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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000450-ME

LESLIE ANNASTASIA AUGUSTA — APPELLANT

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE GENE CLARK, SPECIAL JUDGE
ACTION NO. 04-CI-00559

JEREMY PAUL AUGUSTA — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DIXON AND VANMETER, JUDGES.

COMBS, CHIEF JUDGE: Leslie Annastasia Augusta appeals from an order of the Harlan Circuit Court that granted joint custody of her daughter, Trinitie, to her and to her ex-husband, Jeremy Paul Augusta. The order confirmed the terms of an earlier temporary order naming Jeremy as the primary residential custodian of Trinitie and additionally ordered Leslie to pay Jeremy child support in the amount of $180.00 per month. After our review of the record, we affirm.

Leslie and Jeremy, both natives of Kentucky, were married in Minnesota in 2003. Jeremy is employed in Duluth by the United States Coast Guard. Leslie was eighteen years of age and Jeremy was nineteen at the time of the marriage. Trinitie was born on February 4, 2004. The couple soon separated after her birth, and Leslie took Trinitie and returned to Harlan, Kentucky, to live with her parents. She filed a petition for dissolution of marriage in the Harlan Circuit Court on July 29, 2004. At a hearing conducted on November 22, 2004, the circuit court granted temporary custody of Trinitie to Jeremy. On December 13, 2004, the court entered a decree dissolving the marriage and reserved all other issues for resolution pursuant to a hearing before the Domestic Relations Commissioner.

On December 14, 2004, the circuit court entered a temporary custody order, awarding joint custody of Trinitie to Leslie and Jeremy while naming Jeremy as the primary custodial parent. Leslie was granted visitation with Trinitie for the second week of each month. Leslie was to pick her up in Duluth at the beginning of the visitation period, and Jeremy was to bring her back from Harlan at the end of the visitation period. Provisions were also made for visits during holidays.

The circuit judge later recused himself upon motion by Leslie. The case was ultimately heard on November 14, 2005, before a special judge assigned by the Chief Regional Circuit Judge. The court heard testimony from Leslie, Jeremy, and Leslie's father, Jimmy K. Callahan. Jeremy has remarried, and testimony was also given by his new wife, Katherine. Katherine has a young daughter close in age to Trinitie. Katherine is the primary caregiver for both girls during the day while Jeremy is at work.

The court entered its final order on January 17, 2006, essentially continuing and extending the terms of the previous temporary order. Leslie and Jeremy were awarded joint custody of Trinitie, and Jeremy again was named the primary residential custodian. Leslie was granted one week of visitation per month until Trinitie reaches mandatory school age. The court also established a visitation schedule for holidays and summer vacation and encouraged the parties to combine the standard and holiday visitation periods to lessen the burden of travel required between Kentucky and Minnesota – a distance of more than one thousand miles. The court also imputed an income of the minimum wage to Leslie and ordered her to pay child support in the amount of $180.00 per month. This appeal followed.

Leslie argues that the circuit court erred in using the "best interests" factors set forth Kentucky Revised Statutes (KRS) 403.270(2) to determine which parent should be the primary residential custodian of Trinitie.[1] Leslie contends that this statutory analysis applies only to determining sole custody and is not pertinent to the issues of joint custody with a primary residential custodian.

Although KRS 403.270 does not allude specifically to "joint custody" or to "primary residential custodian," our Supreme Court has held that the statute is directly applicable in these situations:

> Although joint custody consists of both decision-making authority and actual physical custody of the child, joint custody, in its essence, contemplates shared decision-making

[1] As Leslie has noted, the order of the court cites to KRS 403.270(3). We agree with Leslie that this reference was a clerical error and that the court was relying on KRS 403.270(2).

> rather than delineating exactly equal physical time with each parent.

Fenwick v. Fenwick, 114 S.W.3d 767, 777 (Ky. 2003) (citations omitted). The court emphasized that joint custody does not imply that the child will spend equal amounts of time with each parent especially when the parents reside a considerable distance from one another.

> In awarding joint custody, the court must determine, based on the child's best interest, how the parents will share physical custody of the child. And, we would again note that an award of joint custody does not require an equal division of time with each parent; rather, it means that physical custody is shared by the parents in a way that assures the child frequent and substantial contact with each parent under the circumstances. . . . [I]f one or both parents relocate some distance from each other, *e.g.*, 50 miles or more, the distance itself complicates the arrangement, and the parties or the trial court, again focusing upon the child's best interest, will need to devise a time-sharing schedule - *e.g.*, one incorporating telephone or e-mail access, and longer periods of time-sharing – that will assure frequent, continuing, and meaningful contact with both parents to the greatest extent possible under the circumstances.

Id. at 778 (citations omitted).

The Court then proceeded to define the concept of the "primary residential custodian:"

> A child cannot simultaneously reside with both parents, and in most cases, the child will spend more time with one parent than the other[.] . . . Accordingly, in joint custody arrangements, the parties will often agree, or the court will designate, that one of the parents will act as the "primary residential custodian." Although this term – like "joint custody" itself – has not been statutorily defined in Kentucky, it is generally employed by attorneys and courts alike to refer to the party with whom the child will primarily reside. In

> such situations, the other parent is awarded what is referred to as "visitation," "time-sharing," or "parenting time" with the child.

Id. at 778-79 (citations omitted). The Court expressly held that the decision to designate one of the parties as the primary residential custodian was to be based upon a consideration of the child's best interests:

> [A] trial court must again consider the child's best interests in connection with its decision to designate one of the parties as the primary residential custodian.

Id. at 779 (citations omitted). Under *Fenwick*, therefore, the trial court directly relied on the "best interests" factors listed in KRS 403.270)(2) to determine which parent should serve as Trinitie's primary residential custodian.

It is unclear whether Leslie seeks longer visitation periods with Trinitie or whether she wishes to be appointed Trinitie's primary residential custodian. However, she contends that the overwhelming preponderance of the evidence militated against the court's schedule for the time she is to spend with her daughter.

KRS 403.270(2) provides as follows:

> 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 403.720;
>
> (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 in KRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school.

In awarding primary residential custodianship to Jeremy, the court recited in relevant part as follows:

> Upon consideration of the factors set forth in KRS 403.270(3)[*sic*], the Court finds that while both parents are suited to the trust of being the custodian of the child, it is in the child's best interests that the Respondent [Jeremy] remain the primary residential custodian since the child has adjusted well to her current surroundings with the Respondent, the Respondent has matured, has married, and has a stable life.

We review a trial court's findings of fact for clear error and are governed by a stringent standard providing that:

> . . . due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. A factual finding is not clearly erroneous if it is supported by substantial evidence. "Substantial evidence" is evidence of

> substance and relevant consequence sufficient to induce conviction in the minds of reasonable people.

Sherfey v. Sherfey, 74 S.W.3d 777, 782 (Ky. App. 2002) (citations and quotation marks omitted). When a trial court applies the law to facts supported by substantial evidence, its award of custody "will not be disturbed unless it constitutes an abuse of discretion." Abuse of discretion is defined as "arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." *Id.* at 782-83.

Leslie argues that the court failed to consider numerous factors: whether Jeremy's military service would adversely affect the child's best interest; whether the age of the child would be a factor; and the fact that Jeremy was twenty-three years of age at the time of the hearing and was already in his third "family type relationship."

Leslie contends that Jeremy may be reassigned "anywhere the military needs him" -- including Afghanistan, Iraq, or the United States' border with Mexico. She testified that Jeremy used to be out on a boat but that he is now assigned to a station. She explained that he is "required to go wherever they [the Coast Guard] need him." Jeremy testified, however, that he works in the Coast Guard accounting department from 8:00 a.m. to 3:00 or 4:00 p.m., and that his "days of going out on a ship for the Coast Guard" are over.

As to her contention that the court failed to consider Trinitie's age, Leslie has not explained what impact it should have had on the court's decision. The court tried to formulate a visitation schedule that would not be unduly burdensome on either of the parents or to their very young child. Finally, while Jeremy is in his third "family-type"

relationship (he has a child from a relationship that occurred before his marriage to Leslie), there was ample evidence presented at the hearing to support the trial court's conclusion that his current marriage is stable. Under the circumstances, we cannot conclude that the custody arrangement ordered by the court was either unreasonable or unfair.

Leslie's second argument is that the trial court erred in requiring her to pay $180.00 in child support. After noting that Leslie had no regular employment, the court stated that "there is no reason why she should not be able to earn at least minimum wage." The court imputed an income of the minimum wage to Leslie and calculated the amount of child support accordingly.

Leslie is currently a student who commutes to Southeast Community College in Cumberland, Kentucky, where she is studying to be a registered nurse. She argues that she will probably be required to abandon her studies and take a minimum wage job in order to pay the child support. She contends that if she is allowed to continue her education, she will ultimately be in a much better position financially to contribute to her child's future support. She argues that the payments should be held in abeyance until she finishes her schooling.

KRS 403.212(2)(d) provides that:

> [i]f a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income, except that a determination of potential income shall not be made for a parent who is physically or mentally incapacitated or is caring for a very young child, age three (3) or younger, for whom the parents owe a joint legal responsibility. Potential income shall be determined based

> upon employment potential and probable earnings level based on the obligor's or obligee's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community. A court may find a parent to be voluntarily unemployed or underemployed without finding that the parent intended to avoid or reduce the child support obligation.

KRS 403.212.

"[W]hether a child support obligor is voluntarily underemployed is a factual question for the trial court to resolve." *Gossett v. Gossett*, 32 S.W.3d 109, 111 (Ky.App. 2000). Such a finding cannot be set aside on appeal if it is supported by substantial evidence. *Id.*, citing CR 52.01. "[T]he court must consider the totality of the circumstances in deciding whether to impute income to a parent." *Polley v. Allen*, 132 S.W.3d 223, 227 (Ky.App. 2004).

At the hearing, Leslie testified that she had not yet been accepted into the nursing program but that she was working on her prerequisites. She attends three classes that meet on Mondays and Wednesdays from 12:30 p.m. to 2:45 p.m. She testified that she has not succeeded in finding any part- time jobs -- except helping a friend put up promotional fliers. Her college expenses are paid by financial aid, and she resides with her parents. Her mother is a nurse's aide who works the night shift, and her father drives a school bus. Leslie has never held a job.

In light of this testimony, we cannot conclude under our standard of review that the court abused its discretion in imputing an income to Leslie. Her class attendance totals less than five hours per week, and her living expenses are paid by her parents. There was substantial evidence to support the court's finding that she should be able to

hold minimum-wage employment in order to contribute to the expenses of raising her child. Thus, that finding may not be overturned by this court.

The order of the Harlan Circuit Court is hereby affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Crockett Carter
Harlan, Kentucky

BRIEF FOR APPELLEE:

Karen S. Davenport
Harlan, Kentucky