

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001640-MR

MICHELLE MARIE MANNING

APPELLANT

v. APPEAL FROM ALLEN CIRCUIT COURT
HONORABLE WILLIAM R. HARRIS, JUDGE
ACTION NO. 02-CI-00275

JAMES ROSCOE MANNING

APPELLEE

NO. 2005-CA-001898-MR

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v. APPEAL FROM ALLEN CIRCUIT COURT
HONORABLE WILLIAM R. HARRIS, JUDGE
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MICHELLE MARIE MANNING

APPELLEE

OPINION AND ORDER
AFFIRMING

** ** * * *

BEFORE: TAYLOR AND WINE, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Michelle Marie Manning and James Roscoe Manning have filed separate appeals from a judgment and from an order of the Allen Circuit Court relating to the custody of their minor child. Concerning Michelle's appeal, we affirm. Concerning James's appeal, we dismiss as moot.

Michelle and James were married in 1988. They have one child, Michaela Lillia Manning, who was born on May 6, 1997. Michelle and James separated in June 2002, and Michelle filed a petition for dissolution of marriage in the Allen Circuit Court on July 2, 2002.

The parties initially agreed to a temporary order of joint custody with Michelle as the primary residential custodian. During the divorce proceedings, James attempted to get custody of Michaela based on the fact that Michelle was romantically involved with a co-worker, Michael Olson, who was a convicted child sex offender.²

The domestic relations commissioner (DRC) issued his final report on October 12, 2004. The DRC found that it would be in Michaela's best interest for Michelle and James to have

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Olson had been convicted of sex offenses involving his stepdaughter in Utah during a two-year period when the child was 12-14 years of age. Michael may have served time and did complete a sex offender treatment program. After his stepdaughter turned 18, he tried to renew the relationship and have sex with her.

joint custody of her with Michelle as the primary residential custodian. However, the DRC further found that it would be in Michaela's best interest for Michelle to immediately cease her relationship with Olson. The DRC stated that should Michelle be unwilling to do so, then he would find that the child's best interest would "dictate that James be the residential custodian." The DRC also found that should Michelle be unwilling to sever her relationship with Olson, then there should be no contact between Michaela and Olson during Michelle's exercise of custodial time. Both parties filed exceptions to the DRC's report.

In an order entered on June 27, 2005, the trial court rejected the portion of the DRC report recommending that Michelle be the primary residential custodian of Michaela. Rather, the court designated James as the primary residential custodian. The court stated as follows:

[T]he Court is persuaded that it is not in the best interest of the parties' eight-year-old daughter to be placed in a custodial setting where her protection from the proclivities of a convicted child sex offender is dependent upon the petitioner severing her relationship with him. The petitioner's poor judgment in taking up with this man in the first place does not engender confidence that she will not do so again, and thus expose the child to a substantial risk of sexual molestation in the future. The Court's conclusion is that the best interest of the parties' daughter will be served by the respondent being

designated as primary residential custodian, with the petitioner to have visitation (or shared time) with the child[.]

Michelle filed a motion to alter, amend, or vacate, which the court denied. On August 4, 2005, the court entered its final judgment that included a provision granting the parties joint custody of Michaela with James as the primary residential custodian. On August 8, 2005, Michelle filed a notice of appeal and a motion to stay enforcement of the court's final order. Following a hearing on the next day, the trial court entered an order staying enforcement of the custody order "pending further orders from the Kentucky Court of Appeals." James appealed from that order.

We will address Michelle's appeal first. Michelle contends that the court erred by not adopting the portion of the DRC's report designating her as the primary residential custodian. In this regard, we note that the court adopted the DRC's fact findings, but it reached a different conclusion.

Broad discretion is vested in trial courts in matters concerning custody and visitation. Futrell v. Futrell, 346 S.W.2d 39 (Ky. 1961). The discretion of the trial court in this regard will not be disturbed unless that discretion was abused. Id. The trial court's findings of fact will not be set aside

unless clearly erroneous. CR³ 52.01. "The test is not whether we would have decided it differently, but whether the findings of the trial judge were clearly erroneous or that he abused his discretion." Cherry v. Cherry, 634 S.W.2d 423, 425 (Ky. 1982).

The court's use of a DRC report is governed by CR 53.06(2). The court "may adopt the report, or may modify it, or may reject it in whole or in part, or may receive further evidence, or may recommit it with instructions." Id. See also Haley v. Haley, 573 S.W.2d 354, 356 (Ky.App. 1978)(the court has complete discretion as to the use of a DRC's report); Eiland v. Ferrell, 937 S.W.2d 713, 716 (Ky. 1997)(the court has the broadest possible discretion with respect to its use of the DRC report); Basham v. Wilkins, 851 S.W.2d 491, 494 (Ky.App. 1993)(the court may adopt, modify, or reject the DRC's report).

In making an initial custody award, the court is to consider the best interest of the child. See KRS⁴ 403.270. In doing so, the court must consider all relevant factors, including those set forth in KRS 403.270. Stafford v. Stafford, 618 S.W.2d 578, 580 (Ky.App. 1981), *overruled in part on other grounds by* Largent v. Largent, 643 S.W.2d 261, 263 (Ky. 1982).

In this case, the court complied with the requirements of KRS 403.270. First, it adopted the DRC's analysis as it

³ Kentucky Rules of Civil Procedure.

⁴ Kentucky Revised Statutes.

related to the relevant factors set forth in the statute. Second, it adopted the DRC's findings as they relate to the facts underlying Michelle's relationship with Olson, Olson's criminal record, and evidence relating to Olson's conduct since arriving in Kentucky.

Based on these underlying facts, the court then reached its conclusion that Michaela's best interest would be served by James being designated as the primary residential custodian. We conclude that the court did not abuse its discretion in making this determination. Further, contrary to Michelle's assertion, nothing precluded the court from reaching this conclusion and determination. See Basham, 851 S.W.2d at 494, wherein the trial court, with the benefit of the full record, placed greater weight on certain evidence than did the DRC.

Michelle's argument that there was no evidence Michaela would be in immediate danger from the continued relationship is without merit. Olson's criminal record, his actions since arriving in Kentucky, and the fact that Michelle knew about his background yet elected to develop the relationship, stand uncontested. Kentucky law does not require the court, under these circumstances, to wait until something actually occurs to harm the child before it can act. See Krug v. Krug, 647 S.W.2d 790, 793 (Ky. 1983).

Michelle also argues that the court erred in failing to consider that James has a history of domestic violence that would have an impact on his being the residential custodian. She cites Dillard v. Dillard, 859 S.W.2d 134 (Ky.App. 1993), for the proposition that the failure of the trial court to make specific fact findings regarding domestic violence is reversible error.

We reject Michelle's arguments for several reasons. First, the Dillard case does not stand for the proposition Michelle's espouses. Second, because the court adopted the findings of the DRC, including the finding that a domestic violence order had been issued against James in 2003, the court obviously considered domestic violence. We fail to see how the court's failure to specifically address it in its order of June 27, 2005, was error.

Michelle also mentions a child abuse allegation against James and states that the court should have considered it. First, there was no evidence in the record for the court to review. Second, the court remanded that issue to the DRC for review. Third, the allegation was eventually unsubstantiated.

Having found no error regarding the court's determination that James should be the primary residential custodian, we now turn to James's appeal that the court erred in staying its order "pending further orders of the Kentucky Court

of Appeals.” With our affirmance of the court’s order regarding custody, James’s appeal is rendered moot.

The judgment of the Allen Circuit Court designating James as primary residential custodian is affirmed. James’s appeal of the court’s order entering a stay of its original order is dismissed as moot. Pursuant to the terms of the stay order, the trial court should lift the stay since this court has now rendered an opinion in the first appeal.

ALL CONCUR.

ENTERED: October 13, 2006

/s/ David C. Buckingham
JUDGE, COURT OF APPEALS

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