the circuit court's findings, they are sufficient to support its conclusion that it is in the children's best interest not to modify custody.

On this issue, we affirm.

B. Visitation

[4] "An appellate court may affirm a lower court for any reason supported by the record." *McCloud v. Commonwealth*, 286 S.W.3d 780, 786 n.19 (Ky. 2009).

This brings us to visitation. "A parent not granted custody of the child is entitled to reasonable visitation rights[.]" KRS 403.320(1). A "court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health." KRS 403.320(3). Here, Chad requested modification of visitation. The circuit court granted his request, and the order granting incorporated that circuit's standard visitation schedule.

Nevertheless, Chad continues to take issue with the circuit court's visitation decision. He argues the circuit court issued inconsistent visitation rulings and impermissibly burdened Chad's visitation rights by allowing Joann to dictate extracurricular activities. Chad describes the circuit court's oral clarification of the provision of the Code of Conduct related to extracurricular activities during the November 10, 2014, post-judgment hearing as a *sua sponte* modification of visitation without adequate due process. Chad's argument is not well-founded.

The circuit court did not, as claimed by Chad, arbitrarily alter its prior order. It did not change anything related to visitation. The circuit court merely clarified that the language of the Code of Conduct does not take into account the differences between joint and sole custody. A defining attribute of sole custody is the custodian's sole decision-making authority. *Pennington*, 266 S.W.3d at 763. The sole custodian is not required to consult the non-custodian as to the children's

upbringing. *See id*. A different interpretation of the Code of Conduct would be contrary to this principle.

Chad further argues the children's extracurricular activities unduly burden his visitation. He claims the circuit court's visitation order makes visitation in his home subordinate to sports, thereby depriving him of all meaningful parenting time. True, the schedule may require that part of Chad's visitation time be spent transporting his children to sporting events. We are hard-pressed to consider this a burden on his visitation. Such opportunities for parent-child interaction are commonplace and routinely turned to practical parenting advantage. Parenting outside the home is still parenting. The sporting event itself presents another opportunity for Chad to strengthen the bonds with his children. We are not persuaded that the children's extracurricular activities unduly interfere with Chad's visitation.

On this issue we also affirm.

IV. Conclusion

For the foregoing reasons, we affirm the Casey Circuit Court's October 24, 2014, order denying Chad's motion to alter custody.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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