RENDERED: DECEMBER 22, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002235-ME

MARIA REGINA FRANCES — APPELLANT

v.

APPEAL FROM TRIGG CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 04-CI-00088

BOBBY GENE FRANCES — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY AND WINE, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

WINE, JUDGE: Maria Regina Frances, Appellant, and Bobby Gene Frances, Appellee, were married on January 30, 1991. One child, Haley Frances, was born of this marriage on December 2, 1997. The parties separated on March 20, 2004, and on May 9, 2004, Maria filed a petition for dissolution of marriage. The parties subsequently entered into an agreed order on September 2, 2004, that memorialized the parties' child support obligations and

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

custody schedule. Bobby was ordered to pay $212.68 per month in child support for Haley while the parents shared custody. On April 11, 2005, Bobby filed an emergency motion for temporary custody of Haley after learning that Maria had abruptly and without notice removed Haley from school in Trigg County, Kentucky, and moved to Warren County, Iowa, with her boyfriend, Michael Plank. On April 28, 2005, a hearing was held and proof was taken on the issue of custody. The final decree granting the divorce was entered June 8, 2005, with remaining matters left open on permanent custody, visitation, and child support. On June 21, 2005, a hearing was held for the introduction of additional proof by Bobby. Primary physical custody was awarded to Bobby on July 1, 2005. Maria filed a subsequent motion to amend, alter, or vacate the judgment that was denied on September 28, 2005. In denying the motion, the trial court noted that some of the issues raised in the motion to amend, alter, or vacate "[had] to do with credibility of witnesses and the fact finding role of the Court." This appeal followed. We now affirm.

Maria's main contention on appeal is that the findings of the trial court were clearly erroneous in awarding physical custody to Bobby, and in making this decision, the court abused its discretion. Under the Kentucky Rules of Civil Procedure (CR) 52.01, the trial court's findings of fact shall not be set

aside unless clearly erroneous with 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). These rules clearly apply to child custody cases and the findings of fact are particularly important in such situations. Id. In reviewing the decision of a trial court, the test is not whether we would have decided it differently, but whether the findings of the trial judge were clearly erroneous or that he abused his discretion. Eviston v. Eviston, 507 S.W.2d 153 (Ky. 1974).

KRS 403.270 requires the best interest of the child standard for determining custody. Kentucky courts with statutory guidance have defined the best interest standard. See Davis v. Davis, 619 S.W.2d 727 (Ky.App. 1981); Eviston v. Eviston, 507 S.W.2d 153 (Ky. 1974). The tender years' presumption has been expressly abolished by the language of the statute and the law now requires equal consideration for both parents. The factors listed in the statute are not exhaustive for the trial court's consideration and include: (1) the parental wishes; (2) the child's wishes; (3) the interaction and interrelationship of the child with parents, siblings, and other significant persons; (4) the child's adjustment to home, school, and community; and (5) the mental and physical health of all parties. The Supreme Court of Kentucky has made it clear that

"we are not concerned with what might be best for a parent but rather what is best for the children." Cherry v. Cherry, 634 S.W.2d 423, 424 (Ky. 1982).

The record clearly demonstrates the lower court's full consideration of the best interest of Haley. On appeal Maria attacks the findings of the trial court while offering excuses for her sudden and immediate flight from Kentucky. This issue is succinctly addressed in Brumleve v. Brumleve, 416 S.W.2d 345 (Ky. 1967), where a mother requested approval to move her children to another state. While Maria offered no notice to the court, her counsel, or Bobby about leaving the state, the language of Brumleve echoes why we now affirm. The Court stated,

> Mothers should be given considerable latitude in choosing where they will live. But when this right is challenged by the former husband and father of the children, she should offer some plausible reason for taking minor children out of the jurisdiction of the court to the prejudice of the visitation rights of the father. Mere whim is not enough.

Brumleve, 416 S.W.2d at 346.

Despite the noted issues between Maria and Bobby, the evidence of record clearly demonstrates Bobby's willingness and adamant determination to cultivate a strong relationship with his daughter. His participation in her day-to-day life was promptly terminated by Maria's unilateral decision to leave

Kentucky before a final custody decree had even been entered in this case. Maria did not notify her counsel or the court of her intentions. The trial judge directly addressed that Kentucky has enacted legislation and created resources to protect women like Maria from threatening or potentially harmful situations involving a disgruntled former spouse. The record shows that Maria failed to use any of the readily available resources here in Kentucky but, instead, fled the state and severed all relationships for Haley between her father, extended family, school community, and friends. Maria separated Haley some 600 miles from everything that was familiar and stable in her life, most importantly the on-going and consistent relationship with her father. The trial court was in the best position to make a custody determination and we find no abuse or error. What is best for Haley was appropriately determined by the trial court. The Court has fully reviewed the entire record in this case, and for the above stated reasons, we affirm the decision of the lower court granting primary physical custody of Haley Frances to her father, Bobby Frances.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Julia T. Crenshaw
White, White & Crenshaw
Hopkinsville, KY

BRIEF FOR APPELLEE:

Sands M. Chewning
Chewning & Chewning
Hopkinsville, KY