RENDERED: MAY 23, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2007-CA-002141-ME

KATHY L. GILMET APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 04-CI-00301

RODNEY SHANE GILMET APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND VANMETER, JUDGES; KNOPF,[1] SENIOR JUDGE.

VANMETER, JUDGE: Kathy Gilmet appeals from an order entered by the Oldham Circuit Court awarding the parties joint custody of their children, with neither party designated as the primary residential parent. For the reasons stated hereafter, we affirm.

---

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

Kathy and Rodney Shane Gilmet (Shane) married in 1992 and separated in 2004, at which time they agreed to temporary joint custody of their three sons. The marriage was dissolved in 2005, but child custody issues were reserved for later determination. On January 24, 2007, the court directed that based on the concerns set out in a report provided by Dr. Patricia G. McGinty at the court's direction, the parties would share joint custody and no primary residential parent would be designated. Kathy timely moved to alter, amend or vacate the order in several respects, including as to custody. After setting aside the finality language of the January 24th order and conducting a hearing on the multiple pending motions, the court entered a final order on October 4, 2007, denying Kathy's motion to alter the January 24th determination of custody. This appeal followed.

First, Kathy asserts that the trial court erred by failing to make adequate findings of fact to support its custody decision. We disagree.

KRS 403.270(2) requires a trial court to

> 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 parent or 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; [and]

(f) Information, records, and evidence of domestic violence as described in KRS 403.720[.]

Further, CR[2] 52.01 specifies that "[i]n all actions tried upon the facts without a jury . . . , the court shall finds the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment[.]"

Here, the January 24th order provided a detailed description of the testimony and evidence adduced below, including the January 2007 report written by Dr. McGinty after she met with the children and/or parents on numerous occasions. McGinty described the family system as "very dysfunctional . . . with each parent vying to have their position endorsed and neither apparently willing or able to compromise or negotiate in good faith." She also stated that she was unable to make a single specific recommendation regarding custody or a coparenting schedule, and she suggested several possible options including alternating full weeks of visitation with each parent so as to reduce the number of times the children were exchanged each week. As noted above, the January 24th order relied on McGinty's report when holding that the parents should share joint custody, with neither being designated as the primary residential parent. The parties were ordered to alternate weeks with the children, and to continue therapy for themselves and the children "until released by their therapist."

Subsequently, the court received a letter from the maternal grandparents' therapist, Dr. Cheryl Cole, who had never met with the parties or

[2] Kentucky Rules of Civil Procedure.

children but who until recently had shared offices with McGinty. Cole challenged various statements made in McGinty's letter of January 5, opining that the court had been misled and misinformed. After McGinty responded to Cole's allegations, the court stated that it was apparent "that the involvement of Kathy Gilmet, her parents, and the children with three different therapists in this office have had the effect of 'polarizing' the office." The court noted its own familiarity "with the allegations surrounding [a September 2004 pushing] incident between" Kathy's mother and Shane, and stated that school personnel and former therapists had testified by telephone. The court denied Kathy's motion to alter the January 24th custody determination, stating in pertinent part that it would not reopen

> the custody issue or testimony in this case, despite the letter of Dr. Cole, based upon the fact that this court is not convinced that it is in the best interest of these children to change the access schedule between the parents. The Court's Order was intended to reduce the contact between the parents and the back and forth nature of the children's previous access schedule. There is nothing in the testimony of Mr. Dobbs, Ms. Brackett, or the teachers, that would indicate to this Court that this decision was in error. The Court referred the children to Dr. McGinty for treatment, and requested that Dr. McGinty advise it by letter, which is exactly what Dr. McGinty did. The Court does not feel that the letter from Dr. Cole is sufficient to set aside these Orders of the Court.

Although the trial court extensively summarized the evidence adduced below, much of which clearly pertained to the factors set out in KRS 403.270(2) for the court's consideration in making a custody determination, the court made few independent findings of fact and conclusions of law. Indeed, it is arguable that

if our review was limited to the January 24th order, a remand for additional findings and conclusions might be appropriate. However, the interlocutory January 24th order was supplemented and made final by the October 4th final order, which found that it would not be in the children's best interests to change the current schedule whereby they spent alternate weeks with each parent. Further, the court considered but was "not persuaded" by the arguments raised in Kathy's motion to alter, amend or vacate the January 24th order. Regardless of whether the findings set out in the interlocutory January 24th order would have been sufficient alone, the combination of that order and the October 4th order addressing the critical best interests issue after "consider[ing] all relevant factors[,]" KRS 403.270(2), satisfied the requirements of KRS 403.270(2) and CR 52.01. *See Employers' Liab. Assurance Corp. v. Home Indem. Co.,* 452 S.W.2d 620 (Ky. 1970) (entry of a subsequent final judgment readjudicates and makes final all prior interlocutory orders or judgments). Hence, Kathy is not entitled to relief on this ground.

Next, Kathy asserts that the trial court abused its discretion by failing to properly consider the gravity of Shane's abusive conduct when determining the issue of primary residential custody. We disagree.

KRS 403.270(3) provides that the trial 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.

During an October 2004 deposition, Kathy testified regarding the parties' exchange of the children several weeks earlier on September 20, when the parties' two-year-old son resisted leaving her in order to go with his brothers and Shane. In Kathy's words, while she was trying to calm the child and Shane was trying to strap him into a car seat, her mother "was waggin' her finger at him telling him what a rotten father he was for doing this to him and making him cry." As the dispute escalated, Shane made threats to her mother and Kathy asked her mother to stop. However, Kathy's mother and Shane "kept yelling back and forth at each other" while standing in the driveway beside Shane's car. The dispute continued and Kathy's father attempted to intervene. Kathy testified that she then

> A. . . . saw my mom shakin' her finger at him. And then I turned back to say somethin' to dad, and I heard this woo and when I turned, I could see out of the corner of my eye. I just saw my mom fly back.
>
> Q. Going backwards.
>
> A. Right. So, I through [sic] my hands up and I said, "Stop it." And when I did, I made contact with Shane's glasses and that's when he punched me in the face.
>
> Q. His glasses come [sic] off?
>
> A. They came off. They went straight down on the ground. And I looked at him and I said, "What in the hell are you doing?" And he stopped, and he shook his head, and he looked at mom, he looked at me, he looked back at mom, and he said, "You hit me first." And I said, "I don't care."

Shane then called 911 and sat outside until the police arrived. According to the record, Shane subsequently was indicted on a single count of second-degree assault. The trial judge, who presided over the assault charge as well as the instant proceeding, entered an order on September 29, 2004, denying Kathy's petition for a domestic violence order but "restrain[ing] both parties from making derogatory or insulting statements to or about the other, in the presence of the children, or from yelling, cursing or arguing in front of the children." Shane was ordered to remain 500 feet away from Kathy, although he was permitted to contact the children by phone, and to attend the children's sport and school activities. The Court stated that it intended for the order to be temporary,

> to put the children on a regular schedule and give the Parties an opportunity to resolve these matters either between themselves or through mediation. The Court does not condone in any fashion the activities that happened at the last exchange of the children, and notes that the matter escalated over disagreement with regard to whether the youngest child, the two-year-old, should go with his father for visitation.
>
> . . . .
>
> The Court further admonishes Mr. Gilmet to conduct himself in a civil fashion and not to display the degree of hostility and anger as happened during the last exchange of the children. The Court considers such behavior extremely harmful to the children and will impose visitation restrictions if it continues to occur.

In December 2005 the pending assault charge was dismissed without prejudice, subject to several conditions including Shane's completion of a "professionally

recognized, therapeutic anger management program consisting of no fewer than twenty-two (22) sessions."

Although Kathy now alleges that the trial court failed to properly consider "the gravity of [Shane's] domestic abuse when determining primary residential custody[,]" the October 2007 order specifically reflected the court's familiarity with the September 2004 incident. Further, despite the allegations regarding Shane's temper and the children's reactions thereto, the record contains no evidence of other or recent assaultive behavior. Under the particular circumstances reflected in the record, the trial court did not abuse its discretion by failing to attach greater weight to the September 2004 events when finally determining the issue of custody some three years later.

Next, Kathy contends that the trial court abused its discretion by relying on Dr. McGinty's child custody recommendations. We disagree.

The parties initially agreed to share temporary joint custody of their children, with Shane having access to the children during alternate weekends plus two nights each week. In November 2004, after Kathy opposed the equal sharing of time with the children, the court ordered that the oldest child should be interviewed by a therapist, Georgette Brackett, in order to obtain a "pulse check" regarding the child's perception of his own and his siblings' lives. In December, Brackett recommended that the children and parents should participate in ongoing therapy, and that the parties should attempt "to develop a healthy child focused co-parenting relationship if possible." Although Shane asserted in a February 2005

affidavit that he and Kathy had agreed to equally share time with the children, Kathy responded by stating that the attempt to split access to the children had not worked, and that she had always opposed the equal sharing of time. In March 2005, Brackett's letter to the court described her contacts with various family members but included no custody recommendations.

In January 2007, McGinty advised the court in writing that she viewed the family system as being very dysfunctional,

> with each parent vying to have their position endorsed and neither apparently willing or able to compromise or negotiate in good faith. Both state that they do not want to continue with the current state of affairs. Shane has been adamant that he does not want to fight any more, but he is not willing to have his children less than 50 percent of the time. Kathy is convinced that Shane is not trustworthy and feels she should have the children through the week and Shane to have every other weekend and a day each week but not overnight. . . . In the past, there had been a complaint that [Shane] got angry, threw things and yelled at them, but [the children] acknowledge that this has not been a problem since April 2006. Notably when I have seen the children with Shane, they are positive about their time. When they come in with their mother and grandparents, all 3 boys make statements that they "want to be" with their "mother."

McGinty stated that although she could not make "one specific recommendation regarding custody or co-parenting schedule," possible options included either sharing time on a schedule of one week on and one off with each parent "to reduce the frequency of exchanges in a week[,]" or placing the children with Shane during alternate weekends and throughout the summers.

On January 24, 2007, based upon McGinty's report and stated concerns,

> the Court order[ed] that the Parties have joint custody of the children, and there be no designation of a primary residential parent. The access schedule shall be alternate4d [sic] week on and week off, to reduce the number of exchanges between the parents.

Kathy objected, responding that the court abused its discretion by relying on McGinty's report, as McGinty

> did not do a custodial evaluation. Dr. McGinty's report was not made available to either Counsel before it was utilized by the Judge in making the custody determination in this case. There are numerous factual discrepancies and misrepresentations in Dr. McGinty's report. Because there was never a hearing held, an opportunity to cross examine Dr. McGinty or even see Dr. McGinty's report before it was utilized by the Court, then the Petitioner has been denied her due process rights to appropriately present the real custody issues to the Court for a decision that would truly serve the children's best interests.

Kathy further alleged that the court abused its discretion by separating the children from her for full weeks at a time despite their expressed wish to spend more time with her, and that the court erred by failing to make additional findings regarding Brackett's assessment, the September 2004 assault, or the impact on the children of Shane's alleged anger issues. Kathy subsequently requested a reopening of the evidence for the taking of additional testimony regarding custody, relying in part on a letter from her parents' therapist, Dr. Cheryl Cole, who formerly had shared

office space with McGinty. On October 4, 2007, the court declined to reopen the custody issue, as it was

> not convinced that it is in the best interest of these children to change the access schedule between the parents. The Court's Order was intended to reduce the contact between the parents and the back and forth nature of the children's previous access schedule. There is nothing in the testimony of Mr. Dobbs, Ms. Brackett, or the teachers, that would indicate to this Court that this decision was in error. The Court referred the children to Dr. McGinty for treatment, and requested that Dr. McGinty advise it by letter, which is exactly what Dr. McGinty did. The Court does not feel that the letter from Dr. Cole is sufficient to set aside these Orders of the Court.

Although the court's findings were not extensive, we do not agree with Kathy's contention that the court erroneously substituted McGinty's opinions for its own or made findings which were unsupported by the evidence. In accordance with KRS 403.270(2), the court considered each parent's wishes (KRS 403.270(2)(a)), as well as those expressed by the oldest child. (KRS 403.270(2)(b)). The court further considered the children's relationships (KRS 403.270(2)(c)), and their adjustment to their home, schools and community (KRS 403.270(2)(d)), as well as the mental and physical health of the parents and children. (KRS 403.270(2)(e)). Finally, the court evidenced its familiarity with and consideration of the single event which Kathy describes as domestic violence, where that event occurred between family members some three years prior to the final award of custody, and the trial court had refused at the time to enter a domestic violence order. (KRS 403.270(2)(f)).

Kathy asserts that the trial court erred by relying on McGinty's custody proposals to the exclusion of reports from other experts. Although it is clear from the record that the court considered McGinty's report, as permitted by KRS 403.290, it must be noted that McGinty met with the oldest child and/or parents on numerous occasions prior to issuing the report, and that extensive evidence was adduced below. Certainly, as the trier of fact the court was free to judge the credibility of the evidence, and to believe or disbelieve any part of the evidence presented below. *Caudill v. Maloney's Discount Stores,* 560 S.W.2d 15, 16 (Ky. 1977); *K.R.L. v. P.A.C.,* 210 S.W.3d 183 (Ky.App. 2006). Further, nothing in KRS 403.270 compels the selection of a primary residential custodian when joint custody is determined to be in a child's best interest.

As in *Drury v. Drury*, 32 S.W.3d 521, 526 (Ky.App. 2000), here there is "no indication that the trial court failed to adequately consider the circumstances of both parents and the children." McGinty was the therapist who most recently had counseled with the children, she had met with the various family members on numerous occasions, and she merely suggested several possible time sharing options, one of which the trial court chose to adopt. The record does not show that the court erroneously substituted McGinty's opinion for its own, and Kathy is not entitled to relief on this ground.

Finally, Kathy contends that the trial court abused its discretion by failing to reopen the record for the taking of additional evidence. We disagree.

The court's January 3, 2007, order reserved the issue of primary residence and access schedule pending McGinty's update. On January 11, the court provided the parties with a copy of McGinty's January 5th letter, summarized the "suggestions or possible options" set out therein, and stated that it would soon make its residency decision. Neither party filed motions or requested a hearing relating to McGinty's letter. On January 24 the court directed that the parties would have joint custody, and that no primary residential parent would be designated. Only on February 2 did Kathy assert, pursuant to CR 52 and CR 59, that she was denied due process when no hearing was conducted after the filing of McGinty's report. A hearing then was scheduled to review the pending motions. On August 23, prior to the entry of a final order, Karen filed a CR 60.02 motion seeking to submit Dr. Cheryl Cole's letter of August 16th regarding McGinty's alleged improprieties relating to this matter. Shane objected to any reopening of the evidence, and McGinty disputed Cole's allegations. The court expressed its disappointment that "this matter has become an issue of contention for the respective psychologists or therapists in the group of which Dr. McGinty was formerly a part[,]" and described its familiarity with the facts and the testimony of various witnesses, including several who testified by telephone. The court declined to reopen the custody issue, based on its belief that it was not in the children's best interests to change the access schedule since the court's intent was to reduce the number of contacts between the parties. It is clear from the record that McGinty's letter was in line with what was requested by the court, and Cole's

letter did not compel the court to set aside the previous order. In any event, Kathy was not entitled to seek CR 60.02 relief in August 2007, as the January 24th order was interlocutory and a final order had not yet been entered. CR 60.02.

The court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Daniel J. Canon
Thomas E. Clay
Louisville, Kentucky

BRIEF FOR APPELLEE:

J. Michael Smither
Louisville, Kentucky