

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002330-ME

ELLA-CHRISTINE ELIZABETH FISCHER WHITE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOAN L. BYER, JUDGE
ACTION NO. 03-CI-502628

CASEY W. HYLAND

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND MINTON, JUDGES; ROSENBLUM, SENIOR JUDGE.¹

ROSENBLUM, SENIOR JUDGE: Ella-Christine Elizabeth Fischer White (Ella) brings this appeal from the "Findings of Fact, Conclusions of Law and Order" of the Jefferson Family Court, entered October 14, 2004, which established Casey W. Hyland (Casey) as primary residential custodian of the never-married couple's identical twin daughters, born in the summer of 2001. Before us, Ella contends that the family court's award was based

¹ Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

on a misapplication of Fenwick v. Fenwick, 114 S.W.3d 767 (Ky. 2003). We disagree and affirm.

We review questions of fact in a child custody determination under the clearly erroneous standard of Kentucky Rules of Civil Procedure (CR) 52.01, and such will not be disturbed absent an abuse of discretion. Cherry v. Cherry, 634 S.W.2d 423, 425 (Ky. 1982). Abuse of discretion implies that the family court's decision is unreasonable or unfair. Kuprion v. Fitzgerald, 888 S.W.2d 679, 684 (Ky. 1994). The family court is in the best position to evaluate the testimony and to weigh the evidence; thus an appellate court should not substitute its own opinion for that of the family court. Riechle v. Riechle, 719 S.W.2d 442, 444 (Ky. 1986). Our test, therefore, is not whether we would have decided differently, but whether the family court's findings were clearly erroneous and thus an abuse of discretion. Cherry, supra.

Because our review requires analysis of whether the family court's findings and order are supported by substantial evidence, a recitation of the facts is necessary.

Ella was born May 4, 1969, in Greenwich, Connecticut. Her family (including an older brother and younger sister) moved to Hamburg, Germany, when she was five and it was there that she grew up. She became bilingual in English and German. After graduating from the University of Berlin with a degree in

marketing and communications, she worked in various jobs relating to television and movie production at Studio Hamburg and for the MTV channel in London, England. Ella moved to the United States in 1997 and lived with her uncle in Miami, Florida, and her grandmother in Greenwich, Connecticut, before moving to New York City in 1998 where she supported herself as a waitress, caterer, landscaper, and photographer while seeking work in graphic design.

Casey, born December 25, 1971, was born and raised in Louisville, Kentucky where he still maintains a large extended family (including his parents, a brother and his three children, his grandmother, and aunts, uncles and cousins). After graduating from Washington University in St. Louis, Missouri, with a degree in architecture, he received training in the art of glass blowing at several venues, including Washington state, Tennessee, and North Carolina. Casey moved to New York City in the summer of 1999 to work as a studio technician for Urban Glass. He had been in the city six weeks when he met Ella who was looking for a new roommate to share expenses in her two-bedroom apartment.

He moved in and they lived as roommates for six months before moving to another apartment and becoming romantically involved. In October, 2000, Ella became pregnant with twins. After four months she was put on bed rest and Casey became their

sole source of support. Twin girls were born in June, 2001. Before leaving the hospital, Casey acknowledged paternity and the twins took his last name. Ella's mother and Casey's mother both came to help out when the twins came home.

While Ella stayed home to care for the twins, Casey had little work to do in the summer of 2001 and following the terrorist attacks on September 11, 2001. When a previous employer from Louisville called him, unsolicited, and offered him a salaried managerial position, Casey reluctantly decided that a temporary move to Louisville would be best for the family. Ella was less sure, given that she was used to living in bigger cities and had no family in Louisville, but she agreed to a two-year stay in Louisville.

They moved to an apartment in Louisville in December, 2001. Casey's parents provided cars for both Ella and him, and Casey's mother was available once a week to baby-sit. Casey worked full-time and his employer allowed him to work on weekends for himself. He left that job in September, 2002, and, with financial assistance from his parents, opened his own business. He did not, however, advise Ella at the time that his parents had provided him with such assistance.

From the time they moved to Louisville Ella stayed home to care for the twins. She did not like the long hours Casey worked, either at his salaried position or in the new

business. She did assist him with the start-up of the new business by doing some artwork, marketing, catalog development, and logo production.

The couple's relationship problems that had begun in New York City continued to worsen in Louisville. Voluntary counseling from August, 2002, through October, 2002, revealed problems with finances, where there were going to live, and the involvement of Casey's family (especially his mother) in their lives. Ella continued to seek, unfulfilled, a marriage commitment from Casey. She was used to living in cosmopolitan cities and became miserable living in Louisville.

In February, 2003, Ella and the twins visited her uncle in Miami for two weeks. Although she advised her uncle of her unhappiness and he offered her temporary free use of his home (which he used only part of the year), she did not mention this to Casey or her thoughts about moving to Miami with the twins. Casey could not take off work to go with her to Miami, but did fly down at the end of the visit to return home with them. In May, 2003, although Casey felt that the couple did not have enough money for her to go, Ella obtained money from a non-marital source in order to travel to Germany and England for three weeks to visit her parents and friends.

One month later, two days after the twins' second birthday, Ella informed Casey for the first time that she was

thinking of moving with the girls to Miami but she did not know when or for how long. Casey was upset, and indicated that if she decided to leave he wanted her to leave the twins with him.

The next month, on July 21, 2003, Ella and the twins flew to Miami and moved into her uncle's home. During the next year, in addition to free use of his home, Ella's uncle gave her the use of a 1987 Cadillac El Dorado convertible and \$500.00 per month.

Six days before Ella and the twins moved to Miami, Casey filed a petition for joint custody, child support, and visitation. In October, 2003, after she had been gone several months, Casey filed a motion requiring Ella to return the twins to Kentucky, and in November, 2003, Casey moved to amend his original petition, asking at this time for joint custody and for the twins to be returned to Kentucky. After a case management conference, the Jefferson Family Court ruled from the bench on these temporary motions, specifically denying Casey's motion to have the twins returned to Kentucky. On December 19, 2003, the court entered an order memorializing that ruling.

In the fall of 2003, Ella worked at home on commission selling pure water systems. She made no sales and quit this job after one month. In early 2004, she started a freelance graphic design business out of her home and made a few hundred dollars. In July, 2004, she became employed as a reservationist at New

World Travel in Miami working a part-time flexible schedule, and she and the twins moved to an apartment in August, 2004. The location of Casey's business moved, but he continued working.

The case proceeded to trial in September, 2004. The couple agreed on joint custody, but disagreed on residential arrangements and parenting schedules, as well as certain expenses not pertinent to this appeal. A custodial evaluation was performed by Dr. Edward Berlá, who found both parents loving and caring, with appropriate interaction with the twins, and that either parent was capable of being a primary residential custodian. He found that Casey had a more stable personality, and Ella had more detailed plans for the twins.

At the trial, Ella indicated that she would be miserable, unhappy, and depressed if she had to return to Louisville. Since she did not want to be emotionally unavailable for the twins, and it would be a hard decision, she would just not come back. Casey indicated that the twins' move to Miami emotionally devastated him; that neither he nor Ella had the finances to continue visits; and that only forty-one days of visits with the twins in the year they lived in Florida was insufficient.

On October 14, 2004, the family court issued a twenty-nine page order in which it extensively analyzed the situation:

The parties in this action have already agreed to share joint custody of their minor children. They have asked the Court to determine where the children will primarily reside. They also have asked the Court to determine a parenting schedule for the parties. They also have agreed that this Court should retain jurisdiction of this action. The Court notes that the children are now three years of age, but they will be in school in less than two years.

The Court finds that the parties are well-educated people who love and care for their children. Each party brings something unique to his or her relationship with the children. [Ella] has lived overseas for an extended period of time and is able to share her experiences, including her knowledge of the German language, with the children. [Casey] has struggled to be able to support himself as an artist and has started his own business in Louisville, which the children will be able to appreciate more when they are older. The ideal situation would be for the parties to live in the same community, even if they do not live together, so that they could parent their children together.

Relying on Kentucky Revised Statutes (KRS) 403.270, the court concluded:

(I)t is in the best interests of the children for the children to reside primarily with [Casey] in Louisville, Kentucky because he is a loving, caring father who is bonded to his children. He is grounded in this community with a stable job that provides him with a regular income necessary to support the children. He has many resources available to him to help him care for the children, including his extended family.

This appeal followed.

Ella contends that the family court erred by misapplying Fenwick. We disagree. The court clearly based its analysis and decision on KRS 403.270, specifically finding that "it is in the best interests of the children for the children to reside primarily with [Casey] in Louisville" Fenwick is inapplicable because it concerns a modification of custody under KRS 403.340, not an original custody determination under KRS 403.270.

We further conclude that the findings of the family court are supported by substantial evidence, and thus not an abuse of discretion. The court based its decision on the testimony of Ella and Casey, Dr. Berlá, and the couple's mothers, and in so doing, considered the statutory factors as outlined in KRS 403.270: 1) the wishes of both Ella and Casey; 2) the interaction and interrelationship of the twins with both Ella, Casey, and significant others; 3) the twins' adjustment to their home, school, and community; and 4) the mental and physical health of the individuals involved. The record supports the family court's conclusion. We see no abuse of discretion, and thus decline to disturb the family court's ruling.

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

MINTON, JUDGE, CONCURS.

GUIDUGLI, JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

GUIDUGLI, JUDGE, CONCURRING IN RESULT ONLY: I concur in result only because I believe the legal standard of review relating to appellate review mandates such. This case points out the difficult situations a family court judge is often placed in while determining custody when two very capable and loving parents are involved. However, this case also points out that judges can also be very parochial in their approach to such cases.

A review of the record clearly shows that Ms. White has been the primary care-giver of the children since their birth. There appears to be no question that she's an excellent mother. Furthermore, she was willing to move to Louisville despite her concerns in order to support Mr. Hyland in hopes of keeping the family together and with the hope that he would eventually marry her. Unfortunately, neither happened. When she indicated she was going to move to Florida with the children, Mr. Hyland convinced her to stay in Louisville for several more weeks and took the opportunity to file for custody in his hometown.

After hearing all of the evidence, the family court found that "it is in the best interests of the children for the children to reside with [Mr. Hyland] in Louisville, Kentucky

because he is a loving, caring father who is bonded to his children." While this is true, it is also true Ms. White is also a loving, caring mother who is bonded to her children. It is also true that she has spent more time with these children during their lifetime as she was not working while Mr. Hyland was pursuing his career. What concerns me the most about the court's findings are its statements concerning Ms. White's reluctance to live in Louisville. It appears that the court spoke highly of everything Mr. Hyland and his family did in Louisville while downplaying everything Ms. White sought outside of Louisville to the point of criticizing her for not wanting to live there. For example, the court stated:

While Louisville might not have a beach, it does have other things to do. If she had stayed here, she might have discovered that there numerous activities that the parties could engage in, either with or without the children, including the theatre and the orchestra.

. . . .

Ms. White testified that she wanted to move to Florida in order to start a "new life" for herself because she because she could not "bloom" in Kentucky. Although she claimed that she had no friends in Kentucky, she also had no friends in Florida. The only people that she "knew" in Florida before she moved there was her Uncle Herb, who did not reside there the entire year, and another uncle, whom she has not seen since she moved there in July of 2003. She was able to make friends with other young parents in Miami as she undoubtedly was able

to do in Louisville. She also was able to relax without having to answer to Mr. Hyland because, basically, her uncle supported her until she sought work in October of 2003.

The court goes on to state how unfair it would be to Mr. Hyland and his family not to have regular contact with the children, but obviously is not concerned that Ms. White will suffer the same consequences if the children reside in Kentucky while she is in Florida. On this issue, the court stated:

The situation has been very difficult for the family, especially for Mr. Hyland, since Ms. White and the children moved to Miami in July of 2003. The children are very young and have been able to see their father for only 41 days in the year since they left Louisville. This is not enough time to maintain their relationship with him. The children were denied the love and care of their father and his family while they were in Miami. While this move to Miami might have been good for Ms. White, it has not been the best situation for Mr. Hyland and the children.

The family court then orders Ms. White to return the children and the "majority of their toys and their clothing, to Mr. Hyland in Louisville, Kentucky." Then after noting how expensive the travel costs are and how devastated Mr. Hyland and his family were by not having regular visits, the court orders Ms. White visitation must take place in Louisville and she pay all the expenses herself.

While the court points out the obvious that the "ideal situation would be for the parties to live in the same

community" it seems to believe that if the parties don't, the next best solution is for the children to live in Louisville. This philosophy would seem to encourage a race to the local courthouse between two "loving, caring" parents who reside in different jurisdictions. Surely this should not be the main basis for determining such important issues as child custody and residency.

The opinion affirming points out that the family court considered the statutory factors set forth in KRS 403.270. While that is true, it should also be noted that had the court ordered the children to reside with Ms. White it could have easily justified such a conclusion under KRS 403.270 also. Both parents are loving, caring parents and a court could easily justify either decision by citing the KRS 403.270 factors. The court order clearly emphasizes Mr. Hyland's good points and minimizes Ms. White's good points. To have allowed the children to reside with Ms. White, the Court would simply have to do the opposite.

The majority sets forth the standard of review in a child custody determination to be whether the family court's findings are clearly erroneous and whether the court abused its discretion. It further states that an appellate court should not substitute its own opinion for that of the family court. We should give deference to the family court because it is in the

best position to evaluate the testimony and to weigh the evidence. In this case, the family court's findings and order are supported by substantial evidence that Mr. Hyland is a good parent and will properly provide for his children. But that is only part of the picture. Ms. White is equally a good parent who has in the past and would in the future (if given the opportunity) properly provide for the twins. While I do not believe the family court erred in making Mr. Hyland's home the primary residence, I do believe it erred in not giving equal consideration to Ms. White simply because she did not wish to live in Louisville. I concur with the judge that Louisville is a fine city to raise one's children and has much to offer culturally. However, I must differ with the court's perception that a parent who does not share this point of view is somehow lacking and not equally fit to raise her children. While I would have placed the children with Ms. White based upon the evidence in the record, I cannot find the court's order legally deficient. Therefore, I concur in result only and hope the court will give Ms. White every opportunity to continue to be the caretaker she has been to the children up to this point in time.

BRIEFS FOR APPELLANT:

Peter L. Ostermiller
Louisville, Kentucky

BRIEF FOR APPELLEE:

Michael J. O'Connell
Louisville, Kentucky