

RENDERED: AUGUST 31, 2001; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-001419-MR

BELINDA L. PRIEST

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE JANET P. COLEMAN, JUDGE  
ACTION NO. 98-CI-00999

KURT E. PRIEST

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI, HUDDLESTON AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Belinda L. Priest, pro se, has appealed from an order of the Hardin Circuit Court awarding sole custody of her daughters, Julie and Cynthia Priest, to her former husband, Kurt E. Priest; dividing the couple's property and debt; and ordering that Belinda pay Kurt \$648.20 in additional child support for the period of June 2, 1999, through February 29, 2000. Having concluded that all of Belinda's claims of error are without merit, we affirm.

Kurt and Belinda were married on March 12, 1987, in Texas. Two children were born of their marriage. Julie was born on July 19, 1988, and Cynthia was born on March 4, 1995. It was later shown through DNA testing that Kurt was not the biological father of either child.<sup>1</sup> The marriage was stormy to say the least. During their approximate twelve-year marriage, there were five to seven different domestic violence incidents reported, with each spouse accusing the other as being the aggressor. Problems regarding child neglect began to surface in 1997. Army Community Services intervened at one point and temporarily took custody of the children. In addition, the Cabinet for Families and Children has been involved with the family since February 2, 1998.

The procedural history of this case is both tortured and voluminous, but the important points to consider in this appeal are as follows: On June 23, 1998, Kurt filed for dissolution of the marriage and asked to be awarded sole custody of the two children. A hearing was scheduled before the Domestic Relations Commissioner of the Hardin Circuit Court on September 15, 1998.<sup>2</sup> The Commissioner recommended that Belinda be found not suitable as a joint custodian and that Kurt be awarded sole

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<sup>1</sup>Kurt Priest was a member of the armed services and he was away from Belinda on different occasions for extended periods of time. The record is void of any involvement in these proceedings by the biological fathers of the two children.

<sup>2</sup>Amid great confusion, it was later decided by the trial court that each parties' counsel had apparently agreed that the September 15, 1998 hearing was a final custody hearing.

custody of the children. The Commissioner also recommended that Belinda not be allowed visitation until she underwent extensive counseling.

On December 9, 1998, the marriage was dissolved, but the trial court reserved ruling on custody of the children and division of the couple's property and debt. On December 10, 1998, Kurt was awarded temporary custody of the children, and Belinda was granted limited, supervised visitation. On March 26, 1999, the trial court adopted the recommendations from the previous Commissioner's reports and awarded Kurt sole custody of the children. On April 24, 2000, following extensive disclosures regarding the couple's property and debt, the Commissioner filed a report recommending division of their property and debt and the setting of child support. These recommendations were adopted, in part, by the trial court on May 19, 2000. The parties filed various motions seeking modification of the trial court's pendente lite orders. The trial court held a hearing on June 20, 2000, on all pending motions; and in a final and appealable order entered on June 22, 2000, denied the motions to modify its previous orders. This appeal followed.

Belinda claims (1) Kurt failed to prove de facto custodianship and the trial court erred in awarding him sole custody; (2) there was insufficient evidence to warrant a denial of joint custody; (3) the division of property and debt was inequitable; and (4) the trial court erred in increasing her child support obligations retroactively.

Belinda argues that Kurt failed to establish his status as a de facto custodian:

KRS<sup>3</sup> 403.270(1)(a) states[,] "Any period of time after a legal proceeding has been commenced by a parent seeking to regain custody of the child shall not be included in determining whether the child has resided with the person for the required minimum period." Since Belinda began legal proceedings in Hardin Juvenile Court in June 1997 to regain custody of her children, the time from June 1997 to present does not, by law, apply for determining if Kurt qualifies as a de facto custodian [citation to record omitted].

We are limited in our review of this issue since we have not been provided with a record of the evidence regarding this matter.<sup>4</sup> It is well-settled that "[i]n the absence of the presentation of facts in the manner prescribed by law, an appellate court must assume that the findings are sufficiently supported."<sup>5</sup> Therefore, in the absence of any evidence before us that would refute the trial court's findings, we must assume that the facts support Kurt's status as a de facto custodian.

In this regard, the trial court found as follows:

Kurt had full custody of the children from June of 1997 through February of 1998. He provided the sole care for these children and the sole financial support during that

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<sup>3</sup>Kentucky Revised Statutes.

<sup>4</sup>We also note that we have gained little insight from the parties' briefs. Furthermore, appellee failed to comply with Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(iv) which requires, ". . . ample supportive references to the record and citations of authority pertinent to each issue of law . . . ."

<sup>5</sup>Oeltjen v. Oeltjen, 251 Ky. 739, 65 S.W.2d 1004 (1933).

time. However, even prior to that time Kurt was the primary caregiver and financial supporter of these children. Belinda has been highly unstable for quite some time, and Kurt has struggled to keep this family together. If not for Kurt, these children would remain in foster care indefinitely [emphasis added].

It is the finding of this court that by clear and convincing evidence Kurt has proven that he meets the definition of de facto custodian as set out pursuant to KRS 403.270(1)(a).

Absent any evidence to the contrary, we certainly cannot hold these findings to be clearly erroneous.<sup>6</sup>

Belinda also argues there was insufficient evidence to support the denial of joint custody:

We find that a great deal of the Commissioner's report regarding custody references Belinda's conduct that did not affect her relationship with the children . . . . KRS 403.270(3) specifically states, "the court shall not consider conduct of a proposed custodian that does not affect his relationship to the child."

As can be seen from the Commissioner's report, this argument is wholly without merit:

Among other episodes, Belinda has used profanity in front of case workers and the children. She has falsely accused a case worker of kicking her. She has had to be restrained from approaching a worker in an intimidating and threatening manner . . . . She has cancelled and not appeared for visits with the children. On one occasion, she demanded the return of all the children's clothing to her. She even demanded the shoes off their feet during a visit. This demand was made in [the children's] presence.

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<sup>6</sup>See Kentucky Rules of Civil Procedure (CR) 52.01.

Belinda's activities and behavior exhibit . . . an appalling lack of concern or caring for her own children. On most of the occasions mentioned above the children were present.

Chris Long testified that he has supervised visits of Kurt and Belinda separately with their children. He echoes the testimony of Helen Mudd in that Belinda has never been cooperative, and in fact, the children are often very upset after the visits with their mother . . . . After visits with Belinda, the children have resumed troubling behaviors, such as bed wetting and outbursts of temper.

Thus, contrary to Belinda's claims, it is evident from these findings that Belinda's actions have had a direct and negative effect on her children. On the other hand, testimony showed that following supervised visits with Kurt, the children "elicit a positive emotional response" and that "the children are always very happy to see him." Accordingly, there was ample evidence to support the trial court's decision to deny Belinda joint custody.

Belinda makes a related argument that the trial court erred by not joining the biological fathers as parties to this action. Even if Belinda were correct, this error would not affect her rights.

Belinda further claims the trial court erred in the division of the couple's property and debt:

During the review of the record it has come to the attention of Belinda that the disclosure statement represented in the record as her[s] is not the disclosure statement she submitted to the court. Someone has rewritten this statement,

attaching the pages with Belinda's signature.

Belinda's real disclosure statement shows that Kurt removed over \$5,100.00 from the joint checking account shortly after the separation in June 1998 . . . . At no time was Belinda give[n] credit for this money that Kurt removed from the account. [citations to record omitted].

It is unclear when Belinda learned of this alleged tampering with the evidence. However, from our review of the record, it appears that this issue has never been presented to the trial court.

In Payne v. Hall,<sup>7</sup> the former Court of Appeals stated:

The trial court was given no opportunity to pass on these contentions, which is a prerequisite here to appellate review. Com., Dept. of Highways v. Taylor County Bank, Ky., 394 S.W.2d 581 (1965). In 7 Kentucky Practice, Clay 215 it is said, 'Clearly before a party may request appellate review of such matters under those circumstances, the trial court must be given an opportunity to decide the questions raised.' [citations omitted].

Accordingly, this claim of error cannot be considered in this appeal. If Belinda did not learn of this alleged tampering of the evidence in sufficient time to raise the issue in her CR 59 motion to alter, amend or vacate, then she should have sought relief from the trial court pursuant to CR 60.02. Then, if the trial court deems it necessary it can hold an evidentiary hearing and make the appropriate findings. Aside from these bare allegations, there is no evidence in the record before us to support Belinda's claim that Kurt removed the \$5,100.00 from the checking account. Accordingly, there is no

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<sup>7</sup>Ky., 423 S.W.2d 530, 532 (1968).

basis for this Court to hold that the trial court erred in this matter.

Belinda further argues that the trial court erred in the division of the couple's mutual funds:<sup>8</sup>

We also find that the court failed to make an equitable distribution of the mutual funds by failing to liquidate the funds prior to division while knowing that the value of stock based mutual funds fluctuates daily. By awarding Belinda a set dollar amount and delaying the order dividing the property by eleven months, Kurt has enjoyed the benefit of collecting the capital gains, dividends, and interest on Belinda's share of the funds, thus giving Kurt a much more than equitable share of the marital funds by about \$4,000.00. [citation to record omitted].

This argument is also unavailing.

In Quiggins v. Quiggins,<sup>9</sup> this Court stated:

Finally, the appellant argues that the trial court erred in its division of the marital property given the guidelines set forth in KRS 403.190. We disagree. That statute does not dictate that marital property be divided equally. Rather, it states that the trial court "shall divide the marital property in just proportions considering all relevant factors . . . ." The trial court's findings with respect to the division of marital property will not be disturbed unless shown to be clearly erroneous.

In dividing the mutual fund, the trial court made the following findings:

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<sup>8</sup>It should be noted that neither Kurt nor Belinda offered any evidence to the Commissioner establishing the true value of the mutual funds.

<sup>9</sup>Ky.App., 637 S.W.2d 666, 669 (1982).



After Kurt's \$1500.00<sup>10</sup> is deleted from the Janus fund, there remains \$12,700.00 to be divided equally between the parties. That would give each party \$6,350.00. After adding \$550.00<sup>11</sup> to Belinda's share, she should receive \$6,900.00, however, as stated previously, Belinda has already paid herself \$5,000.00 of this portion.<sup>12</sup> Therefore, Belinda should receive \$1,900.00 from the Janus fund. The balance of the Janus and Berger funds should be awarded to Kurt.

We believe the trial court's division of the mutual funds was equitable. The trial court considered the fact that Belinda had already liquidated almost 1/3 of the Janus fund, and that she was going to receive all of the household contents. Accordingly, based upon the limited record before us, we cannot hold the trial court's finding to be clearly erroneous.

Finally, Belinda argues the trial court erred in awarding Kurt child support retroactively:

[T]he court retroactively increased Belinda's child support obligation thus reversing its earlier decision, while failing to release Belinda from her obligation to attend expensive counseling and visitation sessions. Belinda followed the recommendations of the court in good faith expending literally thousands of dollars to comply with the orders of the court while believing that her child support would only be \$60.00 per month during this time. For the court to retroactively raise the child support obligation of Belinda after the fact is nothing less than a breach [sic] of contract.

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<sup>10</sup>Compensation to Kurt for Belinda receiving all of the contents of the marital home.

<sup>11</sup>Her half of the Berger fund.

<sup>12</sup>Belinda liquidated \$5,000.00 to pay for legal services.

In Snow v. Snow,<sup>13</sup> this Court stated:

Child-support awards may be modified only as to installments accruing after notice of the motion for modification and then "only upon a showing of a material change in circumstances that is substantial and continuing." KRS 403.213(1). As with the original determination of a child support award, the decision whether to modify an award in light of changed circumstances is within the sound discretion of the trial court. Price v. Price, Ky., 912 S.W.2d 44 (1995); Rainwater v. Williams, Ky.App., 930 S.W.2d 405 (1996). Under KRS 403.213(2), a change in circumstances is rebuttably presumed to be substantial if application of the child-support guidelines (KRS 403.212) to the new circumstances would result in a change in the amount of child support of 15% or more.

In the case at bar, Kurt filed a motion to modify child support on June 2, 1999, because Belinda had obtained employment. Her monthly income had more than doubled, going from \$892.67 per month to \$1,9997.67 per month. This increase in income certainly was sufficient to constitute a material change in circumstances, which warranted a modification in Belinda's child support obligation. Accordingly, the trial court did not abuse its discretion by retroactively increasing her monthly support payments.

For these reasons, the orders of the Hardin Circuit Court are affirmed.

ALL CONCUR.

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<sup>13</sup>Ky.App., 24 S.W.3d 668, 672 (2000).

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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