RENDERED: August 27, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001704-MR

CYNTHIA DAWN JOHNS — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT, FAMILY BRANCH
HONORABLE JO ANN WISE, JUDGE
ACTION NO. 00-CI-03953

JEFFREY ALLEN JOHNS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI AND KNOPF, JUDGES; AND EMBERTON, SENIOR JUDGE.[1]

GUIDUGLI, JUDGE: Cynthia Dawn Johns, now Fyffe, (hereinafter "Cindy") has appealed from the decision of the Fayette Circuit Court, Family Branch, to award sole custody of her two minor children to their father, Jeffrey Allen Johns (hereinafter "Jeff"). We affirm.

Jeff and Cindy were married in Fayette County, Kentucky, on November 1, 1997. Two children were born of the

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

marriage: Lauren Maisie Johns on June 4, 1998, and Emily Janice Johns on August 14, 2000. Jeff and Cindy separated on October 26, 2000, shortly after Emily's premature birth, and Jeff filed a Petition for Dissolution of Marriage on October 30, 2000. The matter was originally assigned to Fayette Circuit Judge Rebecca Overstreet, and was heavily litigated over the next three years. By orders entered December 7 and 15, 2000, Cindy was given temporary sole care and custodial control over Lauren and Emily. Jeff was ordered to pay child support in the amount of $892 per month and temporary maintenance in the amount of $1650 per month. Both were subject to random drug and alcohol screenings, and smoking was prohibited in the presence of the children. Cindy also received exclusive occupancy of the marital residence. Jeff was allowed time-sharing with the children, with the condition that it take place in the presence of his parents. By order entered January 25, 2001, Jeff and Cindy were referred to parenting coordination. Status reports regarding the parenting coordination showed slow but steady progress in cooperative co-parenting.

On July 11, 2001, the trial court granted Jeff's motion for a custodial evaluation by Diana Hartley, PhD (hereinafter "Dr. Hartley"). On August 16, 2001, the trial court entered an order granting Cindy's motion to discontinue parent coordinating during the custodial evaluation and to also

temporarily terminate all visitation between Jeff and the children. The termination of visitation was based upon the affidavit of Lauren's therapist, Carl Moses, that she was showing emotional distress in connection with her visits with Jeff. Visitation was later reinstated by Agreed Order entered December 13, 2001. In 2002, the trial court also ordered Jeff and Cindy to once again participate in parent coordinating and ordered Lauren to be seen by a counselor other than Carl Moses and to be enrolled in preschool five days per week. The ruling regarding Lauren was apparently based upon Dr. Hartley's recommendation, who had also recommended joint custody. By December of 2002, the parties had agreed to mediate a holiday time-sharing schedule with Dr. Hartley.

In early 2003, the case was transferred to Judge Jo Ann Wise of the Family Court Division. A trial on the contested issues, including custody, was then held on July 15 and 16, 2003, at which time the trial court heard testimony from both Jeff and Cindy, Cindy's mother, Lauren's preschool teacher, as well as several medical and mental health professionals. Following the trial, Jeff requested that the trial court make an award of joint custody based upon the recommendations of Dr. Hartley and Carl Moses and upon Cindy's failure to facilitate

Jeff's involvement with the children's upbringing.[2] On the other hand, Cindy requested that she be awarded sole custody due to their lack of willingness to cooperate and because it would be detrimental to remove the children from the person who had been their primary caregiver.

On July 17, 2003, the trial court entered a Decree of Dissolution dissolving the marriage and granting Jeff sole custody of Lauren and Emily. The trial court incorporated its written and oral Findings of Fact and Conclusions of Law into the decree, and indicated that the supporting findings and conclusions entered orally would be reduced to writing and entered by a supplemental decree. On August 15, 2003, the trial court entered the Final Supplemental Decree of Dissolution, which included the following findings of fact and conclusions of law pertaining to custody:

> 8. This Court agrees with statements made by the wife that joint custody will not work in this case due to the lack of communication between the parties. While there is usually some base line communication between divorcing parties, there is none in this case and there is very little prospect for communication to improve. Since this court has no choice but to award either joint or sole custody, it finds that it is [in] the children's best interests that the husband shall be the sole custodian of the parties' minor children, Lauren, age

[2] We note that although he indicated that he wanted the trial court to award joint custody, during his cross-examination Jeff testified that he wanted sole custody based upon what had happened in the past.

5 and Emily, age 2. This Court makes this ruling for five (5) reasons:

a. The children have been in the care of their mother under the temporary sole custody Order entered in December 2000. The mother's testimony and the testimony of other witnesses is that the children have deteriorated since that order [was] entered. The children have been under their mother's watch during this time with very little involvement allowed for the father. He, therefore, cannot be blamed for this deterioration.

b. It is clearly apparent that the mother has blame and anger at the father. This court was so concerned at the extent of her blame that it researched the dependency/neglect/abuse statute under KRS 600 to determine if the blame and anger warranted a report of dependency/neglect/abuse to the Department for Social Services.

c. The mother's testimony showed that she was very closed-minded regarding the children's relationship with their father and that she had an agenda regarding the children and their father. When she first visited Carl Moses, LSCW on October 30, 2000, the day the Petition was filed and four days after the separation she told him she wanted sole custody with restricted or supervised visits between the girls and their father. This is an agenda. She was closed-minded then and has remained closed-minded regarding the father's development of any relationship with his daughters.

She demonstrated this attitude when she smiled while saying that she didn't think it was so important when the father and girls did not get their Christmas visitation in 2001. She demonstrated this attitude when she did not put the father's name on Lauren's day care registration information. Finally, she demonstrated this attitude when she refused to acknowledge that Lauren's problems could have no other source (such as trauma in the family prior to the separation or the hostility between the parents) than the father and his family. The mental health professionals who testified suggested that the hostility between the parents could be the cause of Lauren's problems. The mother put Lauren, then three, in therapy and that may not have been appropriate. Carl Moses and Jo Lillard testified that Lauren had "plateaued out" in therapy with each of them. The mother testified that when there is no communication, there are no healthy children. This Court believes that statement to be correct and at least one of the children, Lauren, is not healthy. The mother did not look for the true causation for Lauren's problems other than to blame the father.

d. The younger daughter, Emily (who was an infant at the time of the separation) has no difficulties with her father or the visitations.

e. Finally, in her testimony the mother could present no positive ideas as to how to fix Lauren's problems. She felt that granting the father sole custody was ludicrous and this court had the

feeling that her only solution would be the termination of the father's rights. Again, the mother blamed the father, but could prove no causation.

9. The husband shall be solely responsible for making decisions regarding the girls' medical, emotional, educational and religious needs. However, Emily shall be enrolled in a 3 day a week preschool program.

10. While this Court would like to order a traditional time-sharing schedule for the mother (i.e. every other weekend and on weekday evenings) in order for the mother to see what it was like for the father, it recognizes the bond between the girls and their mother. As Dr. Schilling testified, it doesn't take a psychologist to see that there is a problem here. This is a common sense case. Since the children have spent so much time with their mother, it is hard for them to go elsewhere – especially when there is unequal involvement with the parents. Therefore, this Court is willing to try equal involvement and time-sharing with the girls spending alternating weeks with each parent.[3]

11. . . . .

12. A Guardian Ad Litem shall be appointed for the girls. The Court shall issue an Order naming the Guardian and outlining the Guardian's duties and responsibilities. The parties shall be equally responsible for the payment of the Guardian's fees.

13. Due to the discrepancy in incomes at the present time and the equal time-share schedule, the husband shall pay to the

[3] We shall omit the trial court's detailed time-sharing and holiday time-sharing schedules.

wife child support in the amount of $600.00 per month beginning July 21, 2003. He shall also maintain health insurance on the girls and be responsible for 100% of their extraordinary unreimbursed medical expenses unless said payment would become unreasonable. Each party shall be responsible for paying the work-related day care expenses for the children during the week they have the children.

14. The parties shall have equal access to the girls' medical and educational records.

15. Neither party shall smoke around the girls or allow the girls to be exposed to smoke. Neither party shall drink alcoholic beverages before or when they are with the girls and the girls shall not be exposed to firearms.

16. Each parent shall notify the other of phone numbers and addresses and shall provide the other of emergency contact information when taking overnight out of town visits with the girls. Each party shall immediately notify the other of any medical emergencies.

17. Neither party shall make or allow any other person to make any negative or derogatory comments about either parent or family member. Each party shall do whatever possible to foster a loving and positive relationship with the other parent.

18. Neither party shall videotape or photo[graph] the girls for the purpose of litigation unless the party feels that is absolutely necessary.

Cindy filed a motion to Alter, Amend or Vacate pursuant to CR 59.05 regarding the award of sole custody to Jeff and requested additional findings and a new trial. The trial court denied Cindy's motion on August 15, 2003, and this appeal followed.

In her brief, Cindy argues that the trial court erred by not affording joint custody equal consideration in determining custody, by failing to consider the best interests of the children pursuant to KRS 403.270(2), and by using its determination that she would be incapable of future cooperation in making the custody award. Furthermore, Cindy asserts that the trial court erred in relying upon testimony of the custodial evaluator when the provisions of KRS 403.300 had not been met. On the other hand, Jeff asserts that the trial court did not commit any error and that the award of sole custody should be affirmed.

Our standard of review is set forth in CR 52.01:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment. . . . Findings 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.

In Moore v. Asente, Ky., 110 S.W.3d 336 (2003), the Supreme Court of Kentucky addressed this standard, and held that a reviewing court may set aside findings of fact,

> only if those findings are clearly erroneous. And, the dispositive question that we must answer, therefore, is whether the trial court's findings of fact are clearly erroneous, i.e., whether or not those findings are supported by substantial evidence. "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence. (Citations omitted.)

Id. at 354. With this standard in mind, we shall review the trial court's decision in this matter.

We shall first address Cindy's last argument regarding the testimony of the custodial evaluator. Cindy argues that because Dr. Hartley never issued a report, the trial court was precluded from relying upon her recommendations regarding

custody and time-sharing. Dr. Hartley had left her role as an evaluator when she agreed, at the request of the parties, to mediate the 2002 holiday time-sharing, and could not then return to her role as an evaluator. Jeff argues that the trial court did not err in relying upon Dr. Hartley's recommendations, which it not appear to even follow.

KRS 403.300 addresses the appointment and use of a custodial evaluator in custody proceedings:

> (1) In contested custody proceedings, and in other custody proceedings if a parent or the child's custodian so requests, the court may order an investigation and report concerning custodial arrangements for the child. The investigation and report may be made by the friend of the court or such other agency as the court may select.
>
> (2) In preparing his report concerning a child, the investigator may consult any person who may have information about the child and his potential custodial arrangements. Upon order of the court, the investigator may refer the child to professional personnel for diagnosis. The investigator may consult with and obtain information from medical, psychiatric, or other expert persons who have served the child in the past without obtaining the consent of the parent of the child's custodian; but the child's consent must be obtained if he has reached the age of 16, unless the court finds that he lacks mental capacity to consent. If the requirements of subsection (3) are fulfilled, the investigator's report may be received in evidence at the hearing.

> (3) The clerk shall mail the investigator's report to counsel and to any party not represented by counsel at least 10 days prior to the hearing. The investigator shall make available to counsel and to any party not represented by counsel the investigator's file of underlying date, and reports, complete texts of diagnostic reports made to the investigator pursuant to the provisions of subsection (2), and the names and addresses of all persons whom the investigator has consulted. Any party to the proceeding may call the investigator and any person whom he has consulted for cross-examination. A party may not waive his right of cross-examination prior to the hearing.

In Lewis v. Lewis, Ky., 534 S.W.2d 800 (1976), the Supreme Court of Kentucky addressed this statute. There, the trial court ordered the Department of Human Resources to issue a report regarding the fitness of the father's and the mother's homes for the child in question. The trial court received reports from social workers, but the clerk did not forward copies of the reports to counsel for either party. Eight days later, the trial court awarded custody without having held another hearing after receiving the reports. In reversing the judgment awarding permanent custody, the Supreme Court noted:

> Thomas cannot be expected to exercise his right to cross-examine in the absence of knowledge of the identity of the investigators or of the contents of the reports. Furthermore, he did not waive his right to cross-examine, since the right may not be waived prior to a hearing, and no

> hearing was held subsequent to the filing of the reports. Clearly, the mandate of KRS 403.300(3) has not been followed.

Id. at 802. Later in Bond v. Bond, Ky.App., 887 S.W.2d 558 (1994), the Kentucky Court of Appeals relied upon the Lewis decision in holding that the lower court erred when it permitted a court-appointed social worker to testify without having first submitted a written report to the court and to counsel.

In the present matter, the parties and the trial court discussed Dr. Hartley's role just prior to the trial as well as at the March 10, 2003, case management conference. There was no dispute that Dr. Hartley never issued a report, which would have caused Jeff and Cindy to spend an additional $2000 in addition to the money they had already expended for the evaluation itself. Furthermore, the parties were in agreement that Dr. Hartley would be permitted to testify as a witness as to what she had done in the case. At the trial, Dr. Hartley testified regarding the roles she played in the case, as well as to the results of psychological tests she administered on both Jeff and Cindy and of her visitation observations. As a result of her observations, Dr. Hartley recommended that the trial court order joint custody with equal rights to both parents.

We agree with Jeff that there has been no violation of KRS 403.300. The undisputed fact that Dr. Hartley did not issue

a final report[4] regarding her custodial evaluation is not fatal in this case, as it was in the Lewis and the Bond cases. Dr. Hartley did not testify as an evaluator, but simply as an expert witness. Both parties were aware of Dr. Hartley's recommendations prior to trial, and Cindy had a sufficient opportunity to cross-examine her on her methods and recommendations. Furthermore, the trial court did not, routinely or otherwise, adopt Dr. Hartley's recommendations. In fact, the trial court did not order joint custody as per her recommendation. Instead, the trial court ordered sole custody with equal time-sharing. Therefore, we cannot hold that there was a violation of KRS 403.300 in allowing Dr. Hartley to testify at the trial in the matter or that Cindy was harmed in any way by the inclusion of Dr. Hartley's testimony.

We shall next address Cindy's argument that the trial court erred in allowing Jeff sole custody of Lauren and Emily. Cindy raised three issues as to this argument, namely that the trial court failed to consider joint and sole custody equally, did not consider the best interests of the children, and improperly used its determination regarding future cooperation in disallowing her custody.

Cindy first argues that the trial court erred in failing to give sole and joint custody equal consideration. We

[4] There is some indication in the record that Dr. Hartley had at one point faxed a brief report to the trial court.

disagree. KRS 403.270(5) provides that a "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 interests of the child." In Fenwick v. Fenwick, Ky., 114 S.W.3d 767 (2003), the Supreme Court of Kentucky reiterated its previous holding that, "'joint custody must be accorded the same dignity as sole custody and trial courts must determine which form would serve the best interest of the child.'" Id. at 775, quoting Squires v. Squires, Ky., 854 S.W.2d 765, 770 (1993). In its supplemental decree entered in the present case, the trial court stated that it "agrees with statements made by the wife that joint custody will not work in this case due to the total lack of communication between the parties." (Emphasis added.) After noting that the decision was a "tough" one to make, the trial court then decided to award sole custody. It is clear to this Court that the trial court considered both sole and joint custody, and relied at least in part upon Cindy's testimony that joint custody was not possible in this case. Cindy cannot now argue that the decision to order sole custody was in error, when she herself argued before the trial court that joint custody would not work. We find no error in the trial court's decision to order sole custody in this matter.

Cindy next argues that the trial court failed to consider the factors set forth in KRS 403.270(2) in determining

custody, but rather only considered their lack of ability to communicate and cooperate. We disagree.

In KRS 403.270(2), the Legislature specifically listed the factors a trial court must consider when determining custody:

> 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.

In Fenwick, the Supreme Court of Kentucky stated that, "[i]n addition to these statutory considerations, this Court has noted that the likelihood of future cooperation between the parents regarding decisions pertinent to raising the child is a relevant factor in determining whether to award joint custody." Fenwick, 114 S.W.3d at 775-76. The Supreme Court had previously defined "cooperation" in Squires as a "willingness to rationally participate in decisions affecting the upbringing of the child." Squires, 854 S.W.2d at 769.

We must agree with Jeff that the trial court considered all of the relevant factors in this case, including the statutory factors and the ability of the parents to cooperate. We note that the trial court included a detailed summary supporting her ruling in the supplemental decree. In his brief, Jeff provides an excellent analysis of the statutory

factors relevant as they apply to this case.[5] First, the trial court considered the parents' wishes pursuant to KRS 403.270(2)(a). We agree with Jeff that although each expressed a desire for joint custody and the ability to raise their children together, such was not possible. In the end, both indicated a desire for sole custody of the children, which is what the trial court ordered. Next, the trial court considered the interaction and interrelationship between the children and their parents pursuant to KRS 403.270(2)(c). While the mental health professional testified very favorably regarding Cindy's parenting skills, it is apparent from the record that Lauren's condition deteriorated in the years Cindy acted as her sole custodian. Furthermore, the children appeared to do well during their time with Jeff. Next, the trial court considered the children's adjustment to their home, school and community pursuant to KRS 403.270(2)(d). Obviously, both Lauren and Emily are too young to have become firmly entrenched in school and community relationships. Although Lauren is enrolled in preschool and Emily in daycare, there is nothing in the record to indicate that their preschool and daycare would change in light of the custody award. Furthermore, the trial court recognized the need to allow both parents equal involvement in

[5] A de facto custodian was not involved in this case, nor was domestic violence alleged. Furthermore, the children were too young express their wishes regarding custody.

the lives of their children by ordering equal time-sharing on a week-by-week basis. Lastly, the trial court considered the mental and physical health of the parents and the children pursuant to KRS 403.270(2)(e). As the situation stood, Lauren was clearly having difficulties, and neither parent was without fault.

Finally, Cindy argues that the trial court abused its discretion in finding her incapable of further cooperation and basing custody on this finding. Although we agree with Cindy's citation to Squires that goodwill is not required to award joint custody, the ability to cooperate is a relevant factor for the trial court to consider in deciding custody. See Fenwick v. Fenwick, Ky., 114 S.W.3d 767 (2003). In this case, there is substantial evidence to support the trial court's finding that the parties were unable to cooperate. This is evident in the sheer number of motions filed during the course of this litigation as to smoking and alcohol use, time-sharing schedules, the sale of the marital residence, and the treatment by mental health professionals. Thus, the trial court's finding is not clearly erroneous. Furthermore, the trial court did not abuse its discretion in using this finding to support the award of sole custody to Jeff. The case law is clear that the ability to communicate and cooperate is a relevant factor to be considered in custody awards.

For the foregoing reasons, the decision of the Fayette Circuit Court, Family Branch, awarding sole custody of the minor children to Jeff is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael Davidson
Suzanne Baumgardner
Lexington, KY

BRIEF AND ORAL ARGUMENT FOR APPELLEE:

Patricia H. Rabits
Lexington, KY

ORAL ARGUMENT FOR APPELLANT:

Susanne Baumgardner
Lexington, KY