

RENDERED: NOVEMBER 22, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000301-MR

NICHELLE ZORR FELSEN

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE KEVIN L. GARVEY, JUDGE
ACTION NO. 05-CI-500115

LIAM ETHAN FELSEN

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JOHNSON AND WINE, JUDGES; MILLER,¹ SPECIAL JUDGE.

MILLER, SPECIAL JUDGE: Nichelle Zorr Felsen appeals from the "Findings of Fact, Conclusions of Law, Decree of Dissolution and Judgment" of the Jefferson Family Court. Nichelle challenges the family court's awarding of sole custody of the parties' two children to their father, appellee Liam Ethan Felsen, and its denial of a maintenance award. For the reasons stated below, we affirm.

¹ Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

The parties were married on July 1, 1995. They have two children, Tiana Jane, born May 2, 2000, and Zachary Cooper, born April 7, 2002. On January 13, 2005, Liam filed a petition for dissolution of marriage. On January 11, 2006, the family court entered its "Findings of Fact, Conclusions of Law, Decree of Dissolution and Judgment" dissolving the marriage and resolving the pending issues in the case, including custody and maintenance. This appeal followed.

Nichelle contends that the family court erred by awarding Liam sole custody of the parties' two children. She requests that we remand the issue to the family court with instructions to enter an award of joint custody with a 50/50 parenting schedule.

Kentucky's child custody statute, KRS 403.270, 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;

. . . .

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

. . . .

(5) The court may grant joint custody to the child's parents

The family court's January 11, 2006, "Findings of Fact, Conclusions of Law, Decree of Dissolution and Judgment" contained the following findings of fact regarding child custody:

Father is employed on the tenure-track as a teacher in the English Department at Indiana University Southeast. He is in his third of seven years to gain tenure. His base salary is \$43,600 plus father teaches two summer classes which brings his total income to approximately \$50,000 annually.

Father is in charge of his scheduling and can be flexible with his schedule as needed for any child care duties. Father has always been very involved with his children from birth to the present time. He has prepared meals, provided child care and has developed a very close attachment to his children. Father's education includes two Bachelor's Degrees and a Ph.D in English. He teaches Medieval and Shakespeare English which is exactly the area of study which he

enjoys and he is very satisfied with his employment at Indiana University Southeast.

Mother and father met in 1992 and lived together for three years. Both were waiting tables at the same restaurant while mother was finishing her Bachelor's Degree at San Francisco State University. In January of 1993, mother earned a Bachelor's Degree in Clinical Psychology, however, she held other jobs unrelated to her education while father was going to school. Mother has not worked for the past three and a half years. Mother would like to move to California, live with her mom, earn her Master's Degree and attempt to obtain a job in the medical coding field.

Mother traveled alone to California in the summer of 2004 to be with her mother after surgery. Mother admits having an affair with a man named Scott and there was also a relationship with a man named Don. Additionally, mom was using email to express sexual fantasies with a man named Wayne.

Mother and father went to counseling, however, mother made no good faith effort to work on the marriage relationship and has since returned to California from time to time, and one email indicates she was meeting Scott and hoping he would pick her up at the airport to begin some sort of relationship as soon as she arrived.

Mother and father currently continue to live in the same marital residence with their two children. Mother has elected not to find employment here in Louisville. Mother does not have a job arranged in California. Mother appears healthy and there was no evidence to suggest she suffers from any kind of disability.

The children lived in Louisville their entire lives. They are in school in Louisville and father's relatives, i.e.,

paternal grandmother and grandfather, visit regularly and maintain a relationship with the children.

Although the parents live in the same household with the children, it is clear from the evidence there is little or no communication between mother and father. This is especially true about attempts to communicate regarding important issues concerning the children. In marriage counseling, mother wanted to keep secrets and was not able to openly communicate with father despite her verbal articulation of a desire to do so.

Father does not believe that the parties will ever be able to agree about important issues concerning the children. The best example of this is the current struggle between the parents regarding where the children will live. Mother has a very strong desire to move back to California, live with her mom and pursue a career in the medical coding area. Father has a very strong desire to remain at Indiana University Southeast, continue on the tenure-track, obtain tenure and have a secure job in teaching. Both parents desire the children to stay with themselves and therefore, are at an impasse about how to handle the children.

Father has investigated employment opportunities in California. According to a survey of Medieval Academy of America, only about forty percent of applicants at universities get employment and there is no guarantee there will be a job opportunity in California. Today, father has a secure job with retirement, health insurance and dental insurance coverage.

The children have adjusted well to their current environment. The children are bonded to each other. Tiana attends St. Francis Preschool five days per week from

9:00 a.m. to 4:00 p.m., having requested a full day of preschool. Zachary has attended Jacob's Ladder Preschool since August or September of 2004.

The Court concludes that father is more emotionally stable. Father is financially stable with a tenure-track teaching position at Indiana University Southeast. Father has excellent knowledge of parenting skills. Father has always been very involved with his children and has a close attachment to each of them.

Although mother holds a Bachelor's Degree in Clinical Psychology, has known about this Petition to dissolve the parties' marriage since January 2005, has had both children in daycare and has witnessed father get a part-time bartending job to help make ends meet, mother has declined to become employed. Mother and father do not discuss and agree on important issues concerning the children. Mother's emotional reactivity may cause her to put new romantic interest ahead of the needs of the children.

The Court therefore concludes that it would be in the best interests of the children to award father sole custody.

In custody matters tried without a jury, the family court's "[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; Sherfey v. Sherfey, 74 S.W.3d 777, 782 (Ky.App. 2002). "A factual finding is not clearly erroneous if it is supported by substantial evidence." Sherfey, 74 S.W.3d at 782. "Substantial evidence" is "evidence of substance and

relevant consequence sufficient to induce conviction in the minds of reasonable people." Id. As stated in R.C.R. v. Commonwealth Cabinet for Human Resources, 988 S.W.2d 36 (Ky.App. 1998), "when the testimony is conflicting we may not substitute our decision for the judgment of the trial court." Id. at 39.

After a trial court makes the required findings of fact, it must then apply the law to those facts. The resulting custody award as determined by the trial court will not be disturbed unless it constitutes an abuse of discretion." Sherfey v. Sherfey, 74 S.W. 3d at 782-83. Broad discretion is vested in trial courts in matters concerning custody and visitation. See Futrell v. Futrell, 346 S.W.2d 39 (Ky. 1961); Drury v. Drury, 32 S.W.3d 521, 525 (Ky.App. 2000). Id. "Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." Sherfey at 783. Essentially, while "[t]he exercise of discretion must be legally sound," Id., in reviewing the decision of the circuit court, the test is not whether the appellate court would have decided it differently, but whether the findings of the circuit judge were clearly erroneous or that he abused his discretion. Cherry v. Cherry, 634 S.W.2d 423, 425 (Ky. 1982). Mere doubt as to the correctness of the trial court's decision is not enough to merit a reversal. Wells, 412 S.W.2d at 571.

The findings of fact made by the trial court are supported by substantial evidence and, accordingly are not clearly erroneous. Moreover, based upon those findings, the family court did not abuse its discretion by awarding sole custody to Liam. Finally, the record reflects an inability of the parties to cooperate on matters concerning the children. This is an ample basis for the trial court to have exercised its discretion and decided against joint custody. We accordingly affirm the family court's custody award.

Addressing the matter of maintenance, Nichelle contends that the family court erred by denying her an award. Nichelle asserts that as a result of the family court's rulings in this case that she "is not only virtually childless, she is homeless, jobless, and penniless."

Kentucky's maintenance statute, KRS 403.200, provides as follows:

(1) In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of a marriage by a court which lacked personal jurisdiction over maintenance order for either spouse only if it finds that the spouse seeking maintenance:

- (a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and
- (b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances

make it appropriate that the custodian not be required to seek employment outside the home.

(2) The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:

(a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(c) The standard of living established during the marriage;

(d) The duration of the marriage;

(e) The age, and the physical and emotional condition of the spouse seeking maintenance; and

(f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

Under this statute, the trial court has dual responsibilities: one, to make relevant findings of fact; and two, to exercise its discretion in making a determination on maintenance in light of those facts. In order to reverse the trial court's decision, a reviewing court must find either that the findings of fact are clearly erroneous or that the trial court has abused its discretion. Weldon v. Weldon, 957 S.W.2d 283, 285 (Ky.App. 1997).

With regard to its decision not to award maintenance the family court made the following findings:

Respondent/Mother has requested maintenance. The parties have been married ten years. The Respondent has a Bachelor's Degree in Clinical Psychology. She suffers no disability. Testimony established that she is able to work as a data entry person earning \$8.00 per hour. Respondent also testified she would like to continue her education and work in the area of medical coding which would result in an income higher than \$8.00 per hour.

The Court has reviewed Respondent's Exhibit #1 which are estimated monthly living expenses. The Court finds that several of these expenses are exaggerated or unnecessary. The Court concludes that Respondent's reasonable monthly living expenses are approximately \$1,478.00

The Court concludes that the Respondent is voluntarily unemployed. The Court further concludes that income should be imputed to the Respondent at the rate of \$8.00 per hour for a forty hour week. This results in a monthly income of \$1,387.00. Respondent indicated that she would be living with her mother if she moved to California and many of the expenses on her exhibit would be unnecessary, including but not limited to rent, renter's insurance, cable, garbage pickup, gas and electric, etc.

Therefore, the Court concludes that maintenance is not appropriate in this case.

The record contains substantial evidence to support the foregoing findings, and, accordingly, the family court's findings of fact must be upheld. Moreover, based upon those

findings, the family court did not abuse its discretion in determining that Nichelle was not entitled to a maintenance award. The reasonable income imputed to Nichelle - \$8.00 per hour - is sufficient to cover her reasonable living expenses. In addition, we note that the record demonstrates multiple accounts of marital infidelity by Nichelle, and this is a factor which may be considered in a maintenance award. See Tenner v. Tenner, 906 S.W.2d 322 (Ky. 1995).

For the foregoing reasons the judgment of the Jefferson Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Sandra Ragland
Melinda A. Whitton
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BRIEF FOR APPELLEE:

Russell B. Zaino
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