

RENDERED: February 5, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002473-MR

LESLIE JOHNSON FLYNN

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE THOMAS B. MERRILL, JUDGE
ACTION NO. 96-FC-004121

FRANK A. FLYNN

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: DYCHE, JOHNSON, AND KNOPF, JUDGES.

JOHNSON, JUDGE: Leslie Johnson Flynn (Leslie) appeals from a child custody judgment of the Jefferson Family Court entered on July 29, 1997. Leslie and her former husband, Frank Anthony Flynn (Frank), agreed to share joint custody of their two children, but disagreed as to the primary residential placement of the children. The trial court granted primary residential placement of the children with Frank and ordered Leslie to pay child support. In her brief, Leslie claims that the trial court abused its discretion in making both of these decisions. After

reviewing the record, the arguments of counsel, and applicable law, we affirm.

The parties were married in 1990. They had two children, a boy born in 1992 and a girl born in 1995. They separated in 1996 and Leslie petitioned for dissolution of the marriage. The Flynnns divided their property by agreement, and also stipulated that they would share joint custody of the children. The only issue remaining for determination by the trial court was the children's primary physical residence.

The Jefferson Family Court held a hearing in June 1997. By order entered on July 29, 1997, the trial court adjudged that the children's primary physical residence would be with Frank, with Leslie to pay child support. On July 30, 1997, Leslie filed a motion under Kentucky Rules of Civil Procedure (CR) 59.05 and 60.02, alleging that Frank had committed perjury regarding his plans to remarry. The trial court denied the motions on September 23, 1997. This appeal followed.

Leslie argues that Frank committed perjury and perpetrated a fraud upon the trial court when he denied having plans to marry. She asserts that because the trial court's decision in favor of Frank relied upon the uncertainty of Leslie's new relationship and new marriage, Frank's new relationship and his deception concerning an impending marriage warrant a decision in her favor. Frank responds that the trial court's decision was properly based upon Leslie's move to the Cincinnati, Ohio area.

The overriding consideration in any child custody determination is the best interests of the child. Squires v. Squires, Ky., 854 S.W.2d 765, 768 (1993); Kentucky Revised Statute (KRS) 403.270. The trial court's findings of fact in a domestic relations case will not be set aside unless they are clearly erroneous. CR 52.01; Aton v. Aton, Ky. App., 911 S.W.2d 612, 615 (1995). "[I]n reviewing the decision of a trial court the test is not whether we would have decided it differently, but whether the findings of the trial judge were clearly erroneous or that he abused his discretion." Cherry v. Cherry, Ky., 634 S.W.2d 423, 425 (1982).

The record indicates the trial court considered testimony from the parties, three expert witnesses, Frank's mother, and other witnesses with knowledge of the parties. At the time of the hearing, Frank had been employed for many years as a firefighter in St. Matthews. His work schedule was 24 hours on duty, 48 hours off. He had family in the Louisville area and in March 1997 was dating a lady named Keely Graven (Keely). There was evidence that Frank's parents were available to care for the children when they were not with him, Leslie, or at a day care center.

Dr. Paula Berry, a licensed clinical psychologist, was appointed by the trial court to perform a custodial evaluation. She interviewed Frank, Leslie, and Leslie's fiancé Todd Coke (Todd), administered a psychological assessment to each of them, and observed them with the children. Dr. Berry recommended that

the children's primary residence be with Frank because of negative personality traits she identified in Leslie and Todd and the impact of Leslie's move to Ohio.

Leslie has a degree in early childhood education and had worked in retail management in Louisville. She also had family in the Louisville area. She planned to marry Todd, and to move to Ohio with him because his job at United Parcel Services required him to move. Leslie intended to stay at home to care for the children.

Dr. Kathleen Kirby, a licensed clinical psychologist, testified on Leslie's behalf. Like Dr. Berry, she interviewed Frank, Leslie, and Todd, but employed a different psychological assessment. She found them all to be capable of caring for the children. Dr. Kirby recommended that the children's primary residence be with Leslie. Citing the geographical distance between the parties,¹ Dr. Kirby stated that Frank's schedule would make it more appropriate for him to exercise visitation with the children, rather than the children's primary residence being with him.

Dr. Edward Berla also testified for Leslie, but only on the propriety of the psychological assessments used by Drs. Berry and Kirby. He testified that the test administered by Dr. Berry was inappropriate for a custodial evaluation.

¹It takes approximately 1 3/4 hours to drive the distance between Frank's home in the Greater Louisville Area and Leslie's home in the Greater Cincinnati Area.

The trial court found that joint custody was in the best interests of the children and decided the children's primary physical residence should be with Frank. It noted that both parents were fit to have custody of the children and that there was no clear reason to favor one parent's residence as the primary physical residence over the other's. Two factors the trial court mentioned as being against naming Leslie's residence as the primary physical residence included: (1) Leslie's move to Ohio would mean a new environment for the children, away from their established neighborhood, school, church, friends, and extended family; and (2) Leslie was beginning a new marriage.

Leslie timely filed motions pursuant to CR 59.05 and CR 60.02 alleging that she had newly discovered evidence and that Frank had committed a fraud upon the trial court. She requested the trial court to alter, amend or vacate its custody order. Leslie alleged that Frank was planning to marry Keely and that he had misled the trial court about his intentions. The trial court heard arguments of counsel and set a date for a hearing. The parties took additional depositions and stipulated to the entry of documentary evidence.

The additional evidence would support a finding that after the custody hearing in early June, Frank and Keely had made wedding plans for August 15, 1997, but the wedding was canceled upon the advice of Frank's attorney. The trial court stopped short of finding that Frank had committed perjury, but concluded that he had not been completely honest. The trial court further

noted that if it had been informed that Frank planned on remarrying, it would have ordered a custodial evaluation of Keely as it had for Todd. However, the trial court ultimately stood by its original decision and denied Leslie's motion. The trial court stated that it was most concerned with the impact of the children moving from the Louisville area to the Cincinnati area, and expressed concern that it would lose jurisdiction over the parties if the children's primary physical residence was with Leslie.

We find no clear error in any of the trial court's factual findings. Aton, supra. The record supports a finding that both parents are capable of caring for the children. As for Frank's plan to remarry, the trial court's assessment of the evidence is supported by the record. The psychologists and the trial court would have had a more complete picture if the planned marriage between Frank and Keely had been known to them earlier. However, the trial court considered the evidence carefully and thoughtfully, wrestled with the strengths and weaknesses of each parent's home being the primary physical residence, and recognized that Frank had been less than forthcoming. The conclusion reached by the trial court was within its sound discretion and not an abuse of that discretion. Cherry, supra.

In her brief, Leslie also argues that the trial court erred in ordering her to pay child support. Leslie's notice of appeal, which was filed on September 15, 1997, identified the orders appealed from as the July 29, 1997 custody order and the

September 23, 1997 order denying Leslie's CR 59.05 and 60.02 motions. Neither order determined child support. Rather, child support was awarded in an order entered on October 3, 1997. This order was not appealed from, and consequently, this issue is not properly before this Court and we cannot address it. CR 73.02(2). We also note that Leslie's brief is not in compliance with CR 76.12(4)(c)(iv), which requires "a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner."

For the foregoing reasons, the judgment of the Jefferson Family Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Hon. Stuart Yussman
Louisville, KY

BRIEF FOR APPELLEE:

Hon. James O. Risch
Louisville, KY