

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002571-MR

ALSHIELDA BROWN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 01-CI-03207

DON JENKINS

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: DYCHE, GUIDUGLI, AND McANULTY, JUDGES.

McANULTY, JUDGE: This is a child custody case in which Alshielda Brown (Alshielda) appeals from the Fayette Circuit Court's order awarding sole custody of Alshielda's minor child, Alfonzo Jenkins (Alfonzo), to Don Jenkins (Don), Alfonzo's natural father. Because we conclude that the trial court did not abuse its discretion in awarding sole custody, we affirm.

Alshielda gave birth to Alfonzo on January 24, 1994. At the time, Alshielda was unmarried, and Don was married to his current wife, Nancy Jenkins. Don and Nancy Jenkins have been

married since February 17, 1990, and have three children, ages 13, 11 and 8.

After Alfonzo's birth, Don had visitation with Alfonzo beginning at age two weeks and continuing every weekend. Paternity was established in Fayette Circuit Court when Alfonzo was seven months old.

Alfonzo had significant behavior problems as a kindergartner (the 1999-2000 school year). Specifically, Alfonzo would become defiant toward his teachers, would throw tantrums during which he would sometimes hit and would throw or push furniture around. During the kindergarten school year, Alshielda asked Don to help her and the school in controlling Alfonzo's behavior.

In July 2000, Alshielda and Don discussed Alfonzo's progress and decided to try having Alfonzo stay with Don during Alfonzo's first grade school year. As a result, Alfonzo changed elementary schools. At the new school, Alfonzo's tantrums and outbursts still occurred, although they became less frequent and less severe. In July 2001, Alfonzo returned to live with Alshielda.

This case began in August, 2001, when Don filed a petition for sole custody of Alfonzo. In addition, Don filed a motion for an order awarding him temporary sole custody of Alfonzo, which the trial court granted on September 7, 2001.

Moreover, the trial court ordered a custodial evaluation of both parties' homes.

On September 10, 2001, Don filed a motion to set visitation and to stop child support. On September 17, 2001, the trial court set Alshielda's visitation for each Friday after school until 9:00 a.m. on Sunday and each Tuesday after school until 8:00 p.m. Moreover, the trial court granted Don's request to discontinue his child support obligation. Alshielda filed a motion to reconsider the trial court's order awarding temporary sole custody to Don. The trial court conducted a hearing on the motion, but ultimately denied Alshielda's request.

Trial was held on October 28 and 29, 2002. Additional facts established at trial will be developed later in this opinion. Thereafter, the trial court awarded sole custody of Alfonzo to Don, concluding that

"[b]oth parents are loving and caring parents for this child. This Court is faced with the issue of determining the most appropriate primary custodian for this child who would allow as much contact as possible with the noncustodial parent. Considering all the relevant factors under KRS 403.270(2), the Court finds that it is in the best interest of this child that the Petitioner/Father have sole custody of Alfonzo with regularly scheduled time sharing with the Respondent/Mother."

In addition to the custody determination, the trial court also established a timeshare arrangement and ordered Alshielda not to take Alfonzo to Race Street, a high crime area

in Fayette County, when she has visitation with him. Finally, the trial court ordered Alshielda to pay child support.

In support of the trial court's conclusions, it found as follows:

3. Alfonzo Jenkins, age eight, born January 24, 1994, is the child of the Petitioner Don Jenkins (Father) and Respondent Alshielda Brown (Mother).
4. The parties were never married to each other, but had a relationship for approximately nine (9) years beginning in 1992.
5. Alfonzo lived with Mother from his birth until July 2000.
6. Father had visitation with Alfonzo starting at age two weeks and then began overnight visitation when the child was ten months old.
7. In kindergarten, Alfonzo began exhibiting serious behavioral problems described as throwing tantrums, knocking over and throwing chairs and fighting with his teacher(s).
8. In July 2000, after kindergarten ended, the Respondent/Mother suggested that Alfonzo live with the Father and go to school from the Father's home.
9. From July 2000 until the end of the 2000-2001 school year, Alfonzo lived with his Father and his Father's family and became integrated into the Father's family.
10. The Father continued to pay child support to the Mother for the first year that Alfonzo lived in his home.
11. Alfonzo then lived with his Father from September 7, 2001, until the present time. The Father has not requested child support from the Mother, and none has been ordered.
12. Alfonzo has continued to exhibit behavioral problems in school since kindergarten but it is clear that the incidences have decreased in frequency, intensity and seriousness.
13. Aflonzo has a good relationship with his step-mother Nancy Jenkins and with his half-sisters.

14. Alfonzo loves his Mother and his Father and is comfortable in both homes.
15. Father and step-mother do not work outside the home. They are supported by the income produced from assets purchased with step-mother's inheritance.
16. The Mother does not work outside the home and receives government housing, subsidies and financial aid from her grandmother.
17. Mother has some difficulty setting boundaries for Alfonzo and has not followed the advice of removing his TV, VCR and Nintendo from his bedroom while he was in kindergarten. From the testimony, this Court believes it is clear that Alfonzo has not been properly supervised by the Mother and has been found further away from home than would be safe and appropriate for his age.
17. The Mother has a prior felony record that occurred prior to his birth and which was not reported truthfully to the evaluator in this case. She has a number of friends, many of whom have criminal records, and she has allowed them to babysit, transport and have significant contact with Alfonzo. She has allowed Alfonzo to be on Race Street which is inappropriate.

Alshielda raises several issues on appeal. First, Alshielda argues that the trial court erred in considering misconduct on the part of Alshielda without finding that such misconduct was likely to adversely affect Alfonzo. Second, Alshielda argues that the trial court should have awarded joint custody because it found that both parents were loving and caring parents for Alfonzo, but made no finding that Don and Alshielda were unable to cooperate concerning Alfonzo. Third, Alshielda argues that the trial court's findings of fact were clearly erroneous. Finally, Alshielda argues that the trial

court erred in using Alshields's residence in government housing against her in awarding custody to Don.

The trial court possesses broad discretion in determining whether joint custody or sole custody serves the child's best interest. See Squires v. Squires, Ky., 854 S.W.2d 765, 768 (1993). Moreover, "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01. In accord, our review is limited to whether the findings of the trial court are clearly erroneous or whether the trial court abused its discretion in awarding sole custody to Don. See Carnes v. Carnes, Ky., 704 S.W.2d 207, 208 (1986). "[F]indings of fact are clearly erroneous only if there exists no substantial evidence in the record to support them." V.S. v. Commonwealth, Ky. App., 706 S.W.2d 420, 424 (1986).

KRS 403.270 provides:

- (2) The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all relevant factors including:
 - (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;
 - (b) The wishes of the child as to his custodian;
 - (c) 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;
 - (d) The child's adjustment to his home, school, and community;
 - (e) The mental and physical health of all

individuals involved;

(f) Information, records, and evidence of domestic violence as defined in KRS 403.720;

(g) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;

(h) The intent of the parent or parents in placing the child with a de facto custodian; and

(i) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school.

(3) The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child. If 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.

(5) The court may grant joint custody to the child's parents, or to the child's parents and a de facto custodian, if it is in the best interest of the child.

Alshielda argues that the trial court's findings as to her 17-year-old prior felony conviction and the criminal records of her friends were not relevant because there was no evidence that such conduct affected her relationship with Alfonzo. In support, Alshielda cites Moore v. Moore, Ky., 577 S.W.2d 613, 614 (1979), which held that KRS 403.270 requires proof that a parent's misconduct affects the relationship of the parent to the child; otherwise, the misconduct is irrelevant. However, we conclude, that Alshielda's reliance on Moore is misplaced.

First, in any child custody case, no set of facts and circumstances will be exactly the same, and the overriding consideration is the best interest of the child.

Second, in Krug v. Krug, Ky., 647 S.W.2d 790, 791 (1983), the Kentucky Supreme Court granted discretionary review in order to further address the procedures required by KRS 403.270 and by its earlier decision in Moore. The question was "whether a party seeking to show misconduct of a spouse as a factor in the determination of child custody must first introduce evidence showing that the alleged misconduct has adversely affected the child before the proffered evidence may be admitted or considered by the trial court." Id. at 791. The Krug court concluded that a court may consider, in its reasonable discretion, misconduct that either has affected or *is likely to affect* the child adversely if permitted to continue. See id. at 793 (emphasis added).

The Krug court reiterated that a trial judge has broad discretion in determining what is in the best interest of the child when it makes a determination as to custody. Moreover, a trial court may draw upon its own common sense and experiences "to reach a reasoned judgment concerning the likelihood that certain conduct or environment will adversely affect children." Id. at 793. "In other words, a judge is not required to wait

until the children have already been harmed before he can give consideration to the conduct causing the harm." Id.

In this case, we believe the findings made by the trial court in reference to Alshielda's criminal history and the criminal conduct of her friends that have close contact with Alfonzo relate to an unwholesome environment. When read in its entirety, this finding lists a number of potential influences and factors that bear currently on Alfonzo's well-being and safety as a nine-year old and could likely affect him adversely as he grows up.

Alshielda's next argument is that the trial court should have awarded joint custody because it found that both Alshielda and Don were loving and caring parents, but made no finding that they were unable to cooperate in decisions pertaining to Alfonzo. An award of joint custody in a proper case is an option available under KRS 403.270 however its use is not mandated in any case. See Squires, 854 S.W.2d at 768. In the trial court's analysis, it must consider all relevant factors, giving equal consideration to each parent, and formulate a result which is in the best interest of the child whose custody is at issue. See KRS 403.270; Squires, 854 S.W.2d at 768. Indeed, a cooperative spirit between the parents is not even a condition precedent to a determination of joint custody. See Squires, 854 S.W.2d at 768.

In this case, while we recognize the significance of the care and nurturing Alshielda gave to Alfonzo from birth to age 6, we do not believe that the trial court abused its discretion in concluding that sole custody in Don was in Alfonzo's best interests. The findings of the trial court demonstrate that it considered the relevant factors specifically set out in KRS 403.270 and additional factors pertaining to these parties.

In reviewing the transcript of evidence, we conclude that there is substantial evidence to support the court's findings. Alshielda asserts that there is no basis for the trial court's findings that are both numbered 17 and which are set out in their entirety above. Specifically, Alshielda argues that there is no evidence that she has some difficulty setting boundaries for Alfonzo and has not followed the advice of removing his TV, VCR and Nintendo from his bedroom while he was in kindergarten. By her own admission, Alshielda has not removed Alfonzo's TV, VCR and play station from his room even though his kindergarten teacher suggested that she do so. Her testimony is as follows:

- Q. So even though that Mr. Mink and Ms. Finn suggested back when A.J.[Alfonzo] was in kindergarten that you, perhaps, take the television, the VCR out of his room--
- A. Uh-huh (affirmative).
- Q. --you have not done that, have you?

- A. Because he was removed from my home September the 7th and he's not with me during the school week. So why does it matter? He's only with me on weekends. So he can look at TV on weekends.
- Q. But you didn't take it out in the -- any that year that he was with you in kindergarten, did you?
- A. Oh, no.
- Q. No. Okay. And--
- A. I didn't take it out. I just wouldn't let him look at it. But no, I did not remove it from the room.

In addition, Alshielda argues that Joanne Rice, the custodial evaluator, testified that she believed Alshielda had been truthful to her when asked about any prior felony convictions. However, the evidence shows that Alshielda did not respond truthfully when asked about her prior arrests. She informed Ms. Rice that she'd been arrested in 1983 for credit card theft and that she'd had no arrests since then. In actuality, Alshielda was arrested again in 1985 for theft by unlawful taking. In conjunction with this charge, she was subsequently charged with being a persistent felony offender. Ultimately, she was sentenced to five years in prison, but was given shock probation after serving six months of incarceration. Whether or not Ms. Rice believed that Alshielda was lying, the fact remains that she was not truthful, and the trial court did not err in concluding the same.

We move to Alshielda's argument that the trial court erred in failing to make findings on evidence that was favorable

to Alshielda. It seems that Alshielda is essentially arguing that the trial court's findings were incomplete. The trial court is required to find those facts that are mandated by the statute. See Stafford v. Stafford, Ky. App., 618 S.W.2d 578, 580 (1981), overruled on other grounds by Largent v. Largent, Ky., 643 S.W.2d 261 (1982). It is not required to make a finding on all the evidence heard. Moreover, if Alshielda took exception with the trial court's findings, CR 52.04 mandates that she file an appropriate motion with the trial court to identify the defect. See Eiland v. Ferrell, Ky., 937 S.W.2d 713, 716 (1997). "[F]ailure to bring such an omission to the attention of the trial court by means of a written request will be fatal to an appeal." Eiland, 937 S.W.2d at 716. In this case, Alshielda filed no such motion. Further, we believe the trial court's findings are complete given the factors set out in KRS 403.270.

Alshielda's final argument is that the trial court erred in using Alshielda's poverty against her. The specific finding at issue is: "The Mother does not work outside the home and receives government housing, subsidies and financial aid from her grandmother." This finding is supported by substantial evidence and is one of many factors the trial court considered in concluding that sole custody in Don was in Alfonzo's best interests. As the trial court's ultimate objective is the

welfare of the child, it was not an abuse of discretion for it to consider the economic circumstances of the parties, so long as it was not the only circumstance considered in resolving custody. See Calhoun v. Calhoun, Ky., 559 S.W.2d 721, 723 (1977) ("Though every effort must be made to exclude or offset the element of economic disadvantage, it cannot be completely ignored if the ultimate objective really is welfare of the child.").

Because we believe that the trial court's decision to award sole custody to Don is amply supported by the evidence of record and does not, therefore, represent an abuse of discretion, we affirm.

ALL CONCUR.

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