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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000220-MR

HEATHER LINCOLN (NOW WHITEHEAD) APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NO. 06-CI-500048

ROBERT HOLTZMANN APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND NICKELL, JUDGES; KNOPF,[1] SENIOR JUDGE.

NICKELL, JUDGE: Heather Lincoln (now Whitehead) ("Whitehead"), the mother of H.L.,[2] has appealed from the December 7, 2006, judgment of the Jefferson Family Court establishing joint custody between herself and the child's biological

[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.

[2] In keeping with the practice of this Court, to protect the privacy of minors we refer to them only by their initials.

father, Robert Holtzmann ("Holtzmann"), and making Holtzmann the primary residential custodian of the aforesaid minor child. For the following reasons, we affirm.

Whitehead gave birth to H.L. on August 25, 2000. Paternity was established by a judgment entered on January 3, 2002, by the Jefferson Family Court[3] wherein Holtzmann was declared H.L.'s biological father. The standard form paternity judgment contained a section entitled "Joint Custody." Within that section of the order, the court specifically stated "[p]ursuant to KRS 405.020, a finding of paternity establishes, by operation of law, joint custody, with both biological parents having the responsibility of nurture, education and support of the minor CHILD." The judgment then stated the current living arrangements would be maintained until further agreement by the parties or orders of the court. No analysis of the best interests of the child was conducted at that time and there was no other mention of custody within the judgment.

On January 6, 2006, Holtzmann filed a Verified Petition for Custody in the Jefferson Family Court[4] alleging circumstances had changed to the extent it was in H.L.'s best interest that Holtzmann be awarded sole custody. Whitehead answered the petition and opposed any change in custody. Following a full hearing on November 9, 2006, the trial court entered its judgment awarding the parties joint custody and making Holtzmann the primary residential custodian.

[3] Jefferson Family Court, Paternity Division Nine, Case No. 01-FC-001861.

[4] Jefferson Circuit Court, Family Division Six, Case No. 06-CI-500048.

Whitehead filed a motion pursuant to CR[5] 59.05 to amend the judgment which was denied by an order entered on January 12, 2007. This appeal followed.

Whitehead now contends the judgment entered in the paternity action established joint custody and Holtzmann acknowledged same in his petition initiating the instant action. Thus, she alleges Holtzmann was required to follow the statutory mandates set forth in KRS 403.340[6] applicable to motions to modify existing custody decrees, specifically the "change of circumstances" test, and the trial court erred in not requiring him to do so. She further alleges the trial court

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[5] Kentucky Rules of Civil Procedure.

[6] KRS 403.340, in pertinent part, states as follows:

> (3) If a court of this state has jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act, the court shall not modify a prior custody decree unless after hearing it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree, that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interests of the child. When determining if a change has occurred and whether a modification of custody is in the best interests of the child, the court shall consider the following:
>
> (a) Whether the custodian agrees to the modification;
>
> (b) Whether the child has been integrated into the family of the petitioner with consent of the custodian;
>
> (c) The factors set forth in KRS 403.270(2) to determine the best interests of the child;
>
> (d) Whether the child's present environment endangers seriously his physical, mental, moral, or emotional health;
>
> (e) Whether the harm likely to be caused by a change of environment is outweighed by its advantages to him; and
>
> (f) Whether the custodian has placed the child with a de facto custodian.

improperly penalized her for her choice of religion in deciding to modify the custody arrangement.

Holtzmann contends the paternity action did not make a custody determination or award, but merely set forth the parenting duties and obligations of the parties. Thus, he contends the instant matter was an initial custody action not subject to the change of circumstances test set forth in KRS 403.340(3), but rather the best interests of the child test set forth in KRS 403.270(2)[7]. He also disagrees with Whitehead's contention that the trial court impermissibly injected religious concerns into this matter. We agree with Holtzmann and hereby affirm the family court.

We review a circuit court's determination of child custody for clear error or an abuse of discretion. *Eviston v. Eviston*, 507 S.W.2d 153 (Ky. 1974) (citing *Hamilton v. Hamilton*, 458 S.W.2d 451 (Ky. 1970)). The test is not whether we would have decided differently, *id*., and we will not overturn the family court's findings of fact regarding custody in the absence of clear error. CR 52.01; *Reichle v. Reichle*, 719 S.W.2d 442 (Ky. 1986).

First, we must determine whether the judgment entered in the paternity action contained an award of custody as Whitehead contends. If it did, KRS 403.340(3) controls; otherwise, KRS 403.270(2) controls. In *Fenwick v.*

[7] KRS 403.270(2) states in pertinent part, "[t]he court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent . . . ." The statute goes on to state the court should consider "all relevant factors" including nine specifically enumerated factors in determining the best interests of the child.

Fenwick, 114 S.W.3d 767, 783 (Ky. 2003), our Supreme Court held "joint custody is itself a custody award and thus any modification must come within the purview of KRS 403.340 and .350." As a result, Whitehead argues the inclusion of joint custody language in the paternity judgment constituted an initial custody award and KRS 403.340(3) is controlling. However, Whitehead fails to recognize a court must conduct an analysis of the best interests of the child in determining how the parents will share custody. *Fenwick, supra,* 114 S.W.3d at 778.

The paternity judgment recited the statutory language regarding a natural parent's right to joint custody of his/her minor child. Although the court found Whitehead had physical custody of the child and allowed Holtzmann to continue visitation with the child, there is no indication a custody analysis was performed pursuant to KRS 403.270 or that the best interests of the minor child and all relevant factors were considered. Further, the district court received no evidence regarding any of the statutory factors prior to entering its judgment.

As correctly argued by Holtzmann, the paternity judgment merely set forth the language of KRS 405.020 reciting parental responsibilities and maintained the *status quo* of living arrangements and visitation with the child. The purpose of KRS 405.020 is to declare that biological parents presumptively have a superior right to custody of their children unless waived or the parent is otherwise shown to be unfit. *See Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003); *Killen v. Parker*, 464 S.W.2d 815 (Ky. 1971); *James v. James*, 457 S.W.2d 261 (Ky. 1970). Additionally, KRS 405.020 sets forth the obligation of a parent to support his/her

child and provide for the child's education and welfare. Clearly, the court's recital of the obligations imposed by KRS 405.020 is not the equivalent of a best interest analysis under KRS 405.270. *Basham v. Wilkins*, 851 S.W.2d 491, 493 (Ky.App. 1993) (*superseded by statute on other grounds* as stated in *Elery v. Martin*, 4 S.W.3d 550 (Ky.App. 1999)). In the absence of the required best interest analysis, the paternity judgment did not constitute an initial custody award, and the family court correctly treated the instant matter as an initial custody determination and proceeded under the statutory requirements of KRS 403.270.

As this action was properly determined to be an initial custody determination, Holtzmann did not have to allege and prove the child's present environment presented a serious endangerment to her physical, mental, moral or emotional health as required by KRS 405.340(2)(a). Nor was Holtzmann required to allege and prove a change in circumstances affecting the best interests of the child for the family court to proceed to trial under KRS 405.340(3). *See Fowler v. Sowers*, 151 S.W.3d 357 (Ky.App. 2004). Instead, for the family court to proceed, Holtzmann merely had to allege it would be in the best interest of the child for custody to be awarded to him. KRS 403.270. Holtzmann complied with this requirement by filing a verified petition for custody. Thus, the family court did not err in holding a trial in this matter.

Finally, we disagree with Whitehead's contention that the family court improperly penalized her for her religious beliefs. The family court's seven-page judgment in this matter discussed religion in only two paragraphs. A careful

reading of those passages reveals the court's acute awareness of the religious differences between the parties and the conflicts caused by these differences. The family court also indicated it was aware that the conflicts between Whitehead and Holtzmann had impacted the child, especially in her interpersonal relationships. The family court then ordered, pursuant to the agreement of the parents, "that neither would impose his or her religion on the child, but that they will expose the child to both religions. . . ." The court went on to note the parties were addressing the issues presented by their different religious backgrounds. There is no further mention of religion contained in the judgment, and nothing in the record leads us to conclude the family court utilized either party's religious affiliation as a factor in its decision. Whitehead's contention is simply without merit. There was no error.

Therefore, for the foregoing reasons, the judgment of the Jefferson Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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