

RENDERED: JANUARY 14, 2005; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-002335-MR

TAMARA DAWN WATSON WILKINSON

APPELLANT

v. APPEAL FROM CASEY CIRCUIT COURT  
HONORABLE JAMES G. WEDDLE, JUDGE  
ACTION NO. 02-CI-00190

DANIEL CAIN WILKINSON<sup>1</sup>

APPELLEE

OPINION  
VACATING AND REMANDING

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BEFORE: COMBS, CHIEF JUDGE; JOHNSON AND MINTON, JUDGES.

JOHNSON, JUDGE: Tamara Dawn Watson Wilkinson has appealed from the findings of fact, conclusions of law, and decree of dissolution of marriage of the Casey Circuit Court entered on October 6, 2003. Having concluded that the trial court failed to make specific findings of fact regarding the custody of the children, leaving this Court unable to determine whether the

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<sup>1</sup> Daniel's middle name is listed as "Kain" in the circuit court record, but listed as "Cain" in this appeal.

trial court properly applied the factors of KRS<sup>2</sup> 403.270(2)<sup>3</sup> in making the custody award, we must vacate that portion of the

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<sup>2</sup> Kentucky Revised Statutes.

<sup>3</sup> KRS 403.270(2) states:

The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all relevant factors including:

- (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;
- (b) The wishes of the child as to his custodian;
- (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
- (d) The child's adjustment to his home, school, and community;
- (e) The mental and physical health of all individuals involved;
- (f) Information, records, and evidence of domestic violence as defined in KRS 403.270;
- (g) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;
- (h) The intent of the parent or parents in placing the child with a de facto custodian; and
- (i) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined by KRS 403.270 and whether the child was placed with a de facto custodian to allow the parent now seeking

decree of dissolution and remand for further proceedings and specific findings to be entered as required by CR<sup>4</sup> 52.01.<sup>5</sup>

Tamara and Daniel were married on April 4, 2000.

Daniel filed a petition for dissolution of marriage in the Casey Circuit Court on September 20, 2002, and Tamara filed a response on October 12, 2002. Daniel alleged in his petition that the parties separated in May 2001, while Tamara alleged in her response that they separated on September 10, 2002.<sup>6</sup>

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custody to seek employment, work, or attend school.

<sup>4</sup> Kentucky Rules of Civil Procedure.

<sup>5</sup> CR 52.01 provides:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment; and in granting or refusing temporary injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review except as provided in Rule 52.04. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41.02.

<sup>6</sup> At the evidentiary hearing held on August 28, 2003, Tamara testified that they had continued to share a residence and had had sexual relations as recently as three weeks before the hearing. Daniel testified that they had not had sexual relations for more than 10 months before the hearing.

It is undisputed that there were two children born to the parties prior to the marriage, namely Alex Wilkinson, born May 16, 1996, and Jordan Wilkinson, born January 30, 1998. Daniel and Tamara each sought sole custody of the children. Tamara also testified at the evidentiary hearing that she was 14 weeks pregnant and that Daniel was the father of her unborn child. She testified that she and Daniel had continued to have sexual relations during the period of their separation and that no one else could have been responsible for her pregnancy. Daniel claimed that he had not had sexual relations with Tamara for over ten months.<sup>7</sup>

A final hearing was held in this matter on August 28, 2003. The hearing lasted approximately 73 minutes, and the parties were the only witnesses.<sup>8</sup> At the conclusion of the final hearing, the trial court, without motion of either party, amended the temporary agreed custody order by granting sole

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<sup>7</sup> Tamara asked the trial court to order a blood test and the trial court stated that counsel could file the appropriate motion. No motion was filed. The only indication in the record of the birth of the child is Tamara's statement in her brief that Alex had expressed a desire to live with her but that the "two other children are much too young to make this decision."

<sup>8</sup> The trial court administered the oath to the additional witnesses that were present to testify on behalf of both parties, but the trial court only allowed the parties to testify at the hearing. On September 2, 2003, the trial court entered an order allowing Daniel 14 days from the date of the hearing to complete taking his proof by deposition and allowing Tamara 14 days from that date to complete taking her proof by deposition. Neither party supplemented the record within the given time and on October 2, 2003, the trial court ordered the case submitted for a final decree.

custody of the parties' minor children to Daniel and limiting Tamara to supervised visitation twice a month.<sup>9</sup>

On October 6, 2003, the trial court entered the findings of fact, conclusions of law, and decree of dissolution of marriage. The trial court found that it was in the best interests of the two children for Daniel to have their sole custody. Tamara was granted supervised visitation<sup>10</sup> with the children twice a month,<sup>11</sup> and she was prohibited from visiting "the children at school, [Daniel's] residence or anywhere else."<sup>12</sup> This appeal followed.

Tamara, pro se, seeks reversal of the trial court's custody award.<sup>13</sup> In our review, we must determine (1) whether

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<sup>9</sup> On November 6, 2002, a temporary agreed order had been entered granting the parties joint custody of their minor children, with Daniel having residential custody from 6:00 p.m. on Sunday to 6:00 p.m. on Friday and Tamara having residential custody from 6:00 p.m. on Friday to 6:00 p.m. on Sunday.

<sup>10</sup> The trial court determined that Tamara's "visitation should be supervised by and occur at the Casey County Office of the Cabinet for Families and Children, Department of Community Based Services, at the convenience of the Cabinet pending the further Orders of [the trial court]."

<sup>11</sup> The trial court ordered that because Tamara had no income that she would not be required to pay child support pending further orders of the court.

<sup>12</sup> Tamara filed a motion on October 11, 2003, for a change of custody, which was never heard.

<sup>13</sup> Daniel failed to file a reply brief, and we could view such failure as a confession of error under CR 76.12(8)(c) which provides:

If the appellee's brief has not been filed within the time allowed, the court may: (1) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error

the trial court made specific findings of fact as required under CR 52.01; (2) whether the factual findings were clearly erroneous; (3) whether the trial court properly considered the factors set out in KRS 403.270(2) in stating its conclusions of law; and (4) whether the trial court abused its discretion in making its award.

We will first address whether the trial court made sufficient findings of fact under CR 52.01 to support its award of sole custody with supervised visitation. "The cornerstone of CR 52.01 is the trial court's findings of fact,"<sup>14</sup> as they give this Court "a clear understanding of the grounds and basis of the trial court's judgment . . . ."<sup>15</sup> In domestic relations cases,<sup>16</sup> there is no jury and the trial court as the sole finder of fact must find the facts "specifically and state separately its conclusions of law thereon and render an appropriate judgment . . . ."<sup>17</sup>

This Court is constrained by CR 52.01 from

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and reverse the judgment without considering the merits of the case.

However, we have reviewed the court record in full and we will give proper deference to the trial court's factual findings.

<sup>14</sup> Stafford v. Stafford, 618 S.W.2d 578, 580 (Ky.App. 1981).

<sup>15</sup> Id.

<sup>16</sup> Aton v. Aton, 911 S.W.2d 612, 615 (Ky.App. 1995).

<sup>17</sup> CR 52.01.

overturning the findings of the trial court, if supported by substantial evidence and thus not clearly erroneous.<sup>18</sup>

“‘Substantial evidence’ is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people.”<sup>19</sup> The clearly erroneous standard protects against actions being “tried anew upon appeal.”<sup>20</sup> This Court exercises caution in reversing a custody award of the trial court.

In this case the trial court’s findings regarding custody and visitation were clearly not sufficient, as they do not give this Court a proper understanding of the basis of the custody award nor do the conclusions provide the law the trial court relied on to reach its decision. The trial court’s findings as to custody were as follows:

- (8) The Court finds that the Respondent, [Tamara Dawn Watson Wilkinson], suffers from anxiety attacks, has had at least one nervous breakdown, has been involuntarily committed for a mental evaluation on more than one occasion the last being by her sisters, has had repeated DUI convictions including a felony, and that the children were removed from her care by Social Services in Fayette County, Kentucky.

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<sup>18</sup> Sherfey v. Sherfey, 74 S.W.3d 777, 782 (Ky.App. 2002).

<sup>19</sup> Id.

<sup>20</sup> Stafford, 618 S.W.2d at 579.

- (9) The Court finds that the children may be endangered and/or not receive proper care and supervision while in the care of the Respondent, [Tamara Dawn Watson Wilkinson].
- (10) The Court finds that it is in the children's best interest that the Petitioner, [Daniel Cain Wilkinson], have custody of the minor children, [Jordan Wilkinson], born January 30, 1998, and [Alex Wilkinson], born May 16, 1996.
- (11) The Court finds that the Respondent, [Tamara Dawn Watson Wilkinson], should have supervised visitation with the children twice a month. Said visitation should be supervised by and occur at the Casey County Office of the Cabinet for Families and Children, Department of Community Based Services, at the convenience of the Cabinet pending the further Orders of this Court.
- (12) That except for the visitation specified above, the Respondent, [Tamara Dawn Watson Wilkinson], should not go about the children at school, Petitioner's residence or anywhere else pending the further orders of this Court.
- . . .
- (19) The Court finds that the testimony of the Respondent, [Tamara Dawn Watson Wilkinson], to be evasive and untruthful in many respects.

The trial court stated no conclusions of law regarding custody, but it did state in its decree of dissolution of marriage as follows:



- (2) That the Petitioner, [Daniel Cain Wilkinson], is hereby awarded custody of the minor children, [Jordan Wilkinson], born January 30, 1998, and [Alex Wilkinson], born May 16, 1996.
- (3) That the Respondent, [Tamara Dawn Watson Wilkinson], shall have supervised visitation with the children twice a month. Said visitation shall be supervised by and occur at the Casey County Office of the Cabinet for Families and Children, Department of Community Based Services, at the convenience of the Cabinet pending the further Orders of this Court.
- (4) That except for the visitation specified above, the Respondent, [Tamara Dawn Watson Wilkinson], shall not go about the children at school, Petitioner's residence or anywhere else pending the further orders of this Court.

Our review of the record shows that at the final hearing both parties testified concerning their desire to have custody of the children. However, the trial court's findings were limited to evidence about Tamara, a portion of which were clearly erroneous. The trial court stated at the hearing that it found Tamara's testimony not to be credible, but it did not make any finding to this effect. The trial court made no findings regarding Daniel's interaction with the children; his mental or physical health; his home; his family; his employment; his education, interests and lifestyle; and his fitness to have sole custody of the children.

This Court has reviewed the record, including the videotape of the August 28, 2003, final hearing. Daniel appeared to contradict himself and to be evasive during cross examination. Tamara answered all the questions asked of her, even those asked by the trial court, although it was apparent that the trial court was not convinced of her veracity.

The trial court found that Tamara had a history of mental illness; however, there was no expert testimony regarding her illness, nor any proof that her anxiety attacks directly affected the children. Tamara testified that she was under a physician's care, but that her condition was controlled and that she only took one-half of a Xanax at bedtime. Tamara's testimony that she was concerned that Daniel was illegally using Oxycontin went unrefuted by Daniel.

The trial court also found that Tamara had repeated DUI convictions. However, these convictions were over 12 years old at the time of the hearing, and all of the convictions had occurred prior to the birth of the children. Since there was no evidence that this conduct by Tamara affected her relationship with the children, this finding was clearly erroneous.<sup>21</sup> While Daniel claimed that Tamara continued to have problems with alcohol, she denied this accusation; and the trial court failed

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<sup>21</sup> KRS 403.270(3).

to make a finding as her having any current problems with alcohol.

The trial court further found that the children had been removed from Tamara by Social Services. Tamara testified that this incident occurred at a time when she and the children were living in a spouse abuse shelter and she claimed the only reason the children were placed in the care of Social Services was because she was temporarily incarcerated.<sup>22</sup>

Daniel testified that he and the children lived with his mother and that the children slept together and he slept on a mattress on the floor. Tamara introduced into evidence pictures of Daniel's mother's house, which Daniel authenticated, but Daniel claimed the pictures depicted the house messier than normal. One of the pictures showed a large amount of dog feces on newspaper covering the floor of one room of the house, which Daniel testified was accurate. Tamara testified that other people stayed at Daniel's mother's house on a regular basis, including Daniel's siblings and their children, and that it was common for the children on a school night not to get to sleep until 11:30 p.m. or midnight.

Tamara testified that from February 2003 to June

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<sup>22</sup> Tamara claims she was held in contempt of court for an incident in the courtroom at a hearing related to a menacing charge brought by a police officer against her arising out of the officer's investigation of Tamara's allegation of domestic violence by Daniel.

2003, she had moved in with Daniel so she could be with the children during the week. There was undisputed testimony that during this time, Tamara took the children to school several days and that on many occasions she purchased food for the children. Tamara further provided undisputed testimony that she took Alex to the eye doctor in May 2003, when he was fitted for glasses. There was no testimony as to how Daniel provided for the children's needs. Rather, there was testimony that Daniel's mother provided shelter for the children, that Tamara provided their food, and that both Tamara and Daniel's mother provided the children's transportation.

Tamara further testified that she had secured a government-provided, three-bedroom apartment in Lexington, where the boys had their own rooms; however, they normally slept with her. She further testified that she took the children swimming when they visited her in Lexington. There was no testimony offered as to activities that Daniel and the children participated in together. Tamara further testified that the trip from her apartment in Lexington to Daniel's mother's home is approximately 130 miles round-trip and that Daniel never assisted with the transportation during visitation.

Daniel testified that he had difficulty with Tamara abiding by the visitation schedule, but he also acknowledged that there were times he denied visitation to

Tamara because she was late. While Daniel mentioned that he thought Tamara had arrived for visitation intoxicated on a few occasions, he later stated that his main reason for denying visitation was that she arrived late. Daniel also testified that he was afraid for the children to be with Tamara, but he gave no specific reasons. Further, it appears from Tamara's undisputed testimony that, only weeks prior to the hearing, Daniel left the children in her care quite often. Daniel claimed that Tamara screamed at the children, which she denied. Tamara claimed that Daniel cursed in front of the children, which was not disputed. Tamara further claimed that Daniel kicked the children, while Daniel claimed that he never hit the children.

This case presents a family with many problems. Both Daniel and Tamara have failed to provide adequately for their children and a substantial amount of government assistance has been required. Both parents accuse the other of substance abuse and abusive behavior. Evidently, the parties' low income has affected the practicing of this case. While each party had counsel at the evidentiary hearing, no additional steps were taken to present evidence after the hearing.<sup>23</sup>

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<sup>23</sup> We note our concern that while the parties had witnesses at the hearing, the trial court refused to hear any additional live testimony, and ordered the parties to supplement the hearing with deposition testimony. In light of the parties' low income, the expenses of depositions were probably prohibitive.

As to Tamara's pregnancy, it would certainly seem that Daniel's refusal to assume responsibility for allegedly fathering the child Tamara was carrying would have been relevant to his fitness as a parent. From our review of the record, it is obvious that final custody was determined prematurely. This family has had significant involvement with various social service agencies, yet there was no home evaluation ordered, and despite allegations of substance abuse and mental impairment, no psychological or counseling reports were introduced as evidence. There was also testimony of as many as ten occurrences of domestic violence with EPO's being issued. While Tamara has attempted to file some of these documents as attachments to her brief, none of these records was admitted as evidence before the trial court.<sup>24</sup> In light of the KRS 403.270(2) factors that the trial court should have considered, the testimony in the record clearly shows that the trial court's findings were not sufficient.

After a trial court has made the findings required by CR 52.01, it is then required to apply the law to the facts and its decision is not to be disturbed unless it constitutes an abuse of discretion.<sup>25</sup> However, from the scant findings in this case, we are unable to determine whether the trial court applied

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<sup>24</sup> KRS 403.270(3).

<sup>25</sup> Sherfey, 74 S.W.3d at 782-83.

the appropriate law set out in KRS 403.270(2) for determining child custody.

KRS 403.270(2) requires the trial court to determine custody based on the best interests of the child, while considering both parents equally and considering all relevant factors. The trial court stated that its custody determination was based on the best interests of the children, but it failed to support this determination by providing specific findings and by applying the KRS 403.270(2) factors in its conclusions of law. Thus, we hold this award to be a clear abuse of discretion.

"The ultimate or conclusory fact to be found is a determination of the 'best interests of the child.' However, before the factual conclusion can be reached the court is to consider all relevant factors including those specifically enumerated in the statute."<sup>26</sup> While, the trial court stated in its findings that its custody award was based on the best interests of the children, not one of the nine factors set out in KRS 403.270 was addressed specifically in the trial court's order. The only factor that appears to have been considered by the trial court is KRS 403.270(2)(e) and this consideration was erroneously limited to Tamara's mental health. From the testimony of the parties as set out above, all nine factors were

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<sup>26</sup> Stafford, 618 S.W.2d at 580.

relevant. We do not contend that these are the only factors that the trial court should have considered in making its award, but they are clearly relevant as evidenced by the testimony of record and the trial court should have considered no less in making its findings in this case.

Furthermore, even if Daniel were to be granted sole custody, it was an abuse of discretion for the trial court to restrict Tamara's visitation and to require it to be supervised. The parties had been abiding by a temporary agreed order, wherein Tamara had the children every weekend. There was testimony from both parties that they had violated the agreement at times, but it appears, overall, Tamara was allowed to spend more time with the children than allowed under the temporary agreement. On the day of the hearing, the trial court unilaterally amended the temporary order, significantly reducing Tamara's visitation and requiring it to be supervised. This restriction became a permanent visitation award when the trial court entered its final order on October 6, 2003. A determination of reasonable visitation is a matter that must be based on the particular circumstances of each case.<sup>27</sup> There was no evidence to support the trial court's restricted and supervised visitation award in this case, and thus, we hold such restrictions to be an abuse of discretion.

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<sup>27</sup> Drury v. Drury, 32 S.W.3d 521, 524 (Ky.App. 2000).



For the reasons set forth above, we vacate the trial court's order awarding sole custody of the parties' minor children to Daniel, with restricted and supervised visitation to Tamara, and remand this matter for further proceedings and specific findings to be entered in compliance with CR 52.01, upon the trial court's proper consideration of KRS 403.270(2).

ALL CONCUR.

BRIEF FOR APPELLANT:

Tamara Dawn Watson  
Wilkinson, Pro Se  
Lexington, Kentucky

BRIEF FOR APPELLEE:

No brief filed.