

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000611-ME

CHERRI RAE MANIES

APPELLANT

v.

APPEAL FROM MADISON FAMILY COURT
HONORABLE JEAN CHENAULT LOGUE, JUDGE
ACTION NO. 06-CI-00346

RONALD WARF

APPELLEE

OPINION
AFFIRMING

** ** * * * **

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

COMBS, CHIEF JUDGE: Cherri Rae Manies appeals from a custody order entered by the Madison Family Court on March 8, 2007. After our review, we affirm.

Manies and Ronald Warf, the appellee, were never married. They are the parents of twin boys, who were born on March 17, 1998. In March 2006, Warf filed the underlying action seeking custody of the children. A few days later, Manies filed a similar action in Fayette Circuit Court. Warf also filed an application for immediate relief requesting that Manies return the children from Fayette County to to his custody in

Madison County. The court granted Warf's request for immediate relief. The court ordered that the boys be returned to Warf's custody in Madison County and that the "status quo of the children . . . be maintained pending a hearing on the Motion for Temporary Custody filed previously herein." In her filed response, Manies also sought custody of the boys.

Following an extensive hearing conducted in August 2006, the family court entered findings of fact, conclusions of law, and a judgment awarding the parties joint custody. Warf was designated the primary residential custodian. Manies was granted liberal visitation and was ordered to pay child support pursuant to the statutory guidelines. This appeal followed.

A family court has broad discretion in custody matters. *Krug v. Krug*, 647 S.W.2d 790 (Ky. 1983). We review the court's findings of fact for clear error, and we must give deferential regard to the opportunity of the trial court to judge the credibility of the witnesses. *Polley v. Allen*, 132 S.W.3d 223 (Ky.App. 2004). A factual finding is not clearly erroneous if it is supported by substantial evidence. *Sherfey v. Sherfey*, 74 S.W.3d 777 (Ky.App. 2002).

The provisions of Kentucky Revised Statutes (KRS) 403.270(2) require that the court grant custody based on the best interests of the child as determined with reference to several relevant factors, which may include the following:

- (a) The wishes of the child's parent or parents. . . 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 interest;
- (d) The child's adjustment to his home, school, and community; [and]
- (e) The mental and physical health of all individuals involved;
- (f) Information, records, and evidence of domestic violence. . . .

The court may elect to grant *joint custody* to the children's parents if it is in the children's best interests. KRS 403.270(5). Indeed, joint custody must now be treated with the same deference as sole custody by courts in making a determination based on the best interests of the child. *Scheer v. Zeigler*, 21 S.W.3d 807, 811-812. (Ky. App. 2000).

During the hearing, the family court granted wide latitude to the parties in presenting their testimony. They produced evidence regarding the children's relationships and interaction with their parents and other adults; their adjustment to home, school, and community; and their exposure to domestic violence. However, the court did exclude much of the salacious evidence that the parties sought to present since it did not appear relevant to the children's best interests.

Following its review of the evidence, the court found that neither party had “lived an exemplary lifestyle.” Findings of Fact, Conclusions of Law, and Judgment at 2. It observed, however, that Warf had been the children's primary caretaker “for at least the last six (6) years” and that he had been “actively engaged in their upbringing and athletic activities.” *Id.* The court concluded that under the circumstances, the best interests of the children would be best served by awarding joint custody while designating Warf as the primary residential custodian.

Manies argues that the family court erred by failing to make certain factual findings as required by KRS 403.270(2). Specifically, she argues that the court failed to consider the evidence in light of KRS 403.270(2)(c) and (e), requiring consideration of the children's interaction and interrelationships with significant others -- as well as the physical and mental health of the individuals involved. In addition, she contends that the court erred by failing to consider the extent to which domestic violence and abuse had affected the children and their relationship to both parents.

Manies did not file a motion requesting more specific findings of fact pursuant to the provisions of Kentucky Rules of Civil Procedure (CR) 52.02. CR 52.04 provides that:

A final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02.

Nonetheless, we have carefully examined the whole record in this case. Both attorneys were zealous and conscientious advocates for their clients' respective positions. As a result, most of the testimony was carefully tailored to address the factors outlined in KRS 403.270(2).

The testimony before the court indicated that Manies lived and worked in Washington, D.C., between 2000 and 2006 and that her interaction with the children had been sporadic. The boys lived with their father during this time. Warf did their laundry, cooked their meals, took them to school, and was active in their numerous youth league

sporting commitments. Warf's neighbors described his involvement with the children as age-appropriate and loving. He was regarded as a consistent disciplinarian, and other parents entrusted their sons to his care without reservation. The boys had attended a single elementary school and were characterized as well adjusted and well-behaved by teachers, administrators, and the parents of their peers. The boys' counselor related that they appeared content in their father's care. He testified that each of them had expressed anger toward their mother, however -- particularly with respect to her pursuit of their custody. It was his opinion that the boys were suffering tremendous stress as a result of the legal proceedings.

The descriptions of the boys' behavior during visitation periods with their mother mirrored the counselor's impressions. Their interactions with their mother and the other adults who cared for them during visitation periods seemed generally volatile and unpleasant. Manies was regarded by other parents as inconsistent and uninvolved. The observations of Manies's limited relationship with the boys by neighbors and peers was not positive.

Our review of the evidence persuades us that the court carefully considered all of the pertinent statutory criteria before concluding that the best interests of the children would be more positively served by granting the parties joint custody and by designating Warf as the boys' primary residential custodian. There was no way to avoid the painful reality that neither Manies nor her family had played an integral role in the children's upbringing; that neither she nor her family had become a part of their social

network; that neither she nor her family had been a consistent source of comfort or care. The evidence before the court indicated that Warf had shown a commitment to the children that was wholly unmatched by Manies or her family.

Ample evidence supported the family court's findings that Warf had been the boys' primary caregiver for many years and that he had been actively engaged in their upbringing. The court did not abuse its discretion by concluding that the best interests of the boys would be well served by awarding joint custody to their parents and by designating Warf as the primary residential custodian. Finally, in light of the evidence, we do not agree that the trial court overlooked the extent to which domestic violence and abuse had affected the children and their relationship to both their parents. We have found no error.

Consequently, the judgment of the Madison Family Court is affirmed.

VANMETER, JUDGE, CONCURS.

MOORE, JUDGE, CONCURS IN RESULT.

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