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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002436-ME

WILLIAM S. LANE, JR. — APPELLANT

v.

APPEAL FROM GREENUP FAMILY COURT
HONORABLE JEFFREY PRESTON, JUDGE
ACTION NO. 06-CI-00191

LEIGHANNA CAUDILL-LANE — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; HENRY,[1] SENIOR JUDGE.

ACREE, JUDGE: In the spring of 2006, after six years of marriage, William Lane filed a petition for dissolution of his marriage to Leighanna Lane. The parties have one child, a son, born on December 30, 2003. William appeals the order of the Greenup Circuit Court awarding sole custody to Leighanna, limiting William to supervised visitation of

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

approximately 28 hours per month, and requiring William to pay $750 toward Leighanna's attorney's fees. We find no error in the custody award or the award of attorney fees. However, we find that the trial court erred in its award of restricted and supervised visitation. Therefore, we affirm in part, reverse in part, and remand.

The record in this case prior to the final hearing is unremarkable. Though William moved for an order awarding him temporary custody of his son, the record does not reflect that the motion was ever ruled upon. The parties' attorneys acknowledged during the final hearing that the parties privately cooperated and reached an agreement that their son would reside in the marital residence with Leighanna. William also agreed to visitation with his son at the home, or in the presence, of William's parents. William's agreement to supervised visitation extended only until the final hearing.

The court's domestic relations commissioner conducted the hearing in August 2006. William testified routinely in support of the averments in his petition. With regard to custody, William requested a joint award, with Leighanna being the primary residential custodian. William also requested visitation in accordance with the Greenup Circuit Court Visitation Guidelines.

Leighanna opposed joint custody and unsupervised visitation on the basis of her expressed fear for the safety of their son. She testified that her fear was justified by William's past behavior. The behavior that caused Leighanna concern was of two types. First, she believed William lacked the parenting skills necessary to the physical well-

being of their child. Second, she believed William's sexual nature was unusually prurient and lascivious.

We will reference findings of fact and evidence, as well as the applicable standards, as necessary relative to the three main issues we must review: custody, visitation and attorney fees.

CUSTODY

Kentucky Revised Statute (KRS) 403.270 sets forth the standard to be applied by a trial court in determining child custody. When that determination is made as part of the dissolution of the child's parents' marriage, and where no *de facto* custodian is involved, the following provisions of the statute apply.

> (2) The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent . . . . The court shall consider all relevant factors including:
>
> (a) The wishes of the child's . . . parents . . . 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;
>
> . . . .
>
> (3) The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child. If domestic violence and abuse is alleged, the court shall determine the extent to which the domestic violence and abuse has affected the child and the child's relationship to both parents.
>
> (4) The abandonment of the family residence by a custodial party shall not be considered where said party was physically harmed or was seriously threatened with physical harm by his or her spouse, when such harm or threat of harm was causally related to the abandonment.
>
> (5) The court may grant joint custody to the child's parents . . . if it is in the best interest of the child.

Additionally, the trial court is required by Kentucky Rule of Civil Procedure (CR) 52.01 to "find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment[.]"

On appellate review, "[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. Appellate courts review a trial court's conclusions of law *de novo*. *Brewick v. Brewick*, 121 S.W.3d 524, 526 (Ky.App. 2003).

William sought joint custody with Leighanna as the primary residential custodian. He presented evidence of his employment and salary of $2,322 per month, and testified that he knew how to feed and otherwise care for his son.

Leighanna claimed that the best interest of their child would be served if she were granted sole custody. Testimony was adduced that before the birth of the child she worked in a non-management capacity at a grocery. However, while she maintained a license to do manicures and would occasionally babysit her cousin's children, both parties testified that Leighanna had been a stay-at-home mother since their son's birth.

In addition to testifying that she had always been the child's primary caregiver, Leighanna presented evidence that William was not particularly skilled at child care, specifically that he had never changed a diaper or cleaned the child when he spit up. She and her cousin presented testimony that William was not a particularly good role model for children, telling improper jokes despite the fact that the children could overhear them and laughing at, instead of discouraging, aggressive behavior.

Leighanna and her cousin testified to observing an episode in a department store during which, in their opinion, William strayed too far from his son's stroller. They were able to relate this incident because both remained in the immediate proximity of the stroller while William went to speak to a friend from his church. They also testified that William once pinched his son's finger when he folded the stroller. When the boy cried for his mother, William held his son and refused to give him to Leighanna.

Additionally, Leighanna introduced salacious evidence intended to show that William "is sexually excited and has a proclivity for having sexual interest in young boys." A summary of that evidence is sufficient.

In 1994 or 1995, at the age of 18 or 19, William made numerous telephone calls to what are referred to as "phone sex lines." This resulted in a $2,700 phone bill. He subsequently sought counseling for his interest in pornography.

On February 20, 2006, William visited a number of internet pornography sites. None of these sites featured minors in any way.

William also acknowledged viewing on his home television three films he purchased from Dish Network, a direct broadcast satellite service. Even though these movies may have arguably had some "artistic" content, they nonetheless included graphic depictions of homosexual acts that appeal to a prurient interest.

By her testimony, Leighanna also suggested that there had been sexual contact between William and their son during an episode of bathing. She testified that, occasionally, when their son was too young to bathe by himself, either she or William would bathe with him. On one occasion prior to their son's first birthday, William was sitting in the tub bathing their son when Leighanna saw the boy touch William's flaccid penis. She immediately took the boy out of the tub and refused to allow William to bathe the boy again.

William's explanation was simpler. "I did not let him play with me. He turned around and he touched. . . . [H]e was little and he just – you know, he just turned around and that's all he did." Not before nor since has Leighanna seen her son touch William in any way similar to this. There was no evidence at all that William ever touched his son or anyone in a sexually inappropriate manner.

Leighanna testified that William also had a problem with physical violence. She related one incident during her pregnancy in which William threw a frying pan in her direction. Leighanna's friend since sixth grade testified that she saw William "hit Leighanna on the arm several times."

William addressed these issues by admitting he formerly struggled with sexuality issues in the past, including homosexuality issues, but not now. He testified that neither these issues nor his struggles with them have ever affected his daily living. His son was not home on the one day he viewed pornography on the internet, nor was his son home when he watched the three movies described above. He has never touched his son in a sexual manner. He has never abused his son and never intentionally harmed him in any way. Thoughts of having sex with young boys does not excite him. William's father, entrusted by Leighanna to supervise William's visitation, testified that there has never been a problem with William's visitation and that he would have no concern for the safety of his grandson if left alone with William.

Based on the evidence, the commissioner recommended, and the trial court ordered, that the best interests of the child would be served by awarding sole custody to Leighanna. While the order could have better articulated the factual basis of the award, we do not find that the award itself is clearly erroneous.

The facts set forth in the decree as a basis for the sole custody award are limited. They include the finding that William is working and that Leighanna is unemployed. The most emphasis is placed on the evidence of William's conduct relative

to his interest in pornography. William objects to this emphasis and correctly argues that KRS 403.270(3) prohibits the trial court from "consider[ing] conduct of a proposed custodian that does not affect his relationship to the child." He further argues, and we are compelled to agree, that there is no evidence that the behavior Leighanna objects to affects William's relationship to the child.

In a proper case, a potential custodian's regular preoccupation with any activity, including internet pornography, can be of such a degree as to justify, in itself, the denial of a request for custody of a child. However, to survive review, there must be a factual finding, supported by substantial evidence, that the preoccupying activity affects the potential custodian's relationship to the child. KRS 403.270(3). There was no such finding here. However, our review of the record convinces us that the award of sole custody is appropriate based on evidence other than that relating to William's sexual proclivity.

The trial court did find that William is working and Leighanna is not. The record shows this has been their status since the child's birth. Testimony from virtually every witness would support the finding that Leighanna is, in fact, the primary caregiver. And, even under William's proposal for joint custody, the child will continue to reside with Leighanna in the marital residence until it is sold. This evidence militates in Leighanna's favor under the factors expressed in KRS 403.270(2)(c) and (d).

There is an additional factor not excluded by the list set forth in KRS 403.270(2). The Supreme Court indicated in *Squires v. Squires,* 854 S.W.2d 765 (Ky.

1993), that joint custody presumes parties can rise above their differences and cooperate for the good of their child. In this case, the parties' mutual animosity was evident from the transcript. In fact, throughout the divorce, the parties have failed to communicate on any level. To quote William, "Like I said, we don't – we don't talk."

Still, *Squires* warned us that "[i]t would be shortsighted to conclude that because parties are antagonistic at the time of their divorce, such antagonism will continue indefinitely." *Id.* at 769. Therefore, we must "look beyond the present and assess the likelihood of future cooperation between the parents. . . . By cooperation we mean willingness to rationally participate in decisions affecting the upbringing of the child." *Id.*

The award of sole custody does not indicate that the trial court undertook an analysis of this factor. Because William did not request any additional findings, we are neither obligated nor prohibited from considering it. *See* CR 52.04. However, our review of the evidence convinces us that the parties have yet to reach a degree of emotional maturity that would offer some assurance that joint custody would be in their child's best interest. *Squires* at 769 ("Emotional maturity would appear to be a dependable guide in predicting future behavior."). Therefore, we do not find the award of sole custody to Leighanna to be clearly erroneous or an abuse of the trial court's discretion.

VISITATION

The commissioner concluded that "it is in the best interest of the parties['] child [that William's] visitation shall be restricted to the presence of [Leighanna] or to the presence of family members of [William], as approved by [Leighanna], pending further orders of the Court." The trial court later took away from Leighanna the authority to schedule William's visitation and ordered a specific schedule of 8 hours every other Saturday and 3 hours every Tuesday for a total of 28 hours per month. With this exception, the trial court entered an order adopting the commissioner's visitation recommendation, including the requirement that visitation be supervised by Leighanna or a member of William's family approved by Leighanna.

Because the trial court applied the wrong standard, and because substantial evidence does not support the findings of fact on this issue, we find the trial court's failure to award William reasonable visitation to be clearly erroneous.

KRS 403.320(1) sets forth the proper standard to be applied by the trial court in establishing visitation. The statute provides as follows:

> A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health.

We interpret this to mean that "the non-custodial parent cannot be denied reasonable visitation with his [] child unless there has been a finding that visitation will *seriously endanger* the child." *Smith v. Smith,* 869 S.W.2d 55, 56 (Ky.App. 1994)(emphasis added), *citing Hornback v. Hornback,* 636 S.W.2d 24 (Ky.App. 1982)("No 'best interests'

standard is to be applied; denial of visitation is permitted only if the child is seriously endangered.").

No finding was entered that reasonable visitation will seriously endanger the child. Furthermore, "[t]he non-custodial parent is not required to show visitation is in the child's best interest[.]" *Smith* at 56. Because the necessary finding is absent, and because the wrong standard was applied, William should not have been denied reasonable visitation.

Leighanna concedes that the trial court did not articulate the endangerment finding required of KRS 403.320(1), but claims this is a "mere typographical oversight, not an improper legal conclusion." We cannot agree.

Not only was the wrong legal standard applied, but the visitation ruling was based on findings of fact that are not supported by substantial evidence in this case. Those unsupported findings of fact are three in number.

1. William has "frequently visited" pornographic websites and has an "excessive interest in internet pornography, both heterosexual and homosexual."

2. William "reluctantly admits that . . . his interest in pornography . . . could be termed excessive[.]"

3. "[T]he amount, frequency and content of the pornography habit of the petitioner, is of concern to the Commissioner."

We examined the record carefully with regard to William's internet activity and conclude that Leighanna proved only that William visited pornographic websites on a single night of their marriage. When asked if this "was a one-time incident[,]" Leighanna responded that it was, "As far as I know." Therefore, the factual finding that he

"frequently visited" pornographic websites is not sustained by the evidence. Likewise, the inference drawn from this erroneous finding -- i.e., that William has an "excessive interest in internet pornography" that constitutes a "habit" -- is not supported by the evidence.

Nor do we find in the record support for the second factual finding, that William "reluctantly admits . . . his interest in pornography . . . could be termed excessive[.]" In fact, the term excessive was never spoken in the hearing. This finding appears to be based more on Leighanna's effective advocacy than on the evidence. Leighanna repeats in her brief that William admitted to a pornography addiction. But the contrary is fact. After Leighanna's counsel asked William if he was addicted to pornography he tried to testify for William ("I didn't hear your answer. You said yes?"), but William then adamantly denied being addicted to pornography.

The most that can be said in this regard is that William acknowledged an understanding as to why Leighanna would have concerns. However, this understanding, combined with his prior seeking of counseling for pornography related issues, indicates his awareness of the substantial harm that a father's interest in pornography can visit upon a family.

Non-custodial parents have a "strong right to visitation" under KRS 403.320. Graham & Keller, *Domestic Relations Law,* 16 Kentucky Practice § 22.2 (2d ed. 2005).

> Clearly the statute has created the presumption that visitation is in the child's best interest for the obvious reason that a child

> needs and deserves the affection and companionship of *both* its parents. The burden of proving that visitation would harm the child is on the one who would deny visitation.

Smith at 56 (emphasis in original). Leighanna has failed to satisfy that burden.

The commissioner's third finding -- that the evidence of William's interest in pornography, however slight or great, "is of concern" -- could not be disturbed nor should it be. This Court too is concerned, even with this single evening's visit to the world of internet pornography. Consider an analogous situation. If a man drinks to excess on a single night of his life, it would be presumptuous to label him an alcoholic. On the other hand, if upon visiting the home of a friend who has participated in a rehabilitation program for alcohol abuse one finds a bottle of bourbon in the kitchen, it may be that he is in the process of making bourbon candy, but it would be naïve to assume so.

Fortunately for William, this concern, embraced universally by the participants in this case, is simply an insufficient basis upon which to encumber William's entitlement to reasonable visitation by requiring supervision. Where the evidence does not support a finding of serious endangerment, such supervision can impede the development of the relationship between parent and child, and is "simply a source of aggravation." *Schwartz v. Schwartz,* 382 S.W.2d 851, 852 (Ky. 1964). Furthermore, as in *Schwartz*, "[t]here was evidence at the hearing . . . as to the actual experience during the period of supervised custody, warranting the conclusion that supervision was unnecessary[.]" *Id*.

We will repeat, however, what we said with regard to the custody issue. In a proper case, a parent's regular preoccupation with any activity, including internet pornography, can be of such a degree as to seriously endanger a child and, therefore, justify restricting the right to visitation. This is not that case.

Therefore, we find that restricting William's visitation is contrary to the trial court's obligation, and William's rights, under KRS 403.320(1). As such the ruling regarding visitation is clearly erroneous and must be reversed. At the time of the hearing, Leighanna was not employed. Consequently, we know of no reason that the Greenup Circuit Court Visitation Guidelines should not be the starting point of determining reasonable visitation. Upon remand, the Greenup Family Court[2] shall determine unrestricted reasonable visitation in accordance with KRS 403.320(1).

AWARD OF ATTORNEY FEES

We have examined the record and considered William's argument that the trial court's order that he pay $750 toward Leighanna's attorney's fees should be reversed. We find this argument without merit.

The question of attorney fees has repeatedly been held to be entirely within the discretion of the trial court. *E.g., Wilhoit v. Wilhoit,* 521 S.W.2d 512 (Ky. 1975); *Browning v. Browning,* 551 S.W.2d 823 (Ky.App. 1977). All that is expressly required is that the trial court consider the financial resources of the parties when ordering a party to pay a reasonable amount in attorney's fees. While it is quite obviously the better practice

[2]Subsequent to the filing of the Notice of Appeal in this case, a separate family court division was created in Greenup County and a family court judge appointed.

for affidavits or other evidence to be submitted in support of an award of fees, we do not find any abuse of discretion in the present court's award of $750. Leighanna is unemployed and William has a gross monthly income of $2,322.

Therefore, we affirm the award of attorney's fees.

FAILURE TO AUTHENTICATE EXHIBITS 1 AND 2

William argues that Leighanna's Exhibits 1 and 2, photocopies of website pages, were improperly admitted into evidence over his objection that they were not authenticated. This argument is well-taken. However, we believe this error to be harmless. The award of sole custody to Leighanna and the award of attorney's fees are supported by substantial evidence other than these documents. Furthermore, we found that limiting William's visitation is clearly erroneous even when this evidence is considered.

CONCLUSION

For the foregoing reasons, we affirm the trial court's award of sole custody of the parties' child to Leighanna; affirm the award of attorney fees; and reverse and remand the visitation award with instructions to enter an appropriate order consistent with this opinion.

ALL CONCUR.

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