

NEBRASKA SUPREME COURT

Hopkins v. Hopkins

294 Neb. 417 (2016) · No. No. S-14-790 · Decided August 19, 2016

SUMMARY

The Nebraska Supreme Court affirmed the denial of Robert Hopkins’ request to modify custody of his daughters based on their custodial parent’s marriage to a registered sex offender. The court held that Neb. Rev. Stat. § 43-2933(1)(c) creates a presumption affecting only the burden of producing evidence, which the custodial parent overcame. The court further held that the evidence supported the finding that the children were not at significant risk.

CASE DETAILS

COURT	Nebraska Supreme Court
WRITING FOR THE COURT	Heavican, C.J.; Wright, J.; Connolly, J.; Miller-Lerman, J.; Cassel, J.; Stacy, J.
JURISDICTION	Nebraska
DECIDED	August 19, 2016
DOCKET	No. S-14-790
DISPOSITION	affirmed
PROCEDURAL POSTURE	Petition for further review of the Nebraska Court of Appeals' decision affirming the district court's denial of Robert Hopkins' counterclaim to modify custody of his daughters.
STANDARD OF REVIEW	Statutory interpretation is reviewed independently as a question of law. Modification of a dissolution decree is reviewed de novo on the record and affirmed absent an abuse of discretion. When credible evidence on material factual questions is in irreconcilable conflict, the appellate court considers that the trial court observed the witnesses.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Robert Keith Hopkins v. Kyel Christine Hopkins

TOPICS

- child custody
- family law procedure
- statutory interpretation
- presumptions
- appellate procedure

PRACTICE AREAS

family law

child custody

appellate procedure

evidence

statutory interpretation

QUESTIONS PRESENTED

1. Whether Neb. Rev. Stat. § 43-2933(1)(c) creates a presumption affecting only the burden of production or instead shifts both the burden of production and the burden of persuasion.
2. Whether Kyel produced sufficient evidence to overcome the presumption that the children were at significant risk because Thomas Rott, a registered sex offender convicted of a felony involving a minor, had unsupervised contact with them.
3. Whether Robert established grounds for modification of custody and whether the district court abused its discretion in denying his counterclaim.
4. Whether the court's prior reasoning in *Watkins v. Watkins* concerning Neb. Rev. Stat. § 43-2933(1)(b) should be disapproved.

HOLDINGS

1. Section 43-2933(1)(c) creates a bursting-bubble presumption that shifts only the burden of production; once the opposing party produces evidence tending to rebut the presumed significant risk, the presumption disappears and does not shift the burden of persuasion.
2. Kyel overcame the § 43-2933(1)(c) presumption by producing evidence that, if believed, tended to show that Rott was not a significant risk to the children.
3. Section 43-2933(1)(b) requires the court to make a factual finding regarding whether there is no significant risk; it does not itself create a burden-shifting presumption requiring a particular result based solely on the offender's criminal history.
4. Under § 43-2933, the trial court must consider whether a sex offender poses a risk sufficiently great or important to be worthy of attention of committing a sexual offense against the child, and the party seeking custody modification retains the burden of persuasion.
5. The district court did not abuse its discretion by finding that Robert failed to prove that Rott posed a significant risk or that custody modification was otherwise warranted.

KEY QUOTATIONS

“The plain language of § 43-2933(1)(c) shifts only the burden of production.” (430)

“Thus, the § 43-2933(1)(c) presumption disappeared and the district court was entitled to make factual findings free from any mandatory presumption.” (435)

“The decision of the Court of Appeals is affirmed.” (439)

FACTUAL BACKGROUND

Robert and Kyel Hopkins divorced in 2004, and Kyel was awarded custody of their two daughters. Kyel later married Thomas Rott, who had been convicted of attempted sexual assault of a child and was required to register

as a sex offender; Rott lived with Kyel and had unsupervised access to the girls. Robert sought custody modification under Neb. Rev. Stat. § 43-2933, while Kyel presented evidence of Rott's rehabilitation, the absence of later allegations of sexual misconduct, household precautions, and the children's and therapist's testimony concerning their safety. The district court found that the statutory presumption had been overcome and that Robert failed to establish sufficient grounds for modification.

PROCEDURAL HISTORY

The parties' marriage was dissolved in 2004, with Kyel Hopkins awarded custody and Robert Hopkins receiving visitation. In 2013, Kyel sought to modify visitation, and Robert counterclaimed for custody based principally on Kyel's marriage and cohabitation with Thomas Rott, a registered sex offender who had unsupervised access to the children. The Phelps County District Court denied both modification claims, the Nebraska Court of Appeals affirmed with an immaterial modification, and the Nebraska Supreme Court granted further review to address the interpretation of Neb. Rev. Stat. § 43-2933(1)(c).

DISPOSITION

affirmed

CASES CITED

- State v. Neisius, 293 Neb. 503, 881 N.W.2d 572 (2016)
- State ex rel. Medlin v. Little, 270 Neb. 414, 703 N.W.2d 593 (2005)
- Caniglia v. Caniglia, 285 Neb. 930, 830 N.W.2d 207 (2013)
- Schrag v. Spear, 290 Neb. 98, 858 N.W.2d 865 (2015)
- State on behalf of Jakai C. v. Tiffany M., 292 Neb. 68, 871 N.W.2d 230 (2015)
- St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)
- McGowan v. McGowan, 197 Neb. 596, 250 N.W.2d 234 (1977)
- Watkins v. Watkins, 285 Neb. 693, 829 N.W.2d 643 (2013)
- State ex rel. Parks v. Council of City of Omaha, 277 Neb. 919, 766 N.W.2d 134 (2009)
- First Tennessee Bank Nat. Assn. v. Newham, 290 Neb. 273, 859 N.W.2d 569 (2015)
- In re Interest of Xavier H., 274 Neb. 331, 740 N.W.2d 13 (2007)
- Mefferd v. Sieler & Co., 267 Neb. 532, 676 N.W.2d 22 (2004)
- Nebraska Pub. Emp. v. Otoe Cty., 257 Neb. 50, 595 N.W.2d 237 (1999)
- Father Flanagan's Boys' Home v. Agnew, 256 Neb. 394, 590 N.W.2d 688 (1999)
- Smeal Fire Apparatus Co. v. Kreikemeier, 279 Neb. 661, 782 N.W.2d 848 (2010)
- In re Invol. Dissolution of Wiles Bros., 285 Neb. 920, 830 N.W.2d 474 (2013)
- Gourley v. Nebraska Methodist Health Sys., 265 Neb. 918, 663 N.W.2d 43 (2003)
- Salazar v. Scotts Bluff Cty., 266 Neb. 444, 665 N.W.2d 659 (2003)
- Hopkins v. Hopkins, 23 Neb. Ct. App. 174, 869 N.W.2d 390 (2015)
- Alisha C. v. Jeremy C., 283 Neb. 340, 808 N.W.2d 875 (2012)

- Slansky v. Nebraska State Patrol, 268 Neb. 360, 685 N.W.2d 335 (2004)
- McCray v. Nebraska State Patrol, 271 Neb. 1, 710 N.W.2d 300 (2006)
- In re Interest of A.M., 281 Neb. 482, 797 N.W.2d 233 (2011)
- McKune v. Lile, 536 U.S. 24, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002)

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