

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000036-ME

DEBRA L. CRABTREE

APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 03-CI-01237

MICHAEL D. CRABTREE

APPELLEE

OPINION
VACATING AND REMANDING

** **

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

CLAYTON, JUDGE: This is an appeal of a custody modification. Based upon the foregoing, we find that the Daviess Circuit Court's Order modifying custody must be vacated and this case remanded to that court for more developed findings.

¹ Senior Judge Daniel T. Guidugli 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.

FACTUAL SUMMARY

The Appellant, Debra Crabtree, and the Appellee, Michael Crabtree, were married in 1981 and proceeded to have three (3) children, Benjamin, Jonathan and Elizabeth. They were divorced in 2003 and Debra was awarded primary residence of the children. At that time, all three children were minors.

During the marriage, Debra had home schooled the children. While Michael objected to the continuation of their education in this way, the court found during the original custody hearing that this method was adequate and allowed Debra to continue. For the next couple of years, Debra moved the children to various places in Kentucky and once to Nashville, Tennessee. She continued to home school the children during this period.

In July of 2007, Debra decided to move the children to Defuniak Springs, Florida. Her parents reside there and she would have part-time employment. She intended to continue to home school Jonathan and Elizabeth, however, Florida would allow the children to attend classes at their public schools to supplement their educational experience. Debra notified Michael of the upcoming move and he filed a motion to modify custody.

In August of 2007, the Daviess County Circuit Court found that a hearing on the motion was necessary and while primary residence was left with Debra, she was ordered to enroll Jonathan in school.

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.*, citing *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972).

DISCUSSION

The Daviess Circuit Court Judge adopted the findings of the Domestic Relations Commissioner in his Order which modified the Crabtrees’ custody arrangement. The Commissioner found that while “physical structure does not dictate whether there is a stable ‘home’ or not, . . . frequent moves do establish a pattern of instability.” Recommended Order at p. 3. The Commissioner also concluded that:

Of even greater importance is the schooling situation. The older boy was unable to get into college after being home schooled for twelve (12) years by his mother. He is presently taking prep classes so that he can be enrolled at Western as a full time student. The tests conducted by the Hancock County Board of Education reflected that the two (2) younger children are below average in nearly all subjects. While their initial grades after being enrolled in public schools are better than their test scores would have predicted, there is a need for these

children to be enrolled in a regular school environment if they are to have any chance of getting into college.

Id.

Finally, the Commissioner found “that it [was] in the best interest of the children to change the primary custodian to the Respondent/Father.”

Recommended Order at p. 4. The Commissioner did acknowledge that there was “considerable friction” between Jonathan and his father, however, he considered counseling with the two of them to be sufficient in overcoming this problem.

KRS 403.340(3) provides:

the court shall not modify a prior custody decree unless after hearing it 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.

The statute goes on to list the considerations a court should take into account when making a determination regarding the best interests of the child:

- (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;
- (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.

Id.

KRS 403.270(2) provides the following list of considerations:

- (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 403.270;
- (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 403.270 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.

The Commissioner's findings did not specifically set forth his reasons for finding that a move to live with their father would be in the best interest of the children. While he set forth that there was "instability" in moving from one place to another, he did not explain how this was affecting the children. There is nothing in the record that indicates the children's best interests were not being met by their mother in this regard.

The Commissioner also found that attending school rather than home schooling would be in the best interest of the children. He based this finding upon Benjamin's inability to get into Western Kentucky University without taking additional preparatory classes and the children testing on the low end of their age range. These findings alone, however, are not sufficient to indicate that the children's best interests are not being served by the mother's home schooling.

Finally, the Commissioner's finding that there was "considerable friction" between Michael and Jonathan indicates that it may not be in his (Jonathan's) best interest to move into a new environment with his father. While counseling may help, the Commissioner's Report did not go into detail regarding the nature of the friction between Jonathan and Michael.

In short, we find that the Commissioner's Report does not set forth findings which indicate that the best interests of the children would be to modify the current custody arrangement. Thus, we will vacate the Daviess Circuit Court's Order Modifying Custody and remand this action back to that court for further findings. When making those findings, the court should look to the statutes

previously set forth in this Opinion as guidance in determining what is in the best interests of the children.

ALL CONCUR.

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