

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002833-MR

MARY CONLEY

APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE KELLEY ASBURY, JUDGE
ACTION NO. 98-CI-00094

JIMMY CONLEY

APPELLEE

OPINION
VACATING AND REMANDING
** **

BEFORE: BUCKINGHAM, EMBERTON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a decree of dissolution which awarded the parties joint custody of their minor daughter, despite the fact that appellant had a domestic violence order against appellee and appellee had committed acts of domestic violence against appellant in the past. We agree that the trial court improperly failed to set out findings of fact to support its award of custody as required by CR 52.01. Thus, we vacate the order and remand for the court to make adequate findings such that the basis of his award of custody can be determined by a reviewing court.

Appellant, Mary Conley, and appellee, Jimmy Conley, were married in 1989. One child was born of the marriage, Paige Conley, born March 27, 1990. On January 29, 1998, Mary filed a petition for dissolution of marriage. In said petition, she sought sole custody of Paige. She also certified in the petition, pursuant to KRS 403.150: that in 1997, she obtained a temporary restraining order against Jimmy in West Virginia, which was later dismissed because Jimmy could not be served; that in 1997, she obtained an Emergency Protective Order against Jimmy in the Boyd District Court, which was later withdrawn by her; and that she had recently obtained another Emergency Protective Order against Jimmy in the Boyd District Court, which was dismissed because he could not be served. In his response to the petition, Jimmy did not seek custody of Paige and thereafter did not contest Mary being awarded temporary custody of Paige. The court did set out a temporary visitation schedule for Jimmy.

On April 16, 1998, Mary filed a Domestic Violence Petition alleging that Jimmy had been constantly making abusive and threatening phone calls to her and her neighbors for a month and that, as a result, Paige was unable to sleep or concentrate on her homework.¹ On that date, the court (the same judge as in the dissolution matter) entered an Emergency Protective Order forbidding Jimmy from calling Mary. After a full hearing on the

¹The record of this domestic violence matter was not included in the record before us, even though Mary included it in her Designation of the Record. However, we were able to view the petition and the subsequent Emergency Protective Order and Domestic Violence Order because it was attached in the appendix to Mary's appellate brief.

matter, the court entered a Domestic Violence Order on May 8, 1998 requiring that Jimmy stay at least 1,000 feet away from Mary and Mary's family members, except as may be ordered in the future in the divorce case. The court also ordered Jimmy to attend counseling.

On April 29, 1998, Jimmy filed a show cause motion and an affidavit asserting that Mary was not complying with the visitation schedule. Thereafter, the parties began filing various motions regarding visitation and how visitation would be effectuated. On May 15, 1998, Jimmy filed an amended response to the petition for dissolution, seeking custody of Paige.

After a hearing on the divorce action, the Domestic Relations Commissioner entered his findings of fact in which he recommended that a custody evaluation be conducted by the Cabinet for Families and Children. Mary thereafter filed exceptions to the report, arguing that a custody evaluation would be an unjust burden on her since she had recently moved out of state and because of the evidence regarding the incidences of domestic violence committed by Jimmy and the fact that she had always been Paige's primary caretaker. The court sustained Mary's objections with regard to the custody evaluation and referred the matter back to the Commissioner to hear testimony from the minor child.² On October 22, 1998, the court entered its findings of fact, conclusions of law, and decree of dissolution in which it ordered that the parties share joint custody of Paige, with Mary having

²Neither the transcript or tape of that interview nor the transcript or tape of the original hearing before the Commissioner is in the record before us.

primary physical possession of the child. However, the court failed to make any findings as to the basis of the award of joint custody. This appeal by Mary followed.

We first note that Jimmy did not file an appellee's brief in this case. Thus, we can accept Mary's statement of facts as correct. See Whicker v. Whicker, Ky. App., 711 S.W.2d 857 (1986). Also, an amicus curiae brief was filed in support of Mary on behalf of the Kentucky Youth Advocates and the Kentucky Domestic Violence Association.

Mary argues that the trial court committed reversible error when it failed to make findings of fact to explain its decision to award joint custody. CR 52.01 provides, "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment. . ." It has been specifically held that this rule applies to child custody cases. Reichle v. Reichle, Ky., 719 S.W.2d 442 (1986). As the trial court's judgment stands now, we have no way of reviewing Mary's other arguments contesting the joint custody award because we have no way of knowing why the court granted joint custody. Thus, we vacate the judgment and remand the matter for the court to make specific findings of fact as to its decision on custody. In so doing, we remind the court of the factors it must consider in KRS 403.270 in determining the best interests of the child, including section (2)(f), "Information, records, and evidence of domestic violence as defined in KRS 403.270." See Stafford v. Stafford, Ky. App., 618

S.W.2d 578 (1981). In addition, KRS 403.270(3) provides that "[i]f domestic violence and abuse is alleged, the court shall determine the extent to which the domestic violence and abuse has affected the child and the child's relationship to both parents." We also would remind the court that implicit in an award of joint custody is the fact that the parties will be able to cooperate in the future to effectuate joint custody. Mennemeyer v. Mennemeyer, Ky. App., 887 S.W.2d 555 (1994); Squires v. Squires, Ky., 854 S.W.2d 765 (1993).

For the reasons stated above, the judgment of the Boyd Circuit Court is vacated and remanded for specific findings of fact as to custody consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

Elizabeth G. Opell
Ashland, Kentucky

ATTORNEYS FOR AMICI CURIAE,
KENTUCKY YOUTH ADVOCATES:

Valerie J. Salley
Louisville, Kentucky

ATTORNEY FOR AMICI CURIAE,
KENTUCKY DOMESTIC VIOLENCE
ASSOCIATION:

Lisa A. Beran
Frankfort, Kentucky