

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001234-ME

CLARK ALLEN JUDD

APPELLANT

v. APPEAL FROM GREEN CIRCUIT COURT
HONORABLE DAN KELLY, JUDGE
ACTION NO. 07-CI-00189

AMANDA BETH JUDD

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON AND KELLER, JUDGES; ISAAC,¹ SENIOR JUDGE.

KELLER, JUDGE: Clark Allen Judd (Clark) appeals from the trial court's order

awarding the parties joint custody of their minor daughter, designating Amanda

Beth Judd (Amanda) as primary residential parent,² and setting time-sharing. On

¹ Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute(s) (KRS) 21.580.

² The court used the term "primary residential custodian"; however, in *Pennington v. Marcum*, 266 S.W.3d 759, 765 (Ky. 2008), the Supreme Court of Kentucky stated that the appropriate term is "primary residential parent." Therefore, we use that term when discussing the court's order.

appeal, Clark argues that the trial court's order was not based on the facts, which, if followed, would have compelled the court to designate him as primary residential parent. Amanda argues that there were more than sufficient facts to support the court's decision. Having reviewed the record, we affirm.

FACTS

Clark and Amanda married on May 3, 2002, separated on May 30, 2007, and their marriage was dissolved on March 25, 2009. One child, a daughter, was born of the marriage.

Initially, the parties agreed to temporary joint custody with Clark having time-sharing every other weekend. However, in July 2008, Clark filed an affidavit alleging that the daughter had been sexually abused while in Amanda's care. The court entered an emergency order, awarding temporary custody to Clark. Amanda then filed a motion seeking a return of custody. The parties apparently resolved their differences and entered an agreed order on August 22, 2008, stating that they would resume temporary joint custody with week-to-week time-sharing. The agreed order also provided that Amanda would not permit her daughter to have any contact with the two boys who allegedly abused her.

Thereafter, the Kentucky State Police conducted an investigation of the abuse charges. During the course of that investigation, the daughter, the parties, their parents, and one of the alleged perpetrators were interviewed. The daughter underwent a physical examination that revealed abnormal findings "suggestive/consistent with child sexual abuse." However, the records from the

investigation also indicate that the examination findings could have been the result of an accident and an underlying medical condition. Furthermore, the daughter, when interviewed a second time, stated that she had lied, and that Clark had told her to do so. It appears from the record that the abuse claim against one of the alleged perpetrators was found to be unsubstantiated and the other claim was found to be substantiated. However, there was no finding of neglect or abuse against either Amanda or Clark.

In addition to the above, the parties testified at the final custody hearing and presented evidence calling into question each others' parenting skills and character. Briefly, Clark alleged that Amanda had a spotty work record; had participated in an adult website; had smoked marijuana and used cocaine; had assaulted him; and spent three days in rehabilitation. Amanda alleged that Clark had a problem with alcohol and drug abuse; that she and Clark smoked marijuana and used cocaine; that Clark participated in the adult website; that Clark had issued various threats against her and her family; that Clark had assaulted her and their daughter; and that Clark had been unemployed and living with his parents for several years.

Based on the evidence, the court found that both parties had a close relationship with the daughter; that the daughter had a close relationship with her maternal half-sister and her paternal grandparents; that Clark lead a "dual life," attending to the daughter when she was with him and "partying hard all week long" when she was not with him; and that Amanda had "remarried into what appears to

be a stable relationship, has established independent living for her and her children and has a record of steady employment." Having made the above findings, the court awarded the parties joint custody and awarded Clark time-sharing according to the "standard visitation schedule."

Clark filed a motion to alter, amend, or vacate asking the court to make additional findings of fact and arguing that the court misconstrued his testimony about "partying," his employment, and his living arrangements. The Court granted Clark's motion in part, amending its order by specifically quoting his testimony regarding those matters. Furthermore, the court noted that the additional findings requested by Clark consisted of

a litany of facts reflecting negatively on [Amanda] and were addressed in finding #6 in the courts [sic] order. Equally negative behavior by the petitioner could have been adopted by the court in the findings. The court told both parties, at the hearing, that neither would qualify for parent of the year and each had terrible records in regard to their behavior in the care of this child. However, the court found that both parties were attempting to change their behavior, therefore, the court did not base its decision on their past bad behavior. The court based its decision on what the court thought would be best for the child based on the current circumstances.

Following entry of the order denying his motion to alter, amend, or vacate, Clark filed this appeal.

STANDARD OF REVIEW

The standard of review in a child custody case is whether the lower court's factual findings are clearly erroneous. *B.C. v. B.T.*, 182 S.W.3d 213, 219 (Ky. App. 2005). "A finding of fact is clearly erroneous if it is not supported by

substantial evidence, which is evidence sufficient to induce conviction in the mind of a reasonable person." *Id.* The questions for the reviewing court are not whether it would have come to a different conclusion, but whether the family court applied the correct law and whether the family court abused its discretion. *Id.* at 219-20.

ANALYSIS

On appeal, Clark argues that the evidence compelled a finding in his favor. In support of his argument, Clark cites *Krug v. Krug*, 647.S.W.2d 790 (Ky. 1983), for the proposition that a "trial court does not just consider whether the past misconduct of the parties has adversely affected a child, but rather it must consider whether the misconduct indicates it is likely to adversely affect the child's well-being in the future."

However, Clark misreads the Supreme Court's holding. In *Krug*, the appellant argued that the trial court impermissibly admitted and relied on her past misconduct in awarding custody to the appellee. In addressing that issue, the Supreme Court held that:

when the misconduct of a proposed custodian is advanced as a factor in the determination of custody, evidence of such misconduct may be heard and received, but before giving any consideration to such misconduct, the court must conclude, in his reasonable discretion, that such misconduct has affected, or is likely to affect, the child adversely. If such a determination is made, the trial court may then consider the potential adverse effect of such misconduct as it relates to the best interests of the child.

Id. at 793. (Emphasis added). The Supreme Court did not hold that the trial court was required to consider such misconduct, only that it could. Furthermore, the trial

court herein considered Amanda's past misconduct, as well as Clark's, and determined that designating Amanda as primary residential parent is in the daughter's best interest.

The parties demonstrated an inability to agree about time-sharing and who should be the primary residential parent. Therefore, the trial court was forced to make those determinations for them. Clark's arguments to the contrary notwithstanding, the evidence did not compel the trial court to designate him rather than Amanda as primary residential parent. In fact, as the trial court noted, both parties exhibited significant deficits as parents. As is often the case, the trial court was faced with the dilemma of forging a solution in the best interest of the minor child, which it did. We discern no reversible error in its choice; therefore, we affirm.

CONCLUSION

For the foregoing reasons, we affirm the trial court's award of joint custody, its designation of Amanda as primary residential parent, and its award of standard time-sharing to Clark.

ALL CONCUR.

BRIEF FOR APPELLANT:

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