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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001532-ME

RANDALL J. BERZANSKY APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE A. CHRISTINE WARD, JUDGE
ACTION NO. 13-CI-501180

WENDILL H. PARRISH APPELLEE

OPINION
AFFIRMING

** ** ** ** **

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

KRAMER, JUDGE: Randall Berzansky ("Randy") appeals from the Jefferson Family Court's order denying his motion to modify custody of the parties' minor child. Having concluded that there was no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Randy and Wendill ("Wendy") were divorced in the state of Washington in 2012. The parties' only child ("Child") was two years old at the time. Prior to the divorce, the parties entered into an agreed parenting plan wherein Wendy received sole custody of Child. Shortly thereafter, Wendy and Child moved to Louisville, Kentucky. Wendy registered the agreed parenting plan as a foreign judgment in the Jefferson Family Court in April 2013.

Sometime after Wendy and Child moved to Kentucky, the parties began working with a parenting coordinator, Dr. Shannon Voor,[1] because they were unable to effectively communicate and cooperate with one another. Wendy agreed to involve Dr. Voor even though she had sole custody. In October 2015, Randy moved to Louisville. In March 2017, Randy motioned the family court to modify the custody arrangement and award the parties joint custody of Child. The family court ordered a custodial evaluation, which was performed by Dr. Jennifer Cebe, licensed clinical psychologist. The family court conducted a hearing on August 8, 2018, and subsequently denied Randy's motion in a thorough and well-reasoned twenty-one-page order. This appeal followed. Further facts will be developed as necessary.

[1] Dr. Voor is a licensed clinical psychologist.

STANDARD OF REVIEW

Our standard of review is set forth in Kentucky Rule of Civil Procedure (CR) 52.01, and findings of fact shall not be set aside unless clearly erroneous. A finding of fact is clearly erroneous if it is not supported by substantial evidence, which is evidence sufficient to induce conviction in the mind of a reasonable person. *B.C. v. B.T.*, 182 S.W.3d 213, 219 (Ky. App. 2005). The question before this Court is not whether we would have reached a different decision, but rather, whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion. *Id.*

ANALYSIS

Randy presents two arguments on appeal. He asserts that the family court: (1) failed to discuss and properly apply KRS[2] 403.340(6) because it failed to presume joint custody would be in the best interest of Child; and (2) erred by relying upon the report of Dr. Cebe, which was "riddled with error." We disagree with both arguments.

Randy claims that the family court "glosse[d] over KRS 403.340" and that it should have presumed joint custody from the outset. The family court rejected Randy's argument that 403.340(6) creates a presumption in favor of joint custody in a proceeding for modification of a prior custody decree. Instead, the

[2] Kentucky Revised Statute.

family court considered Randy's motion for modification of the custody decree pursuant to KRS 403.340(3) which states,

> If a court of this state has jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act, 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. When determining if a change has occurred *and* whether a modification of custody is in the best interest of the child, the court shall consider the following:
>
> (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.

(Emphasis added).

> The family court held that
>
> with consideration to KRS 403.340(3), [the court] concludes that a substantial change has occurred since entry of the prior Decree as [Randy] relocated to Kentucky. Despite this change, the lack of

> communication and inability of the parties to co-parent remains the same. Even with deference afforded to this change, the [c]ourt concludes that a custody modification is not necessary to serve [Child]'s best interests. Although [Randy] lacks decision-making power concerning [Child], this has not impacted his ability to have a strong, healthy, and loving relationship with him.

KRS 403.340(6) states, in relevant part, "*if* the court orders a modification of a child custody decree, there shall be a presumption, rebuttable by a preponderance of evidence, that it is in the best interest of the child for the parents to have joint custody[.]" (Emphasis added). We agree with Wendy's assertion that the plain and unambiguous language of the statute creates a rebuttable presumption only *after* the court determines that a modification of an existing custody decree is in the child's best interest. The family court did not err in rejecting Randy's assertion that it should have presumed joint custody pursuant to KRS 403.340(6) before it determined if a custody modification was proper and in the best interest of Child under KRS 403.340(3). Moreover, the family court did not "gloss over" KRS 403.340. The findings of the family court clearly establish that modification of the custody decree is not in the best interest of Child. This is primarily due to the actions and behaviors of Randy.

As of the date of the hearing, the parties had been divorced for over six years and there had been little to no improvement in their ability to co-parent. Randy testified, and the record reflects, that the family court in the state of

Washington made a finding of domestic violence against Randy.[3] This was based on verbal aggression towards Wendy and threats to take Child to Croatia so that Wendy would never see him again. Although he completed a domestic violence treatment program, the family court below found that "[Randy's] continual maneuvering for control and constant badgering and bullying of [Wendy] indicate to the [c]ourt that he continues in the same patterns of behaviors that were identified by the Washington Court in 2012 as domestic violence." The family court cites several examples. First, Randy abruptly --and without notice-- stopped returning Child to Wendy's home on Sunday evenings despite the visitation arrangement that the parties had in place. Randy unilaterally decided to extend his visitation with Child. The family court found that this was a retaliatory measure by Randy in response to a failed mediation attempt between the parties. Another example is the email communication between the parties. Wendy testified that she frequently receives voluminous emails from Randy that are critical of her parenting choices, causing her to lose confidence and second guess her choices regarding Child. Wendy produced an email from Randy that stated, in relevant part, that Randy felt "disgusted by [Wendy's] actions. Sick. . . just sick." The family court

[3] In his brief to this court, Randy argues that no court has made a finding of domestic violence against him. However, this contradicts his own testimony in which he stated that the Washington court found that he had committed an act of domestic violence by "saying some mean things to my wife."

also cited as an example Randy's refusal to agree to any swimming lessons proposed by Wendy. Randy's refusal was in spite of the fact that he was the parent insisting that Child continue to take swimming lessons. Finally, Randy admitted that he refused to comply with Wendy's explicit request to not send items of monetary or sentimental value with Child when he returned to Wendy's home.

The family court also considered the continued use of a parenting coordinator in the parties' ongoing inability to co-parent. The parties had used Dr. Voor as parenting coordinator for approximately four years at the time of the hearing. Wendy testified that, at the time, she had spent approximately $30,000 for her half of Dr. Voor's fees. Although Randy insisted that the parties were now able to agree on some matters, the family court found his argument unpersuasive because Randy also "acknowledged the necessity of Dr. Voor remaining on as a parenting coordinator." Dr. Voor testified that she had met with the parties approximately seventy-three times. She acknowledged that she cannot meet with the parties together due to high conflict, so she meets with them individually. The family court found, consistent with Dr. Voor's testimony, that the parties "frequently use her for even minor decisions," and that "there has never been a month where Dr. Voor was not required to assist the parties." Dr. Voor is copied on many of the emails between the parties. She testified that, in the past, she had been copied on each and every email exchange and this was approximately fifty to

one hundred emails per month.[4] The family court concluded that "it is unrealistic to require the parties to indefinitely use a parenting coordinator to resolve their conflicts when there has been minimal improvement over the years in which the parties have used Dr. Voor."

Although the family court found that, "[b]y all accounts [Child] is a happy and well-adjusted child who enjoys time spent with both parents," it also found that was "not to say that [Child] hasn't experienced any fall-out from the parental conflict." The family court noted Child's prior struggles with nightmares and anxiety and found that Randy was unwilling to engage in Child's therapy during that time. Child also informed Dr. Cebe that Randy has yelled and cussed at him regarding violin practice, but maintained that Randy's behavior did not worry him. However, the family court found that it "has concerns that [Child] is, as his mother testified, a people pleaser, and that may be influencing his reports minimizing any concerning behaviors by [Randy] or that he is too young to recognize emotional manipulation by [Randy]."

The family court found that that "[Wendy's] willingness to include [Randy] demonstrates her ability to place [Child]'s best interests above her own." However, the court also found that "[Randy] is unable to prioritize [Child]'s

[4] This was corroborated by Wendy's testimony that she recalled receiving eighty-four emails in one month from Randy.

wellbeing over his personal feelings of being 'side-lined' by not having the same decision-making authority as [Wendy]." The family court found no evidence that Randy has been side-lined as a parent or that he is not a meaningful part of Child's life. Randy has coached Child's soccer team, attends school events, frequently takes Child sailing in Chicago, and attends church with Child. The family court concluded that Randy's "motivation for seeking joint custody has more to do with his own struggle for power and control than his child's best interest," and that "a modification of custody would only invite continued and escalating conflict and would encourage further power struggles wherein [Randy] would seek to assert his will for [Child] based on his personal feelings of self-worth and empowerment and not based upon what is in [Child]'s best interest."

Randy argues that caselaw demonstrates conflict between former spouses is not a reason to reject joint custody. Specifically, he asserts that

> [a]lthough there have been some communication issues, no evidence was provided that the communication between [Mother] and [Father] is so terrible that sole custody is the only solution. In fact, the evidence on the record showed that notwithstanding the awkwardness of the separation, the [child was] doing well academically, continuing to participate in extracurricular activities, enjoying spending time with both parents, and adjusting appropriately to the new situation. Simply put, the [child is] flourishing. The fact that the [child is] adjusting speaks very highly of the parents' focus on their [child's] well-being, even with the personal conflict between them. It is our conclusion that the family court was clearly erroneous in its determination that the best

> interests of the [child] would only be served by awarding sole custody to [Mother].

Maxwell v. Maxwell, 382 S.W.3d 892, 900 (Ky. App. 2012). The Kentucky Supreme Court has held that trial courts "should look beyond the present and assess the likelihood of future cooperation between the parents. It would be shortsighted to conclude that because parties are antagonistic at the time of their divorce, such antagonism will continue indefinitely." *Squires v. Squires*, 854 S.W.2d 765, 769 (Ky. 1993). Randy's argument misses a crucial distinction. In both *Maxwell* and *Squires*, the parties were in the throes of a divorce. The issue in both cases concerned entry of a final custody decree pursuant to KRS 403.270, rather than modification of an existing custody decree pursuant to KRS 403.340. In the instant action, the parties had been divorced for more than six years at the time of the hearing on Randy's motion to modify custody. Wendy had sole custody of Child during that period. Even with the passage of time and the help and associated expense of a parenting coordinator for four years, the parties are still unable to effectively communicate and cooperate, primarily due to the actions and behaviors of Randy. The family court recognized this in its findings of fact and conclusions of law denying Randy's motion to modify the custody decree. We conclude there was no error.

Next, Randy argues that the family court erred by relying upon the report of Dr. Cebe, which was "riddled with error." We note that the family court

engaged in an extensive analysis of Dr. Cebe's custodial evaluation and took into account all criticisms of the report as contained in the testimony of Randy's expert witness, Dr. David Medoff, a forensic and clinical psychologist.

Dr. Medoff was not hired by Randy to give a custodial recommendation. Rather, he testified as to what he believed were unreliable aspects of Dr. Cebe's report. Specifically, Dr. Medoff opined that Dr. Cebe's use of the Perceptions of Relationships Test (PORT) was inappropriate and lacked a scientific basis. He also testified that he believed that use of PORT violated Section 9.02 of the American Psychological Association Ethical Code and Code of Conduct. Finally, Dr. Medoff testified that Dr. Cebe failed to contact adequate collateral sources for each of the parties as part of her evaluation. However, on cross-examination, Dr. Medoff testified that Dr. Cebe had reviewed therapy records, the prior custody evaluation from the state of Washington, court orders, and emails between the parties. He testified that these items also constituted collateral sources.[5] Dr. Medoff testified that he did not believe that Dr. Cebe's report was invalid, only that it was his opinion that the report contained many flaws related to data collection and analysis.

[5] Dr. Cebe also used Dr. Voor, Dr. Ginger Crumbo (Child's former therapist), Dr. Mindy Warren (Wendy's therapist), and Matt Veroff, LCSW (Wendy's therapist in the absence of Dr. Warren) as collateral sources in her report.

Dr. Cebe also qualified as an expert witness. She had performed a custodial evaluation and spent approximately eleven hours with the parties in preparation for her report. She acknowledged the criticisms of Dr. Medoff, but acknowledged that PORT can be useful to her because it allows a child (particularly a child under age ten) to express himself beyond words and can prompt conversation. Dr. Cebe testified that she did not believe that use of PORT violated any professional guidelines. Dr. Cebe also testified that if she disregarded PORT, her recommendation would not change. Dr. Cebe recommended that Wendy retain sole custody of Child, citing the lack of co-parenting and the inability of the parties to reach an agreement on even minor issues due to the high conflict in their relationship. Dr. Cebe did find that each parent was fit and able to take care of Child. The family court found "Dr. Cebe's testimony to be credible and reliable and concludes the use of the PORT test [sic] did not significantly impact her recommendations. The Court values her expert opinion and has considered it appropriately herein."

Randy also points to a discrepancy between Dr. Cebe's report and the testimony of Dr. Voor. The report states that Dr. Voor "confirmed that Randy and Wendy are unable to reach agreement on even minor parenting issues, and their different styles make joint decision-making almost impossible." However, Dr. Voor testified that the parties are sometimes able to agree on minor parenting

issues. However, Dr. Cebe testified that, even if she had misunderstood Dr. Voor, it would not change her recommendation regarding custody. Of note, Dr. Voor did not offer an opinion on custody and never performed a custody evaluation. In fact, she has never met Child.

The family court acknowledged Randy's assertion that Dr. Cebe's report was "riddled with error," including the administration of PORT. However, the court concluded that use of PORT "did not significantly impact the whole of Dr. Cebe's evaluation." The family court found that "the main factor in Dr. Cebe's recommendation was the parties' long history of conflict." We note that, although the family court engaged in extensive analysis of Dr. Cebe's report and Dr. Medoff's criticisms, this was not the only evidence considered. The record before us reveals that the family court considered testimony of the parties, emails between the parties (and related testimony), the prior custody evaluation, and testimony of all witnesses at the hearing. As a reviewing Court, we are constrained by CR 52.01 which states, in relevant part, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." The family court clearly found credibility in the testimony of Wendy and Dr. Cebe, which was well within its discretion. Therefore, there was no error.

The family court put forth extensive and detailed findings of fact and conclusions of law for this Court to review. The family court properly considered

the statutory factors, the credibility of the witnesses, and determined what was in the best interest of Child. The family court did not abuse its discretion in refusing to modify custody of Child. Accordingly, we affirm the Jefferson Family Court.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Louis P. Winner Louisville, Kentucky	Melanie Straw-Boone Louisville, Kentucky