

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-002052-MR

ELIZA BRANHAM CONNER

APPELLANT

v.

APPEAL FROM POWELL CIRCUIT COURT  
HONORABLE LARRY MILLER, JUDGE  
ACTION NO. 99-CI-00071

TIMOTHY R. PECK

APPELLEE

OPINION  
AFFIRMING

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BEFORE: EMBERTON, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal by the mother from a judgment awarding joint custody with the father having primary residential custody of the child. The mother argues that the court erred in awarding the father primary residential custody when he had no contact with the child for the first six years of her life. Given the evidence regarding the living conditions in the mother's home, we cannot say the court abused its discretion in giving the father primary residential custody of the child. Hence, we affirm.

Appellant, Eliza Conner, and appellee, Timothy Peck, have never been married but are the biological parents of Denisha

Branham, born March 19, 1992. In a 1993 paternity action, Timothy was adjudged to be Denisha's father and was ordered to pay child support. Although Timothy paid child support, it is undisputed that Timothy had no contact with and showed no interest in Denisha until 1998.

In 1998, Timothy's wife, Tabitha Peck, called Eliza and asked if she and Timothy could have visitation with Denisha. Thereafter, Timothy began having visitation with Denisha on a regular basis. At that time, Timothy had the child on weekends, and during the summer of 1998, Denisha spent four weeks with Timothy and Tabitha. In early 1999, problems with the visitation began and Eliza stopped allowing Timothy visitation.

On February 26, 1999, the Powell District Court placed Denisha in the temporary emergency custody of Timothy after social workers found unsanitary conditions in the home of Eliza and her husband. Responding to a report of unsanitary conditions, social workers inspected the mobile home and found that the bathtub contained animal feces which had reportedly been there for a year. There was no running water, and the family used a bucket for a toilet. The commode was used as a trash can, and garbage, including used feminine napkins, littered the floor. Spoiled food was found on the kitchen counter. Further, dangerous tools and a handgun were left out in the home within reach of the child. The Emergency Custody Order was dissolved several days later, after the mobile home had been cleaned.

On March 15, 1999, Timothy filed a petition seeking sole custody of Denisha. A full evidentiary hearing was held

before the Domestic Relations Commissioner on May 17, 1999, in which testimony was taken from the parties, several family members, and three social workers. The Commissioner also interviewed Denisha. Based on the evidence adduced at the hearing, the Commissioner recommended that the parties share joint custody with Timothy having primary residential custody. On August 4, 1999, the trial court entered its findings of fact and conclusions of law in which it followed the Commissioner's recommendations and awarded the parties joint custody with Timothy being the primary residential custodian. From that order, Eliza now appeals.

Eliza first argues that she is entitled to de facto custodial status as to the child since Timothy essentially abandoned the child early on. We view this argument as a red herring. Eliza's argument is based on KRS 403.270 wherein there are provisions for a de facto custodian to be considered in determinations of custody. Eliza maintains that since she meets the definition of a "de facto custodian" under KRS 403.270(1)(a) ("the primary caregiver for, and financial supporter of, a child who has resided with the person for a period . . . of one (1) year or more if the child is three (3) years of age or older . . ."), she should be given preference as the person who should continue as custodian. From our reading of KRS 403.270, it is clear that a "de facto custodian" means a nonparent custodian. In any event, even if Eliza was a de facto custodian, under KRS 403.270(1)(b), she would only be given the same consideration as a parent in a determination of custody. Thus,

she would have no preference over Timothy. Since Eliza is the child's parent, KRS 403.270(1) has no relevance.

The thrust of Eliza's argument is that she should be entitled to preference over Timothy because she took care of Denisha for six years, while Timothy had no contact with the child during that time. While we would agree that the fact that she was Denisha's sole caretaker for six years is entitled to great weight, there are other factors to be considered in determining the best interests of the child. See KRS 403.270(2). We would further note that Timothy's parental rights were never terminated as a result of his abandonment, and, thus, he still has the same right to custody of the child as Eliza.

KRS 403.270(5) allows the court to award joint custody if it is in the best interest of the child. The trial court possesses broad discretion in determining the child's best interest. Dull v. George, Ky. App., 982 S.W.2d 227 (1998). The court's findings regarding custody will not be reversed unless they are clearly erroneous. Reichle v. Reichle, Ky., 719 S.W.2d 442 (1986).

Besides the deplorable condition of Eliza's home, there was evidence that Denisha has a bed-wetting problem and Eliza fails to properly clean her bedding. As a result, the child smells of urine at school and is teased by her classmates about her odor. There was also evidence that Eliza does not make Denisha brush her teeth and, as a result, some of her baby teeth have rotted. The court also noted that Denisha suffers from kidney infections and allergies, both of which require prompt

medical attention. Finally, there was evidence that Denisha was often looked after by her stepfather's mother, Edna Campbell, whose husband had been charged with sexual abuse and medical neglect of his son, although said charges have not been substantiated.

Eliza and her husband, James Conner, have been married for two years and have one child together, Jasmine, born in December of 1997. Eliza and James both worked at the same metal plant for four years, but Eliza was recently laid off at the time of the hearing. Eliza testified that she has much family support in raising Denisha and that Denisha is very close to her cousins who live nearby. She stated that Denisha's best friend lives next door. According to Eliza, Denisha has always made good grades in school.

The evidence regarding Timothy established that he was convicted of Driving Under the Influence in 1991 and has had two prior convictions for Public Intoxication. He has had no alcohol-related convictions in the past two years. The trial court found that at the time of the hearing, Timothy did not have a problem with alcohol.

Timothy and Tabitha have been married since 1994 and have no children together. However, Timothy has a four-year-old child by another woman (not his wife) and has no contact with that child. Timothy has had the same job at Cooper Manufacturing for three years and does some farming. Tabitha works outside the home at a bank. Timothy testified that when Denisha is not in

school, Tabitha's mother is available to take care of Denisha until they get home from work.

The evidence established that during the four-week period that Denisha stayed with Timothy and Tabitha, Denisha fared very well. She attended Bible school and made friends with other children. When the social worker visited Timothy's home, she noted that Denisha showed no signs of wanting to be elsewhere. There was also evidence that the child's hygiene was better in her father's care.

Eliza testified that her sister told her about one incident in a Wal-Mart store wherein Tabitha shook Denisha. However, the court specifically found that Tabitha does not pose a danger to Denisha.

The trial court specifically viewed the above findings in light of the factors in KRS 403.270(2) and concluded that it was in the best interest of Denisha that the parties share joint custody and that Timothy be the primary residential custodian. The court recognized that Denisha has a close bond with her mother and stepfather and their families, and that up until 1998, that was the only family she had ever known. The court also acknowledged Timothy's lack of interest in the child for the first six years of her life. The court essentially weighed those factors against the evidence regarding the home environment provided by Eliza and found:

Although Denisha may have adjusted to the only family and community she has known, it does not overcome the deplorable unsanitary and unsafe home environment in which this child was residing in February of 1999. It is not unreasonable, at least to some extent,

to attribute Denisha's health problems to her unfavorable living conditions.

From our review of the record, the trial court's findings were supported by substantial evidence. Further, we cannot say that the court abused its discretion in adjudging that it is in the best interest of Denisha that her father have primary residential custody of her. We would agree that in the interest of the child's physical and emotional well-being (KRS 403.270(2)(e)), the abhorrent living conditions in the mother's home outweigh the fact that her father has unfortunately only recently taken an interest in having a relationship with the child.

For the reasons stated above, the judgment of the Powell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Stephen R. Johnson  
Campton, Kentucky

BRIEF FOR APPELLEE:

Robert G. King  
Stanton, Kentucky