

RENDERED: NOVEMBER 23, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2005-CA-000665-ME

MELISSA A.

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN, JUDGE
ACTION NO. 02-CI-00621

JENELL C.

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: Melissa A. appeals from an order of the Daviess Circuit Court, entered February 28, 2005, awarding permanent custody of Melissa's two children, T.A. and D. A., to Jenell C., the children's paternal grandmother. Melissa contends that the trial court abused its discretion by refusing to interview the older child, T.A. She also contends that the court's custody ruling was erroneous in that it does not serve the best interests of the children. We affirm.

Jenell initiated this matter in May 2002. At that time she had been the children's temporary custodian and their sole source of care and support for about three years, since shortly after D. A.'s birth in February 1999 when both parents, Melissa and James A., were incarcerated on drug charges. T. A., who was born in June 1995, was then not quite four. Melissa testified that she was probated and spent 2000 and 2001 living with her parents. She admitted that she continued to use drugs during those years and did not seek the return of her children because she did not consider herself stable and dependable. In early 2002 she was convicted of a misdemeanor paraphernalia offense and was sentenced to several months in jail followed by drug rehabilitation. The rehabilitation program ended in February 2003. In April 2003, nearly a year after Jenell filed her petition, Melissa filed her answer contesting Jenell's claim and seeking custody of the two children.¹ A domestic relations commissioner heard the matter in November 2003, then, following the recusal of both judge and commissioner, the matter was resumed before a second commissioner in February 2004. For reasons not apparent from the record, the second commissioner did not issue his recommended order until December 2004. Relying primarily on testimony by a therapist and a clinical

¹ James A., the father, did not contest his mother's claim. James died during the pendency of the action.

psychologist who were treating the children and by a social worker who had investigated charges that Jenell had neglected T. A., the commissioner found that upsetting the children's custody regime would not be in their best interest and so recommended that Jenell be awarded permanent custody. The trial court adopted the commissioner's recommendation by order entered February 28, 2005. It is from that order that Melissa has appealed.

Melissa claims that she has turned her life around. She concedes her neglect of the children from before D. A.'s birth (D. A. was born with methamphetamine in his system) until her 2002 arrest and conviction, but asserts that she has remained drug-free since May 30, 2002, and has committed herself to making up for her past absence from the children's lives. She testified that she had been steadily employed as a manager in a fast-food restaurant for several months, and the social worker for the state found her living quarters at her parents' house suitable for the children. Melissa also presented evidence tending to show that Jenell treated the children unequally, attending more to D. A. while punishing T. A. unduly. Lay testimony that Jenell abused T. A., however, was contradicted by other lay witnesses and was not borne out by any of the more objective professional witnesses.

On the contrary, the children's therapists both testified that D. A. was thoroughly bonded with Jenell and terrified of being separated from her, and that T. A., although eager to resume contact with her mother, was torn between wanting that renewed contact and wanting not to lose contact with Jenell. Both therapists strongly recommended that D. A.'s custody not be transferred and warned that because T. A. was a strong-willed child she was apt to pose discipline problems for any caretaker.

As the parties note, under KRS 403.270 custody disputes are to be resolved "in accordance with the best interest of the child," which is a factual finding this Court reviews only for clear error.² Here, evidence that Jenell had taken good care of the children in the past and that she remained able to do so, together with the therapists' testimony, was substantial evidence supporting the court's finding that transferring the children's custody from Jenell to Melissa would not be in their best interest; thus, the Court's finding may not be disturbed.

This is so notwithstanding the fact that the commissioners and the trial court rejected Melissa's repeated request that they interview T. A. Melissa contends, correctly, that in making its best-interest finding the trial court is

² Largent v. Largent, 643 S.W.2d 261 (Ky. 1982).

obliged to consider "the wishes of the child as to his custodian," and that failure to consider this or any of the other factors enumerated in KRS 403.270 constitutes an abuse of discretion. The trial court committed such an abuse, she maintains, by declining to interview T. A. concerning her wishes and Jenell's alleged abuse. Whether to interview the child, however, is discretionary with the court,³ the decision depending on such factors as the child's age and maturity, other evidence of the child's wishes, and other overriding best-interest factors.⁴ Although a suitably mature child's wishes may be entitled to substantial weight,⁵ a child's wishes will seldom be dispositive of the real question before the court, which is the child's best interest.⁶

We are not persuaded that the trial court abused its discretion in this case. T.A. was only nine years old at the time the trial court made its best-interest determination, not old enough to make a mature assessment of her own best

³ KRS 403.290; Brown v. Brown, 510 S.W.2d 14 (Ky.App. 1974).

⁴ Sanders v. Busch, 123 S.W.3d 311 (Mo.App. 2003); McDowell v. McDowell, 868 P.2d 1250 (Mont. 1994); Annotation, "Propriety of Court Conducting Private Interview with Child in Determining Custody," 99 ALR 2nd 954 (1965).

⁵ Lewis v. Lewis, 343 S.W.2d 146 (Ky. 1961).

⁶ Shepherd v. Shepherd, 295 S.W.2d 557 (Ky. 1956); Annotation, "Child's Wishes as Factor in Awarding Custody," 4 ALR 3rd 1396 (1965).

interests, particularly an assessment of her own need for discipline. The court, moreover, had been presented with overwhelming evidence that D. A.'s custody should not be changed and properly finds that T. A.'s interest would not be served by being separated from her brother even if she voiced a preference for living with her mother. Finally, the court had other evidence tending to show that T. A. resented what she perceived as Jenell's favoritism, but could not take that possible resentment into account without burdening the child with a sense of having betrayed either her mother or her grandmother by testifying. All of these are legitimate reasons justifying the trial court's decision not to interview T. A.

Because that decision did not constitute an abuse of the trial court's discretion, and because substantial evidence supports the court's finding that the children's best interest will be served by remaining in Jenell's custody, we affirm the February 28, 2005, order of the Daviess Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Austin
Owensboro, Kentucky

BRIEF FOR APPELLEE:

Christopher G. Safreed
Moore, Malone & Safreed
Owensboro, Kentucky