

SUPREME COURT OF MISSOURI

Speer v. Colon

155 S.W.3d 60 (Mo. banc 2005) · No. SC 86321 · Decided February 15, 2005

SUMMARY

The Missouri Supreme Court reversed and remanded a child-custody modification judgment because the trial court failed to make the written findings required by Missouri Revised Statutes section 452.375.6. The court also directed the trial court to state the custody arrangement using the statutory categories, noting that Missouri law does not authorize an order granting "primary physical custody."

CASE DETAILS

COURT	Supreme Court of Missouri
WRITING FOR THE COURT	Ronnie L. White, Chief Justice
JURISDICTION	Missouri
DECIDED	February 15, 2005
DOCKET	SC 86321
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Appeal from a circuit court judgment modifying child custody and child support and overruling Speer's contempt motion.
STANDARD OF REVIEW	A custody-modification judgment is affirmed if supported by substantial evidence, is not against the weight of the evidence, and does not erroneously declare or apply the law. Although custody determinations receive greater deference than other types of cases, credible evidence must support the custody award.
PRECEDENTIAL VALUE	Published en banc opinion of the Supreme Court of Missouri.
PARTIES	Brian Speer v. Neysa Colon, formerly known as Neysa Rosario

TOPICS

- child custody
- family law procedure
- child support
- appellate procedure
- standard of review

PRACTICE AREAS

- family law
- appellate procedure
- civil procedure

QUESTIONS PRESENTED

1. Whether the trial court's custody-modification judgment complied with Missouri Revised Statutes section 452.375.6 by making written findings detailing the specific relevant best-interest factors supporting the custody arrangement.
2. Whether the trial court could enter an order granting 'primary physical custody' under Missouri's statutory custody scheme.
3. Whether the appellate court should address Speer's challenge to the trial court's contempt ruling.

HOLDINGS

1. When the parties have not agreed to the custodial arrangement, the trial court must include written findings based on the public-policy provision and relevant best-interest factors in section 452.375, detailing the specific relevant factors that make the chosen arrangement in the child's best interest. The trial court's judgment failed to comply with that requirement.
2. Missouri's statutory custody scheme does not permit an order granting 'primary physical custody'; the custody finding must conform to the statutory categories in section 452.375.1.
3. The court did not reach the contempt issue because the parties would have an opportunity to revisit the contempt motion on remand.

KEY QUOTATIONS

“because the parties had not agreed to [the] custodial arrangement, the trial court was required to include in its judgment a written finding based on the public policy in section 452.375.4 and the factors listed in section 452.375.2(1) to (8) detailing the specific relevant factors that made the chosen arrangement in the best interest of the [child].” (61)

“The trial court's judgment is not in compliance with section 452.375.6, because it failed to make the required written findings detailing the specific relevant factors that supported its judgment.” (62)

FACTUAL BACKGROUND

Brian Speer and Neysa Colon dissolved their marriage in 1996 and shared joint legal and joint physical custody of their child, J.A.S., with Colon having primary care and custody. In 2001, Speer sought primary physical custody and termination of support, alleging that Colon had physically abused J.A.S.; he also sought contempt relief based on alleged interference with visitation and failure to produce the child for a psychological evaluation. The trial court's 2003 modification judgment awarded joint legal custody, designated Colon as having primary physical custody, granted Speer liberal and specific visitation, increased child support, and overruled the contempt motion.

PROCEDURAL HISTORY

The parties' marriage was dissolved in 1996, and the trial court awarded joint legal and joint physical custody, with Colon having primary care and custody. Speer later sought primary physical custody, termination of support, and contempt relief. On May 7, 2003, the trial court modified the arrangement by awarding joint legal custody, designating Colon as having primary physical custody, granting Speer liberal and specific visitation,

and increasing his child support obligation. Speer appealed, challenging the sufficiency of the custody and support findings and the failure to rule on his contempt motion.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The trial court must make the required written findings in compliance with section 452.375.6, take whatever other action is appropriate, and enter its custody finding in conformity with section 452.375.1. The parties may also revisit the contempt motion.

CASES CITED

- Kubley v. Brooks, 141 S.W.3d 21, 25 (Mo. banc 2004)
- Lueckenotte v. Lueckenotte, 34 S.W.3d 387, 397 (Mo. banc 2001)
- Spradling v. Spradling, 959 S.W.2d 908, 911 (Mo. App. 1998)
- Cunningham v. Cunningham, 143 S.W.3d 647, 650 (Mo. App. 2004)
- Gross v. Helm, 98 S.W.3d 85, 88 (Mo. App. 2003)
- Morse v. Morse, 80 S.W.3d 898, 903-904 (Mo. App. 2002)
- Sleater v. Sleater, 42 S.W.3d 821, 823-824 (Mo. App. 2001)

OPINION

WHITE, J.

155 S.W.3d 60 (2005) Brian SPEER, Appellant, v. Neysa COLON, f/k/a Neysa Rosario, Respondent. No. SC 86321. Supreme Court of Missouri, En Banc. February 15, 2005. Sarah L. Reeder, Joplin, for appellant. Aaron W. Farber, Neosho, for respondent. RONNIE L. WHITE, Chief Justice.

I. Brian Speer appeals from the circuit court's order modifying child custody and *61 support for his only child, J.A.S. This Court has jurisdiction, Mo. Const. art. V, sec. 10. The judgment is reversed, and the cause is remanded. II.

In 1996, Speer and Neysa Colon dissolved their marriage, and the trial court awarded the couple joint legal and joint physical custody of J.A.S. The order also granted "primary care and custody" to Colon with liberal visitation rights for Speer.[1] In 2001, Speer sought primary physical custody and termination of his support payments alleging that Colon physically abused J.A.S.[2] Speer also filed for a contempt citation, alleging that Colon had refused him visitation on J.A.S.'s birthday and had failed to produce J.A.S. for a court-ordered psychological evaluation.

On May 7, 2003, the trial court entered a modification judgment awarding joint legal custody to Speer and Colon, with Colon having "primary physical custody" of J.A.S. and with Speer having "liberal and specific visitation." [3] The trial court also overruled Speer's contempt motion. III. Speer raises three points on appeal.

The first two challenge the sufficiency of the trial court's findings with regard to child custody and support as required by sections 452.375, 452.400 and 452.370. [4] Speer's third point asserts that the trial court failed to rule on his contempt motion as required under section 509.370.

On review of a custody modification case, the appellate court will affirm if the judgment is supported by substantial evidence, is not against the weight of the evidence, and does not erroneously declare or apply the law. [5] In the context of this custody action, which predicates the determination of support, while the trial court's determination is afforded greater deference than other types of cases, there must still be credible evidence to support the custody award. [6] "[B]ecause the parties had not agreed to [the] custodial arrangement, the trial court was required to include in its judgment a written finding based on the public policy in section 452.375.4 and the factors listed in section 452.375.2(1) to (8) detailing the specific relevant factors that made the chosen arrangement in the best interest of the [child]." [7] The trial court's judgment is *62 not in compliance with section 452.375.6, because it failed to make the required written findings detailing the specific relevant factors that supported its judgment. [8] Section 452.375.6 does not mandate the need for a written finding on all of the factors listed, but the relevant factors must be detailed. [9] IV.

The judgment is reversed, and the cause is remanded. On remand the trial court shall make the required written findings in compliance with section 452.375.6, and take whatever other action is appropriate. [10] The court shall also enter its custody finding in conformity with section 452.375.1 because Missouri's statutory scheme does not allow for an order granting "primary physical custody." [11] All concur.

NOTES [1] The original order was modified in 1999 increasing Speer's support obligation, and although it maintained the award of joint physical and legal custody, it also designated Colon as being the primary physical custodian.

[2] The juvenile office of Jasper County dismissed its separate action pending on the abuse charges based on a psychologist's recommendation that J.A.S. be returned to Colon. [3] "Joint physical custody" was deleted, and Speer's previous option of having the child during Mother's working hours was omitted. Additionally, Speer's child support obligation was increased.

[4] All statutory references are to RSMo 2000 unless otherwise noted. [5] *Kubley v. Brooks*, 141 S.W.3d 21, 25 (Mo. banc 2004); *Lueckenotte v. Lueckenotte*, 34 S.W.3d 387, 397 (Mo. banc 2001). [6] *Spradling v. Spradling*, 959 S.W.2d 908, 911 (Mo.App.1998).

[7] *Cunningham v. Cunningham*, 143 S.W.3d 647, 650 (Mo.App.2004); section 452.357.6. Had this action been brought by a person who was solely seeking visitation rights, or seeking modification of visitation rights, as opposed to an action seeking to modify custody, then the applicable statute would be section 452.400 and the trial court would only be required to make a finding as to why the ordered visitation would serve the best interests of the child.

[8] *Id.*; *Gross v. Helm*, 98 S.W.3d 85, 88 (Mo.App.2003); *Morse v. Morse*, 80 S.W.3d 898, 903-904 (Mo.App.2002); *Sleater v. Sleater*, 42 S.W.3d 821, 823-24 (Mo.App.2001). [9] It should be noted that a change in Rule 78.07(c), effective January 1, 2005, requires that, "In all cases, allegations of error relating to the form or language of the judgment, including the failure to make statutorily required findings, must be raised in a motion to amend the judgment in order to be preserved for appellate review."

[10] On remand the parties will have the opportunity to revisit the motion for the contempt order, and; consequently, this Court need not reach that issue at this time. [11] Section 452.375.1. As used in this chapter, unless the context clearly indicates otherwise: (1) "Custody", means joint legal custody, sole legal custody, joint physical custody or sole physical custody or any combination thereof.