

RENDERED: December 27, 1996; 2:00 p.m.
NOT TO BE PUBLISHED

96-CA-0660-MR

CRYSTAL FAYE GHOLSON

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LEON M. EICHENHOLZ, SPECIAL JUDGE
CIVIL ACTION NO. 95-FC-004212

BRUCE JOSEPH BRAWNER

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: DYCHE, GUIDUGLI and SCHRODER, Judges.

GUIDUGLI, JUDGE. This is an appeal from a judgment of the Jefferson Circuit Court awarding custody to the appellee/father, Bruce Joseph Brawner (Brawner) of a child born out of wedlock. The child has resided with his mother, Crystal Faye Gholson (Gholson) since birth, a period of over five years, prior to this action for custody being commenced by the father. Appellant argues that the trial court erred by awarding custody to the child's father, by not utilizing KRS 403.340(2) and (3) in that this case was actually a modification of a prior custody agreement and by not considering awarding joint custody under KRS 404.270(4). Having reviewed this matter thoroughly, and having found that the court's judgment is not clearly erroneous, we affirm.

The trial court made specific findings of fact in which it set forth, in detail, the testimony presented at the hearing and the history of the parties as it relates to this case. However, some basic facts must be delineated so that the issues can be defined.

Aaron J. Brawner-Gholson was born on June 1, 1990, to the parties hereto. He was born out of wedlock and the parties never married. Paternity was established and appellee has regularly paid court ordered child support and faithfully maintained weekly visitation with the child. Both parties testified that the other was a good parent. There was no testimony that the child suffered from any physical, mental, moral or emotional harm. The primary emphasis of the testimony before the court was that appellee was employed earning approximately \$50,000 per year, lived in a house he purchased in Jeffersontown with his new family and was able to provide a better standard of care and environment for Aaron than appellant. Appellant is an unemployed single mother of four children, living in an apartment in an area of downtown Louisville that the trial judge characterized as being a "difficult neighborhood in which to live from a standpoint of crime and safety."

The court also heard from a representative from the Louisville Police Department as to the number and nature of police runs to appellant's neighborhood and from Richard K. Johnson, Ph.D., a licensed clinical psychologist who performed a court ordered custodial evaluation on the parties and child.

The trial court set forth specific findings of fact as to the evidence it considered in awarding sole custody to the father in its order entered February 8, 1996. It also correctly set forth the standard it utilized in making its determination to be KRS 403.270. By doing so, the court found that this was an original custody action and not, as appellant argues, a modification of a previous custody determination which would have required the court to follow KRS 403.340. Although paternity of the child was established by previous court action in 1990, the district court, who entered the paternity/child support order, did not have statutory authority to address the custody issue. Therefore, appellant's argument, whether properly preserved or not, simply does not have any legal basis or validity.

Since KRS 403.340, the modification of custody statute, is not applicable, appellant argues that the trial court erred when it based its custody determination primarily on economic factors. A review of the record, as well as the court order, finds this not to be the case. In addition to the financial circumstances of the parties, the court specifically considered the child's educational opportunities, the parties' housing arrangements, the crime rate and related problems of appellant's neighborhood, her unemployment, the professional opinion of the court appointed psychologist, and the attitude and demeanor of the parties. Having heard the testimony and giving equal consideration to each parent, the court found that it would be in

the best interest of the child to award sole custody to the father.

Although poverty alone should never be the sole reason for denying custody, the court must, in part, base its decision on the existing living condition of the parties. Jones v. Jones, Ky. App., 577 S.W.2d 43 (1979). "Though every effort must be made to exclude or offset the element of economic disadvantage, it cannot be completely ignored if the ultimate objective is the welfare of the child. Regrettably it is a fact of life and there is no way to deny its relevance." Calhoun v. Calhoun, Ky., 559 S.W.2d 721, 723 (1977). On appellate review, this Court will not interfere with the trial court's discretion in determining custody unless that discretion is abused. Davis v. Davis, Ky. App., 619 S.W.2d 727 (1981).

It appears that the trial court did not make its ruling solely on economic factors as appellant contends, but rather that the judge weighed all relevant factors under KRS 403.270 as it relates to the best interest of the child in awarding custody of the child to the father and that his ruling is obviously not clearly erroneous.

Appellant also argues that the trial court erred when it failed to consider joint custody. Citing Chalupa v. Chalupa, Ky. App., 830 S.W.2d 391 (1992) and Squires v. Squires, Ky., 854 S.W.2d 765 (1993), appellant contends that the trial court must not have considered joint custody since the court did not, in fact, grant joint custody. Again, this is not the case. The

trial court judge specifically stated in his findings that he had considered Dr. Johnson's testimony and was impressed with said report and found the evaluation to be very thorough in assessing the parties. As appellant states in her brief, Dr. Johnson recommended that the court award joint custody with primary residency with the father. To now claim that the judge did not consider that evidence when making his final determination as to sole custody simply ignores the evidence and facts.

In this matter, the Jefferson Circuit Court made specific findings based upon all the evidence presented and applied the correct standard under KRS 403.270 as to awarding custody to the father based upon the best interest of the child. Custody questions are among the most difficult issues to be resolved. However, in this case, we cannot say that the findings of the trial court were clearly erroneous. CR 54.01.

Therefore, we affirm.

ALL CONCUR.

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