

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001486-MR

KELLI RENEE JUDD

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
CIVIL ACTION NO. 02-CI-01310

CHRISTOPHER EDELEN

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: COMBS, Chief Judge; MINTON, AND VANMETER, Judges.

MINTON, Judge. Kelli Renee Judd appeals from an order of the Hardin Circuit Court that awarded Christopher S. Edelen sole custody of their infant daughter. Finding no error, we affirm.

Judd and Edelen are the parents of one child, a daughter, Scotlyn T. Edelen, born out of wedlock on September 18, 1999, in Pensacola, Florida, when Judd and Edelen were living there. After the couple broke up, Edelen petitioned

for custody of Scotlyn in the circuit court in Escambia County, Florida, sometime in early 2000. Initially, the Florida court designated Judd as the temporary residential parent and gave Edelen regular visitation. Before custody was resolved, however, Judd left Florida with the child and moved to Kentucky. In September 2000, the Florida court made Edelen the primary residential parent and held Judd in contempt for failing to allow visitation to Edelen and for failing to appear at a show cause hearing.

A spate of litigation followed in Kentucky as Judd filed successive custody petitions and sought domestic violence protective orders in Taylor Circuit Court, Jefferson Circuit Court, and Hardin Circuit Court. In each case, Edelen contested the jurisdiction of the Kentucky courts and responded that the pending Florida action gave him a superior claim to the child. Eventually, the Florida action was dismissed for lack of prosecution. Hardin Circuit Court, being the venue of Judd's last place of residence with the child, then proceeded to resolve the custody matter.

In an order entered July 14, 2003, the circuit court extensively analyzed the evidence adduced at the Domestic Relations Commissioner's (DRC) hearing and overruled Judd's numerous objections to the findings and conclusions recommended by the DRC. In a separate order entered on the same date, the

circuit court adopted the DRC's recommendations giving Edelen sole custody of Scotlyn. Judd received one week's visitation monthly until the child enters kindergarten. The court also ordered Judd to pay \$137.75 per month as child support, the amount recommended by the DRC, beginning June 1, 2003.

Judd raises three arguments on appeal. First, she argues that the trial court abused its discretion by awarding sole custody of the child to Edelen, characterizing the trial court's custody decision as punitive for Judd's having frustrated Edelen's visitation with the child for nearly two years. Next, she argues that the trial court failed to consider and to award joint custody. Thirdly, she argues that the trial court erred in awarding "retroactive" child support beginning June 1, 2003, because Edelen did not get sole custody until entry of the order on July 14, 2003.

We will consider Judd's first two arguments together because they are addressed to the proper application of the best interests of the child standard. The best interests of the child standard applies in determining custody of children born out of wedlock.¹ Regardless of the marital status of the parents, the overriding consideration in any custody determination is the best interests of the child.² Kentucky

¹ Basham v. Wilkins, Ky.App., 851 S.W.2d 491, 493 (1993).

² Squires v. Squires, Ky., 854 S.W.2d 765, 768 (1993); KRS 403.270.

Revised Statute (KRS) 403.270 lists factors which should be considered in assessing the best interests of the child. The statute provides, in relevant part, as follows:

- (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....

In his recommendation to the circuit court, the DRC recommended the following findings:

On balance, [Edelen] offers, at least, a more stable environment than that offered by [Judd]. He has maintained the same home over a long period of time and maintained employment for 5 years. He appears to have a supportive family structure capable of rendering appropriate care. [Judd] moved from one location to the other, at least in part, in order to file multiple petitions seeking to frustrate visitation. Overall, her actions are intolerable.

After conducting an independent review of the evidence following Judd's objections to the DRC's report, the circuit court adopted the DRC's report and made the following additional findings:

When possession of the child was actually transferred to [Edelen] belatedly for visitation, [Judd] did not tell [Edelen] that the child was allergic to sulfa medications. Fortunately, no harm came to the child as no such medications were

prescribed during [Edelen's] possession, but the consequences of that lack of information could have been tragic.

There is no question that [Judd] moved several times during the time she has had physical possession of the child. [Judd] did not take the child off of her bottle until she was almost 3 years old. The child did not see a dentist until just before the hearing in this matter, and there is no dispute that the child has cavities which may be the result of this extended use of the bottle, especially when the child is left with the bottle before she goes to sleep at night. [Judd] conceded that it was not good to let the child use the bottle so long, but she explains that it was a security item for the child.

Also disturbing is one issue in the context of the sexual abuse allegations. There was testimony about [Judd's] having in her possession anatomically correct dolls. [Judd] suggested that she had those dolls only for a limited period of time and that she had borrowed them. When [Judd's] mother testified, she indicated that [Judd] has owned such a set of dolls since her own childhood. This rather unusual ownership of such items properly figured into the Commissioner's consideration as to the merit of the various sexual abuse allegations.

Considering the testimony of the two parties, it is clear that [Edelen] is more stable and more credible, although neither party has been wholly credible, and certainly neither party has acted at all times in the utmost good faith. [Edelen] has a long-term employment history in one location. He can provide for the child's needs. While [Judd's] situation may have improved as is indicated by her current residence and her engagement, her past history of moving around was properly

considered by the Commissioner in making a recommendation as to custody.

... The Court would independently find that, based upon the living situations, employment history and family influences [Edelen] provides the best environment for the child at this time. It is in the best interests of the child that sole custody be awarded to [Edelen] as recommended by the Commissioner.

In reviewing a child custody determination, the standard of review for the appellate court is whether the factual findings of the trial court are clearly erroneous.³ Findings of fact are clearly erroneous if they are manifestly against the weight of the evidence.⁴ Since the trial court is in the best position to evaluate the testimony and to weigh the evidence, an appellate court should not substitute its own opinion for that of the trial court.⁵ After the trial court makes the required factual findings, it must apply the law to those facts. The trial court's application of the law to the facts and the ultimate custody award will not be disturbed absent an abuse of discretion.⁶ Abuse of discretion implies that

³ Kentucky Rules of Civil Procedure (CR) 52.01; Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986).

⁴ Wells v. Wells, Ky., 412 S.W.2d 568, 570 (1967).

⁵ Reichle, *supra*.

⁶ Cherry v. Cherry, Ky., 634 S.W.2d 423, 425 (1982).

the trial court's decision is unreasonable or unfair.⁷ In reviewing the decision of the trial court, therefore, the test is not whether the appellate court would have decided the case differently but whether the factual findings of the trial judge were clearly erroneous or its application of the law an abuse of judicial discretion.⁸

The trial court noted from the evidence that since coming to Kentucky Judd had filed actions in courts in three counties in which she had made various allegations containing material misstatements and that Judd had otherwise engaged in a pattern of conduct designed to keep Edelen from seeing the child. The trial court observed the undisputed fact that Edelen did not see the child from June 2000 until September 2002. Finally, trial court expressed concern over reckless allegations of sexual abuse of the child made by both sides. There is substantial albeit disputed evidence in the record to support these findings by the circuit court. The circuit court's order clearly states that these facts provide the unfortunate backdrop against which the custody dispute has unfolded. The court states repeatedly that it has not deviated from the best interest standard in order to punish Judd. We agree.

⁷ Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994).

⁸ Cherry, *supra*.

The circuit court actually found that Edelen would provide a more stable home environment and would provide a more supportive family structure for the child. On the other hand, the circuit court found that Judd's stability and credibility are questionable because of a) her history of moving from place to place to frustrate visitation, b) her failure to inform Edelen of the child's allergy to sulfa drugs, c) her failure to wean the child from the bottle thereby contributing to the child's tooth decay, and d) her lack of candor concerning her possession of anatomically correct dolls. These findings are supported by substantial evidence. The issues of stability of home environment and conduciveness of that environment to raising a child are relevant under KRS 403.270(2)(c) and KRS 403.270(2)(d).

Contrary to Judd's argument, the record indicates that joint custody was considered and rejected as follows:

The Commissioner has considered the matter of joint custody, but the parties simply cannot cooperate sufficiently to engage in joint custody of the child. The Commissioner can not [sic] envision circumstances under which they could cooperate sufficiently to make joint decisions with respect to the child's education, medical needs and religious training.

Again, the focus when reaching a decision between sole or joint custody is which would promote the child's best interests. In assessing the appropriateness of joint custody, the court must

consider the factors of KRS 403.270 and the likelihood of future cooperation.⁹ Therefore, the circuit court did not abuse its discretion in awarding sole custody of the child to Edelen.

Finally, Judd mentions in her Brief that the trial court erred by ordering child support to become effective June 1, 2003, the month when the DRC's report was filed, instead of July 14, 2003, the month when the circuit court's order was entered. Edelen responds that this issue was waived by Judd's failure to raise a timely objection to this aspect of the DRC's report. Based upon our review of the record, we agree that this issue has not been preserved for argument on appeal.¹⁰

For the reasons discussed above, the custody order of the Hardin Circuit Court is affirmed.

ALL CONCUR.

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⁹ Squires, 854 S.W.2d at 769.

¹⁰ Eiland v. Ferrell, Ky., 937 S.W.2d 713, 716 (1997); C.R. 53.06(2).