

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
PREBLE COUNTY

CANDICE R. LEETH,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-02-004
- vs -	:	<u>OPINION</u>
	:	8/24/2009
FREDERICK C. LEETH III,	:	
Defendant-Appellant.	:	

CIVIL APPEAL FROM PREBLE COUNTY COURT OF COMMON PLEAS
Case No. 05-DR-4457

Gray W. Bennett, Bennett Law Bldg., 200 West Main Street, Eaton, Ohio 45320, for plaintiff-appellee

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BRESSLER, P.J.

{¶1} Defendant-appellant, Frederick C. Leeth III, appeals a decision of the Preble County Court of Common Pleas, modifying the terms of a shared parenting plan.

{¶2} Frederick and plaintiff-appellee, Candice R. Leeth (n.k.a. Candice R. Fife), were married on April 4, 1998. During their marriage, the parties had two children: C.L., who was born on October 21, 2000 and S.L., who was born on December 10, 2004. The trial court issued a Final Decree of Divorce and Shared Parenting Plan on April 26, 2006, and on the

same day, Candice moved to reappoint the children's Guardian Ad Litem (GAL) and to request a review of the custody arrangement. On July 3, 2006, Candice filed an ex parte motion for immediate change of custody. On January 29, 2007, Candice dismissed all pending motions.

{¶13} On April 13, 2007, Candice filed an ex parte motion for a temporary order that she be given "unilateral authority" to make medical decisions for C.L. for an 11-day period. The trial court granted that motion, and named Candice the "custodial parent for purposes of making medicinal decisions and authorizations [until April 23, 2007] pending hearing [sic] on the motion." On April 23, 2007, Candice moved to extend authority to make medical decisions and the trial court granted her motion. On May 23, 2007, Candice moved to adopt her new proposed shared parenting plan or in the alternative, to designate Candice as the custodial parent. On June 11, 2007, Frederick filed a multi-part motion in which he also requested to be named the children's custodial parent.

{¶14} On August 16, 2008, the trial court magistrate filed her report and recommendation that Candice shall be the physical custodian of the children subject to Frederick's parenting time. Frederick filed objections, and the trial court adopted the magistrate's report and recommendations as its final order. Frederick appeals the trial court's order, raising the following assignment of error:

{¶15} "THE TRIAL COURT ABUSED ITS DISCRETION ORDERING THE PARTIES' SHARED PARENTING PLAN BE MODIFIED BY THE COURT SO THAT THE PLAINTIFF SHALL BE THE PHYSICAL CUSTODIAN OF THE PARTIES' MINOR CHILDREN."

{¶16} Generally, the standard of review in custody cases is whether the trial court abused its discretion. *C.D. v. D.L.*, Fayette App. No. CA2006-09-037, 2007-Ohio-2559, citing *Davis v. Flickinger*, 77 Ohio St.3d 415, 416-417, 1997-Ohio-260. Abuse of discretion implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v.*

Blakemore (1983), 5 Ohio St.3d 217, 219. The appellate court must be mindful that the trial court is better equipped to examine and weigh the evidence, determine the credibility of the witnesses, and make decisions concerning custody. *Terry L. v. Eva E.*, Madison App. No. CA2006-05-019, 2007-Ohio-916, ¶9. A judgment supported by some competent, credible evidence will not be reversed by a reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, 280.

{¶7} Pursuant to R.C. 3109.04 (E)(1)(a), a court "shall not modify a prior decree allocating parental rights and responsibilities for the care of children unless it finds, based on facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child, the child's residential parent, or either of the parents subject to a shared parenting decree, and that the modification is necessary to serve the best interest of the child. In applying these standards, the court shall retain the residential parent designated by the prior decree or the prior shared parenting decree, unless a modification is in the best interest of the child and one of the following applies:

{¶8} "(i) The residential parent agrees to a change in the residential parent or both parents under a shared parenting decree agree to a change in the designation of residential parent.

{¶9} "(ii) The child, with the consent of the residential parent or of both parents under a shared parenting decree, has been integrated into the family of the person seeking to become the residential parent.

{¶10} "(iii) The harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child."

{¶11} Further, in designating a residential parent, the primary concern is the best interest of the children. *Gamble v. Gamble*, Butler App. No. CA2006-10-265, 2008-Ohio-

1015, ¶25. In making a best interest determination, the trial court must consider all relevant factors, including but not limited to those enumerated in R.C. 3109.04(F)(1)(a) – (j).

{¶12} Frederick argues the trial court failed to properly find that a change of circumstances has occurred. Further, Frederick maintains the trial court's decision designating Candice the residential parent is not supported by competent, credible evidence. Frederick claims that in making its decision, the trial court utilized unreliable testimony.

{¶13} In its decision, the trial court found it is not in the children's best interest to terminate the shared parenting plan. However, the trial court found that there have been changes in the circumstances of the children and the parents since the parties entered into the current shared parenting plan and that substantial issues have arisen. The trial court found that there have been continuing problems between the parents regarding C.L.'s medical care, and that Preble County Children's Services became involved with the family on at least two occasions due to alleged abuse and neglect by Frederick. Further, the trial court expressed concern over other hygiene and health-related issues, including instances where S.L. returned from Frederick's care with "terribly chapped cheeks * * *, a terrible diaper rash, pink eye, a double ear infection and a yeast infection * * * and [Frederick declined] to take her to the doctor [because] she was fine."

{¶14} Further, the trial court noted that C.L.'s former GAL complained that the child's behavior substantially worsened after the parties' divorce. The trial court expressed concern over Frederick's denial that C.L.'s behavior is a problem and that the behavior is related to Frederick's failure to consistently administer C.L.'s prescribed medication. The trial court considered accounts from C.L.'s teacher and care providers regarding C.L.'s need for medication, his behavior while he is not medicated, and the vast improvements when he is medicated. Specifically, the trial court considered the testimony of C.L.'s baby-sitter that Frederick pretended to give C.L. medication but instead gave him an empty capsule, and that

Frederick at times failed to provide enough diapers and appropriate clothing for the children.

{¶15} Next, the trial court considered the best interests of the children by thoroughly analyzing the factors contained in R.C. 3109.04(F)(1)(a) – (j). While the trial court found some factors more relevant than others, the court indicated it had considered each of them.

{¶16} The trial court found that both parties wish to be designated the residential parent, and that currently the children alternate between the parents on a week-to-week basis. Further, the trial court found the children have good relationships with both parents and Candice's parents.

{¶17} The court found that while Candice moved to a different residence during the pendency of these proceedings, the children seem to have adjusted well and there is no concern over the appropriateness of Candice's new home. Also, the court found that C.L. has always attended school in the district where Candice lives, and that it would be beneficial for him to remain in that district. The court noted that Frederick lives in another school district.

{¶18} Next, the trial court considered the parties' mental and physical health. The trial court found that while Candice was diagnosed with Obsessive Compulsive Disorder in 1996, she does not currently suffer from the condition and has had no relapses. Otherwise, the trial court found both parties to be mentally and physically healthy. The court found that both maternal grandparents have health issues, but there is nothing to indicate they would be the only people available to watch the children in Candice's absence.

{¶19} Also, the trial court stated its primary concern is over the health of C.L., and his need for stability and consistent medical treatment. The trial court expressed concern over Frederick's history of refusing to acknowledge the child's need for treatment and medication, and noted that Candice has consistently complied with C.L.'s prescribed treatment and medication. The trial court found that at times Candice has failed to be entirely truthful

regarding healthcare providers' recommendations, but that her approach to the wellbeing of the children is better than Frederick's failure to acknowledge the children's health needs.

{¶20} Further, the court found that C.L. needs stability with regard to his schoolwork and that the week-to-week living arrangement does not seem conducive to this. The trial court noted that Candice appropriately oversees C.L.'s homework but that Frederick does not.

{¶21} The court found that parenting time has been problematic, but that the parties seem to have worked out most of the issues in this regard. The trial court found that Candice does not appear to intend to try to keep the children away from Frederick, but wants to be the residential and custodial parent for school and medical purposes. While Frederick also wishes to be the same, he has not consistently attended the children's medical appointments and parent teacher conferences.

{¶22} Also, the court found that there is no child support order currently in place, but that one would be necessary if Candice is designated the residential parent based on a disparity in the parties' income. The court found that based on this disparity, Frederick must pay child support in the amount of \$535.54 per child per month, plus processing fees, as child support, if Candice is designated the residential parent.

{¶23} Finally, the trial court considered two incidents in which Preble County Children's Services became involved with the family. In the first incident, S.L., who was two years old at the time, was injured when Frederick allowed her to fire a .22 caliber youth rifle. Frederick claims this happened because he allowed her to hold the gun too close to her face, and the gun hammer pinched S.L.'s cheek when she fired the gun. Frederick stated that he took safety precautions by ensuring S.L. was wearing eye and ear protection, but ultimately took responsibility for the injury. In the second incident, C.L. reported that Frederick pulled him off S.L.'s bed, dragged him down the hall, and threw him into his bed, causing C.L.

injuries to his shoulder blade, elbow, and hip. Frederick claimed he was punishing C.L. for fighting with S.L., but the trial court found that Frederick used excessive force.

{¶24} Frederick does not challenge the trial court's findings with respect to any specific factor contained in R.C. 3109.04(F)(1) or allege that the trial court failed to consider all the factors. Rather, Fredrick argues the trial court placed unnecessary emphasis on Candice's testimony, although he does not specify exactly which testimony. Further, Frederick argues the trial court placed unnecessary emphasis on the two incidents in which Preble County Children's Services became involved with the family.

{¶25} After reviewing the record, we find that the trial court properly considered all required factors and did not abuse its discretion in designating Candice the residential parent. Further, we find that there is competent, credible evidence supporting the trial court's judgment. We reiterate that in making custody determinations, the trial court is better equipped to examine and weigh the evidence and determine the credibility of the witnesses. See *Terry L.*, 2007-Ohio-916, ¶ 9.

{¶26} Frederick's assignment of error is overruled.

{¶27} Judgment affirmed.

POWELL and YOUNG, JJ., concur.

[Cite as *Leeth v. Leeth*, 2009-Ohio-4260.]