

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-001532-MR

CLIFTON HOLLOWELL AND  
JUANITA HOLLOWELL

APPELLANTS

v. APPEAL FROM CALDWELL CIRCUIT COURT  
HONORABLE BILL CUNNINGHAM, JUDGE  
ACTION NO. 96-CI-00238

BELINDA KNIGHT AND  
BRADLEY DEAN KNIGHT

APPELLEES

OPINION  
AFFIRMING

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BEFORE: JOHNSON, KNOPE, AND MILLER, JUDGES.

MILLER, JUDGE: Clifton Hollowell and Juanita Hollowell (the Hollowells) bring this appeal from a June 12, 2000, judgment of the Caldwell Circuit Court. We affirm.

Appellees, Bradley Dean Knight and Belinda Knight<sup>1</sup>, are the biological parents of Dakota Knight, born April 9, 1997. Bradley and Belinda were separated at the time of Dakota's birth. Belinda and the child resided with the maternal grandparents, the Hollowells.

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<sup>1</sup>Although Belinda Knight is a named party to this appeal, she has failed to file an appellate brief.

On September 14, 1998, by agreement of the parties, Belinda was awarded sole custody of Dakota and Bradley was granted visitation rights. From April 1997 to October 1999, the evidence indicates that Belinda moved in and out of the Hollowells' home, but the Hollowells' residence remained Dakota's primary residence. In October 1999, Belinda was arrested on drug charges. Consequently, a child neglect and dependency action was commenced in the Caldwell District Court. Temporary custody of the child was placed with the Hollowells. In March 2000, Bradley filed a custody petition in the Caldwell Circuit Court. The parties stipulated that the Hollowells had been the primary caretakers of the child for a period longer than one year and thus qualified as de facto custodians under Kentucky Revised Statutes (KRS) 403.270. Following a hearing, Bradley and the Hollowells were awarded joint custody with primary physical custody exercised by Bradley. This appeal follows.

The Hollowells contend that the circuit court committed reversible error by failing to properly consider KRS 403.340. That statute states, in relevant part, as follows:

- (1) No motion to modify a custody decree shall be made earlier than two (2) years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe that:
  - (a) The child's present environment may endanger seriously his physical, mental, moral, or emotional health; or
  - (b) The custodian appointed under the prior decree has placed the child with a de facto custodian.

We think the circuit court correctly applied KRS 403.340. The court cited to a district court order which removed custody from Belinda and temporarily placed it with the Hollowells. The circuit court also found that Belinda had been convicted of a drug offense and had tested positive as recently as February 2000 for drugs. The circuit court observed that Belinda currently lives with her boyfriend in Lyon County and that the child resides with the Hollowells in Caldwell County. Based upon the above evidence, the court concluded that Belinda's sole custody seriously endangered the child's physical, mental, moral, or emotional health under KRS 403.340. Upon the whole, we cannot say that the circuit court's findings were clearly erroneous, nor can we say the circuit court abused its discretion in so holding. Ky. R. Civ. Proc. 52.01.

The Hollowells also argue that KRS 403.340 somehow applies to determine custody of the child between them and Bradley. The Hollowells were awarded temporary custody by the district court. In Shifflet v. Shifflet, Ky., 891 S.W.2d 392, 393 (1995), the Court held that "[c]learly the standards set forth in this statute [KRS 403.340] are intended to apply only to modifications of **permanent awards of custody.**" As the Hollowells had only been granted temporary custody, we do not believe that KRS 403.340 is applicable.

The Hollowells maintain that the circuit court erred by failing to grant them equal consideration as mandated by KRS 403.270 in determining custody. We think not. The circuit court clearly viewed the Hollowells as de facto custodians and placed

them "upon equal footing" with the natural father, Bradley. Indeed, the court specifically concluded that "in determining whether custody should be placed with the grandparents, who are de facto custodians, or the natural father, the Court will use the best interest of the child standard as established by KRS 403.270." We are of the opinion that the circuit court engaged in the correct legal analysis as mandated by KRS 403.270(2).

The Hollowells further contend that the circuit court committed reversible error by determining that the best interest of Dakota mandated a joint custody award between them and Bradley, with Bradley exercising primary custodianship. The Hollowells also maintain that the circuit court abused its discretion by relying solely upon the age of the Hollowells in determining the best interest of Dakota. Our standard of review is enunciated in Eviston v. Eviston, Ky., 507 S.W.2d 153 (1974), wherein the Court stated:

In reviewing the [custody] decision, the test is not whether we would have decided differently but whether the findings of the trial judge were clearly erroneous or he abused his discretion.

In deciding the best interest of Dakota, the circuit court specifically found:

[T]he more difficult question is whether it is in the best interest of the child to be in the custody of his maternal grandparents or his father.

In making this determination, the Court must not look just to the present, but to the future. Undoubtedly the maternal grandparents provide a good home for this three year old. However, it is equally convincing that the father is capable of providing a good home, especially in the

environment in which he now lives. Both of the maternal grandparents are in their late fifties. The most difficult years in raising this young boy remain in the future, especially the teenage years when they will be moving into old age.

Young Cody might very well be in the best of hands to remain in the primary custody of his maternal grandparents over the next few years. However, stability is also critical to his well being. Therefore, it is in Cody's best interest that the Court fashion a custody arrangement at this time under which there will be the least amount of upheaval and custodial chaos in his future. At the same time, his bonding with the maternal grandparents and his mother is sufficient that they should also share a substantial portion of his life.

Considering all of these things, the Court finds that it is in the best interest of Cody that joint custody be awarded to the Petitioners, Clifton Hollowell, Juanita Hollowell, and Belinda Knight, and the Respondent, Bradley Dean Knight. . . .

After January 1, 2001, primary physical custody shall vest with the Respondent/father, Bradley Dean Knight, subject to reasonable visitation awarded to the Petitioners, Clifton Hollowell and Juanita Hollowell. . . .

As is evident from its opinion, the circuit court balanced many factors in determining the best interest of Dakota. It looked to the ability of Bradley to take care of the child, the relationship that Bradley has with the child, and his contribution to the support of the child. The court also noted that Mr. Hollowell suffered from progressive heart disease and took into account the age of the grandparents. The circuit court admitted that the grandparents had provided a good and stable home for Dakota during the first three years of his life. Upon the whole, we do not believe that the circuit court abused its

discretion by considering the age of the grandparents. The circuit court considered a plethora of factors in deciding the best interest of the child. While we may not have found as the circuit court, we cannot say that its findings of fact were clearly erroneous. Id. Hence, we are of the opinion that the circuit court did not commit reversible error by awarding joint custody of the child to Bradley and the Hollowells with Bradley serving as primary custodian.

For the foregoing reasons, the judgment of the Caldwell Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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BRIEF FOR APPELLEE, BRADLEY  
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