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Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002680-MR

JUDY JONES TRAUGHBER (NOW GREEN) APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN D. MINTON, JR., JUDGE
ACTION NO. 93-CI-00247

DARRELL TRAUGHBER APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BUCKINGHAM, JOHNSON AND MILLER, JUDGES.

JOHNSON, JUDGE: Judy Jones Traughber (now Green) appeals from an order entered by the Warren Circuit Court on July 19, 1999, that changed the primary residential custodian of her daughter from her to her former husband, Darrell Traughber. Since the change of the primary residential custodian in this joint custody case occurred prior to this Court's rendition of Scheer v. Zeigler,[1]

[1]Ky.App., 21 S.W.3d 807 (2000).

which overruled Mennemeyer v. Mennemeyer,[2] the circuit court, in part, followed the Mennemeyer test. However, since the circuit court went beyond the Mennemeyer test and also found proper grounds for a change in custody under the "serious endangerment" standard of KRS[3] 403.340, we affirm on the latter grounds.

Judy and Darrell were married on August 24, 1991, and their marriage was dissolved by decree on March 3, 1994. Their daughter, Susan Paige, was born on March 23, 1992. Pursuant to the divorce decree, the parties were awarded joint custody of Susan with Judy "to act as the primary custodial parent."

On March 25, 1998, Darrell filed a motion for change of custody wherein he asked the circuit court "to grant him sole custody or, in the alternative, designate him as the residential custodial party sharing joint custody of the minor child." In support of his motion, Darrell stated that he had been "granted custody by the Warren District Court by virtue of a Temporary Custody Order." Darrell also filed in support of his motion his affidavit wherein he swore that "[t]here have been numerous hearings before the Warren District Court regarding my former wife, Judy . . . , and her use of marijuana, and other circumstances in the home that are inappropriate to be occurring within a home with a six-year-old child present."

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[2]Ky.App., 887 S.W.2d 555 (1994).

[3]Kentucky Revised Statutes.

On April 22, 1998, Darrell supplemented his motion for change of custody by filing a second affidavit, wherein he reiterated his previous allegations and provided more specific claims that Judy was having serious parenting problems with her two teenage daughters from a previous marriage. Darrell claimed that approximately three years previously "the two older girls were removed from Judy's care [; that one of Judy's girls] has had numerous problems, including being hospitalized . . . [for] serious emotional and drug problems, including suicide attempts." Darrell also stated:

> 9. Susan has told me a number of things that caused me concern as to what goes on in Judy's household. Susan has talked about marijuana cigarettes and appears to have inappropriate knowledge for a five year old regarding marijuana, which is how old she was when she started talking to me about these events.
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> 10. Judy's household at 606 Nutwood could only be described as chaotic. I lived there off and on during the time that I was married to Judy. My disagreement with how Judy raises Susan and her other children is that she does not discipline the children and the children are constantly back-talking to her. Judy does not correct the children for misbehavior and there are no consequences for misbehavior. The environment is hectic and chaotic. There is a total emphasis on superficial appearances and not on the actual care and welfare of the children's mental and moral environment.
>
> 11. I believe my daughter, Susan, would be subjected to emotional, mental and physical endangerment if custody were returned to Judy. Furthermore, Judy and I cannot agree as to an environment that would be safe for my child. The environment that Susan was in while in her mother's care was injurious to

> her emotional, moral, mental and physical health. The environment was chaotic when I lived there and I believe that Judy is not able to change her parenting methods and cannot be cooperative with me in good faith if she is the custodial parent.
>
> 12. It would be in the best interest of my daughter, Susan, if I were granted her sole custody or, in the alternative, if I were designated her residential custodian in order to protect her from the unhealthy environment that exists in her mother's care.

Darrell also filed an affidavit from his current wife, Geavonda Traughber, that alleged Judy had engaged in sexual conduct with a man that was accidently witnessed by Susan and that she had smoked marijuana with one of her teenage daughters. Geavonda also expressed her opinion "that Susan has had a serious endangerment of her physical, mental, moral or emotional health. . . [and] that it would be harmful and injurious to Susan's present and future health to be returned to her mother."

On April 30, 1998, Judy filed a motion seeking "an immediate return of . . . Susan." The Domestic Relations Commissioner heard evidence in this matter at hearings conducted on May 29, June 17, and July 15, 1998, but he did not file his report until June 3, 1999. The Commissioner noted under Mennemeyer, supra, that "[t]his is a case of joint custody, and the court finds that the joint custodians are unable or unwilling to rationally cooperate with each other regarding decisions affecting the upbringing of the child, and that said behavior constitutes an inability of one or both parties to cooperate for the benefit of the child and therefore the court should consider

the best interests of the child in reaching the decision to modify custody." After discussing evidence related to various problems of both parents, the Commissioner observed that "[n]either party has done all that well with what they have." The Commissioner concluded his report by recommending that "it would be in the best interests of Susan for Judy to be designated as residential custodian, with the parties to maintain joint custody."

On June 14, 1999, Darrell filed exceptions to the Commissioner's report as well as numerous motions. The motions included a motion for a new hearing due to the long delay from the date of the last hearing on July 15, 1998, and the date the Commissioner's report was filed on June 3, 1999; a motion for an <u>in camera</u> interview of Susan; and a motion for more specific findings of fact. Judy responded to Darrell's exceptions, but did not file her own exceptions.

In its order changing the residential custodian that was entered on July 19, 1999, the circuit court indicated that following the hearing on exceptions it "reviewed the whole record, including the videotapes of the DRC's hearings." The circuit court found "that the record supports the DRC's recommended finding that Darrell has shown the parties' inability to cooperate which justifies a review of joint custody . . . [and it] adopt[ed] the recommended finding that joint custody would be in the child's best interests." However, "contrary to the DRC's recommendation, the Court [found] from the evidence that the best

interests of the child require that Darrell be designated as Susan's primary residential custodian." Judy filed multiple post-judgment motions under CR 52.04 and 59.05, which were denied on October 6, 1999. This appeal followed.

Judy's first issue concerns whether the circuit court erred in ruling that Darrell had met the threshold requirements of Mennemeyer that "in non-consensual modification situations involving joint custody, . . the trial court may intervene to modify a previous joint custody award only if the court first finds that there has been an inability or bad faith refusal of one or both parties to cooperate."[4] Since Mennemeyer has been overruled by Scheer, we are no longer concerned with the Mennemeyer threshold requirement. Instead, we must determine whether the circuit court's ruling meets the requirements of Scheer or whether it must be vacated and remanded for further findings.

This Court in an en banc opinion in Scheer held:

> [J]oint custody is an award of custody which is subject to the custody modification statutes set forth in KRS 403.340 and KRS 403.350 and that there is no threshold requirement for modifying joint custody other than such requirements as may be imposed by the statutes [footnote omitted].

Under KRS 403.340(2), a prior custody decree shall not be modified by the circuit court

> unless it finds, upon the basis of facts that have arisen since the prior decree or that

[4]Mennemeyer, supra at 558.

were unknown to the court at the time of entry of the prior decree, that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interests of the child.

KRS 403.340(2) and (3) continue by providing:

In applying these standards, the court shall retain the custodian appointed pursuant to the prior decree unless:

(a) The custodian agrees to the modification;

(b) The child has been integrated into the family of the petitioner with consent of the custodian; or

(c) The child's present environment endangers seriously his physical, mental, moral, or emotional health, and the harm likely to be caused by a change of environment is outweighed by its advantages to him.

(3) In determining whether a child's present environment may endanger seriously his physical, mental, moral, or emotional health, the court shall consider all relevant factors, including, but not limited to:

(a) 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 interests;

(b) The mental and physical health of all individuals involved;

(c) Repeated or substantial failure, without good cause as specified in KRS 403.240, of either parent to observe visitation, child support, or other provisions of the decree which affect the child, except that modification of custody orders shall not be made solely on the basis of failure to comply with visitation or child support provisions,

> or on the basis of which parent is more likely to allow visitation or pay child support;
>
> (d) If domestic violence and abuse, as defined in KRS 403.720, is found by the court to exist, the extent to which the domestic violence and abuse has affected the child and the child's relationship to both parents.

In addition to finding that the evidence satisfied the Mennemeyer threshold "that there has been an inability or bad faith refusal of one or both parties to cooperate," the circuit court also noted:

> 3. Moreover, it was implied in Mennemeyer, 887 S.W.2d at 557, that if a party to joint custody can meet the higher burden of proving grounds sufficient to modify an order of sole custody under KRS 403.340, there were per se sufficient grounds to modify joint custody. Thus, if a party to joint custody can prove that the child's present environment in the custody of the other parent endangers the child's physical, mental, or emotional health, that should be enough to likewise modify joint custody, even if the evidence establishes that the parties have been cooperating in good faith with one another.

The circuit court continued by stating:

> 4. Judy's open marijuana use in the home, the chaotic environment in Judy's home, the mental and emotional state of the half-sisters whom Judy could not control, and the interventions by CFC and the district court removing Susan from the home are all evidence of an inability on Judy's part to make rational decisions regarding the child regardless of the level of cooperation between Darrell and her. And, while Dr. Reeves was not able to state the magic words "serious endangerment," the Court concludes that the evidence taken as a whole points to an endangerment of Susan's mental and emotional health under the current joint

> custody arrangement unless Darrell is made the primary residential custodian.
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> 5. Using the standard set out in KRS 403.270, the Court concludes that the best interests of the child would be promoted by continuing joint custody with Darrell to be the primary residential custodian. The best interests of the child further dictate that Judy will have liberal opportunity to have Susan with her. KRS 403.270 and KRS 403.320

As a general rule, a trial court has broad discretion in determining the best interests of children when awarding child custody. Not infrequently, a trial judge may draw upon common sense and personal life experiences, as well as those of mankind, to determine that certain conduct or environment will adversely affect children.[5] In reviewing a child custody determination, the standard of review is whether the factual findings of the trial court are clearly erroneous.[6] Findings of fact are clearly erroneous if they are manifestly against the weight of the evidence or not supported by substantial evidence.[7] The trial court is in the best position to evaluate the testimony and weigh the evidence, so an appellate court should not substitute its own opinion for that of the trial court.[8] A trial court's decision on an award of custody will not be disturbed absent an abuse of

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[5] Krug v. Krug, Ky., 647 S.W.2d 790, 793 (1983).

[6] CR 52.01; Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986); Basham v. Wilkins, Ky.App., 851 S.W.2d 491, 493 (1993).

[7] Wells v. Wells, Ky., 412 S.W.2d 568, 571 (1967); Poe v. Poe, Ky.App., 711 S.W.2d 849, 852 (1986).

[8] Reichle, supra.

discretion.[9] The discretion granted to a trial court allows it to adopt a conclusion on the facts before it, if such conclusion could have been reached by a reasonable person based on the evidence. Abuse of discretion implies that the trial court's decision is unreasonable or unfair.[10]

We hold that the circuit court findings of fact are based on substantial evidence of record and not clearly erroneous. Furthermore, in making its determination of custody based on those findings of fact, the circuit court did not abuse its discretion. The circuit court specifically found "that the evidence taken as whole points to an endangerment of Susan's mental and emotional health under the current joint custody arrangement unless Darrell is made the primary residential custodian" [emphasis added]. While the circuit court continued by making reference to the "best interests of the child" standard provided for in KRS 403.270, to us it is clear that the circuit court found and concluded that under KRS 403.340(2)(c) Susan's present environment with Judy as the primary residential custodian "endanger[ed] seriously [her] physical, mental, moral or emotional health, and the harm likely to be caused by a change of environment is outweighed by its advantages to [her]." Obviously, in determining whether the change of custody is

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[9] Dudgeon v. Dudgeon, Ky., 458 S.W.2d 159, 160 (1970); Cherry v. Cherry, Ky., 634 S.W.2d 423, 425 (1982).

[10] Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994); City of Louisville v. Allen, Ky., 385 S.W.2d 179, 182-84 (1964).

advantageous to the child, the circuit court must consider the child's best interests. We do not believe the circuit court's reference to the best interests standard of KRS 403.270 precludes it from also making a determination of serious endangerment under KRS 403.340.

The second issue raised by Judy concerns the delay of over one-year from the date of the last hearing before the Commissioner on July 15, 1998, and the circuit court's decision on July 19, 1999. Judy states that "[t]hese facts create a situation in which the Court is rendering a decision predicated on evidence which is not timely as to the current status of the parties involved." She claims that "due to the lack of timeliness of the decision being made in this case, the Warren Circuit Court erred in basing its decision on improper and dated evidence as well as its failure to take additional, current proof in this matter."

Judy takes particular exception to the following finding by the circuit court:

> Susan has now lived with Darrell continuously since March, 1998. In the pursuit of a secure home, which the record demonstrates to be a need paramount to the welfare of this child, the Court cannot ignore that Susan has been living in Darrell's home now for almost 16 months. The time factor weighs heavily in favor of maintaining what appears to be a healthy status quo for Susan. Moreover, the evidence indicates that Susan is well adjusted in her father's home and is enrolled at Cumberland Trace Elementary School. She will attend the same school beginning three weeks from now if Darrell continues as the residential custodian.

Judy points out that KRS 454.350(2) provides:

> Where a report, findings, or recommendations of a commissioner or hearing officer are required by statute or rule as a prerequisite to an order or judgment by the circuit or district Court the same shall be filed within ninety (90) days of the conclusion of the trial or hearing at which the commissioner or hearing officer presided.

Judy claims that if the Commissioner's report had been filed within the 90-day period, the status quo issue would have favored her because she "was the primary caregiver to the child from the time of the child's infancy through the time period immediately preceding the May 1998 hearings."

In response, Darrell notes that "KRS 403.270(1)(d) requires the trial Court to consider the child's adjustment to his home, school, and community." Darrell claims that Judy's failure to fully exercise the visitation she was granted with Susan contributed to the status quo favoring Darrell. He also claims that Judy "did not submit to the trial Court that there had been any problems with Susan's present living situation [and that] [i]f there had been such problems certainly those facts which may have supported a new or supplemental hearing would have been brought to the Court's attention by affidavit."

While neither party has presented any case law that addresses this issue, we are acutely aware of the difficult problem that the parties and the courts face in giving the proper weight to the stability of the child's living arrangements in making a child custody determination. Obviously, great

discretion has to be placed with the trial court in such matters; and we do not believe that the trial court abused its discretion concerning the status quo factor as a factor favorable to Darrell being the primary residential custodian.

While Judy objected to the delay, she has failed to specifically identify any additional evidence that she was not allowed to present to the trial court. We fail to see how merely the taking of additional evidence by the trial court would have benefitted Judy's case. Obviously, to help Judy's case, the additional evidence would have had to have been favorable to Judy or unfavorable to Darrell. The additional delay in taking additional evidence would have added time to Susan's residing primarily with Darrell, whereby the status quo factor would have, without some evidence to the contrary, favored Darrell's position even more.

In discussing her third issue, Judy expands her criticism of the trial court for "its failure to take additional proof in this matter to support its finding of facts, and [claims it] abused its discretion in altering the Commissioner's report in a manner which does not properly reflect the record." Judy takes particular exception to the underlined portions of the trial court's findings in paragraphs 6 and 7:

> 6. Since Susan's removal from the home, Judy says that she has given up marijuana. Her claim is supported by negative drug tests performed routinely pursuant to the district court's order and continued by her voluntarily. She has successfully completed the reunification plan designed for her by

> CFC,[11] including parenting classes. The two older children are back home stabilized, according to Judy, but with ongoing psychotherapy and medication. Judy married Murphy Green in 1998 and moved to a large new house with a swimming pool and ample space to accommodate the family comfortably. Murphy is a retired medical doctor. Judy believes that her personal life is under control, her older children's turbulent lifestyle is calmer, and she is anxious for Susan's return. Judy is a loving parent for Susan and there is a close bond between this mother and daughter. <u>But, unless Judy has learned stronger parenting techniques in the two years that CFC has put her through their various programs, Judy is not capable of providing the control and discipline of her older daughters necessary to protect Susan</u> [emphases added].
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> 7. According to Judy, Susan interacts well with her half-sisters in her home, especially the older half-sister. But, the Court is required also to consider the mental health of all of the individuals involved. <u>The Court finds that the mental health of Susan's half-sisters, which has been a major contributing factor to the chaos of Judy's home, has yet to be demonstrated as sufficiently settled to warrant Susan's permanent return</u> [emphases added].

Judy states that "[t]he parties can only speculate as to what current evidence the Court has relied upon in making the decision referenced in paragraph 7." Darrell does not specifically address this argument in his brief.

As we stated previously, we have reviewed the record and we believe the trial court's findings are supported by substantial evidence and are not clearly erroneous. Judy puts great emphasis on the Commissioner's recommendation being

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[11] Cabinet for Families and Children.

favorable to her, but obviously the trial court was authorized to give the Commissioner's report whatever weight it chose.[12] As we noted concerning the status quo issue, Judy has failed to specify any evidence that she wished for the trial court to consider that was rejected by the trial court. The trial court's obligation was to decide the case based on the evidence before it. If the trial court had wanted to allow for the submission of additional evidence, it certainly would have been within its discretion to have done so. But, in the same regard, the trial court's determination to decide the case on the evidence before it was also certainly not an abuse of discretion.

Judy concludes her brief with an argument alleging cumulative error. Having found no error, there are no grounds for finding cumulative error. Accordingly, the order of the Warren Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

David F. Broderick
Andrew A. Stanford
Bowling Green, KY

ORAL ARGUMENT FOR APPELLANT:

David F. Broderick
Bowling Green, KY

BRIEF AND ORAL ARGUMENT FOR APPELLEE:

Pamela C. Bratcher
Bowling Green, KY

[12] Eiland v. Ferrell, Ky., 937 S.W.2d 713, 716 (1997).