

RENDERED: NOVEMBER 22, 2006; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2006-CA-000532-ME

BOBBY JACK HALL

APPELLANT

v. APPEAL FROM ESTILL CIRCUIT COURT  
HONORABLE BRUCE PETRIE, SPECIAL JUDGE  
CIVIL ACTION NO. 02-CI-00223

ROSELLA (HALL) LUEDTKE

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \*

BEFORE: BARBER, JUDGE; HUDDLESTON AND PAISLEY, SENIOR JUDGES.<sup>1</sup>

HUDDLESTON, SENIOR JUDGE: This is an appeal from an Estill Circuit Court order that awarded joint custody of Bobbie DeLanna Hall (called "Sissy") to her parents, Bobby Jack Hall and Rosella (Hall) Luedtke and named Luedtke the child's primary residential custodian.

---

<sup>1</sup> Senior Judges Joseph R. Huddleston and Lewis G. Paisley sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

At issue is whether the circuit court abused its discretion when it permitted Hall's counsel to withdraw prior to the final hearing without granting a continuance and whether the findings of fact that formed the underpinning of the court's custody decision are clearly erroneous. Because we have determined that the circuit court did not abuse its discretion in awarding joint custody of the parties' daughter with the child's mother as primary residential custodian and, inasmuch as Hall failed to preserve the issue of the adequacy of the court's factual findings, we affirm.

The parties are before this Court for the second time. In an opinion rendered on August 19, 2005,<sup>2</sup> we vacated an Estill Circuit Court order that awarded sole custody of Sissy to Hall. The case was remanded for the circuit court to make the findings required by Kentucky Revised Statutes (KRS) 403.270. After *de novo* review, on January 19, 2006, the circuit court granted what it referred to as a "Judgment of Custody" which is the subject of this appeal. The court determined that, pursuant to KRS 403.270, it was in Sissy's best interest for the parties to have joint custody, with Luedtke as the primary residential custodian.

---

<sup>2</sup> Rosella Hall v. Bobby Jack Hall, 2004-CA-001446-MR (unpublished opinion rendered August 19, 2005).

On appeal, Hall argues that the circuit court abused its discretion when it allowed his attorney to withdraw without granting him a reasonable opportunity to retain new counsel. Although Hall acknowledges that there is no ultimate right to counsel in a civil proceeding, he insists that it was unreasonable and unfair for the circuit court to expect him to proceed without benefit of counsel.

On October 28, 2005, Hall's attorney filed the first of two motions to withdraw. Although that motion was subsequently withdrawn, a second motion seeking permission to withdraw was filed on December 28, 2005, and was heard on January 5, 2006. The circuit court granted counsel's motion to withdraw but denied a contemporary motion for a continuance. Hall made no argument then, nor does he argue now, that he either attempted to or intended to retain new counsel, even though he was aware that his attorney planned to withdraw and he knew that the court was not inclined to postpone the hearing. Neither did Hall renew the motion for a continuance at the final hearing on January 13, 2006. Indeed, it is clear from a review of the proceedings that Hall planned and was prepared to proceed *pro se*. He cannot now be heard to complain, as any failure to effectively present his case was self-determined.

An "application for a continuance is addressed to the sound discretion of the court, and unless this discretion

has been abused the action of the court will not be disturbed.”<sup>3</sup> Matters involving child custody are necessarily expedited, as each delay threatens to continue the uncertainty for the child.<sup>4</sup> In this case, the custody issue had been pending since January 2003. The circuit court was not in a rush to conclude the case, as claimed by Hall, but rather was obviously mindful of the inconvenience and prejudice to the parties and the child in any further delay of the proceedings. Therefore, we conclude that the circuit court did not abuse its discretion in allowing counsel to withdraw without granting a continuance.

Hall next argues that the findings of fact that form the basis of the circuit court’s custody decision are clearly erroneous, that is, they are not supported by substantial evidence.

KRS 403.270(2) provides, in pertinent part, that

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,

---

<sup>3</sup> *Simpson v. Sexton*, 311 S.W.2d 803, 805 (Ky. 1958).

<sup>4</sup> See Ky. Rev. Stat. (KRS) 403.310(1).

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 403.720..

Hall argues that the circuit court failed to consider these factors. What he is actually arguing is that the court did not consider every factor outlined in the statute and make a finding on each one. Even so, because Hall failed to request additional findings pursuant to Kentucky Rules of Civil Procedure (CR) 52.02, he failed to preserve this issue for review.<sup>5</sup> While he insists that a CR 52.02 motion was not necessary because this Court remanded for consideration of the statutory factors, his argument is not well taken. The case was remanded because the original custody order failed to make any of the findings required by KRS 403.270. In contrast, on remand the circuit court did make specific findings to support its custody decision.

In support of its conclusion that it was in Sissy's best interest for Luedtke to be the primary residential custodian, the court found that Hall was the parent most likely to interfere with Sissy's access to and love and attention from

---

<sup>5</sup> *Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982).

the child's other parent, her mother. This determination was based on Hall's history of moving Sissy in order to interfere with Luedtke's ability to see the child at school, interfering with Luedtke's ability to have Sissy's school photographs, and interfering with Luedtke's involvement in meeting Sissy's healthcare needs. The court also found that Hall's disability, for which he took pain medication, and the severe health problems of another child living in his home made him less able than Luedtke to meet Sissy's day-to-day needs. The court focused on the interaction and interrelationship of Sissy with those who significantly affect her best interests; her adjustment to home, school and community; and the physical health of those involved. Nothing more was required.

Even had Hall preserved the issue, we would decline to set aside the findings of fact because they are not clearly erroneous.<sup>6</sup> A finding of fact is "clearly erroneous" if it is not supported by substantial evidence, that is, evidence sufficient to induce conviction in the mind of a reasonable person.<sup>7</sup> After review of the testimony taken at the final hearing, it is apparent that the circuit court's findings of fact are supported by substantial evidence. Therefore, it was

---

<sup>6</sup> Ky. R. Civ. Proc. (CR) 52.01; and see *B.C. v. B.T.*, 182 S.W.3d 213 (Ky. App. 2005).

<sup>7</sup> *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003).

not an abuse of discretion for the circuit court to conclude that it was in Sissy's best interest to reside with her mother.

For the aforementioned reasons, the custody order from which this appeal is prosecuted is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

C. Gerald Martin  
Winchester, Kentucky

BRIEF FOR APPELLEE:

Lois Matl Prewitt  
Lexington, Kentucky