

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-002571-ME

SANDRA JEAN GREENWOOD

APPELLANT

v. APPEAL FROM HARDIN FAMILY COURT
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 06-CI-01744

HUBERT ALLEN GREENWOOD

APPELLEE

OPINION
AFFIRMING IN PART AND
REVERSING IN PART

** ** *

BEFORE: ACREE AND CLAYTON, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

CLAYTON, JUDGE: Appellant appeals a decision of the Hardin Family Court

¹ Senior Judge Daniel T. Guidugli 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.

regarding the custody and support of her two children. After reviewing the record in this case, we will affirm in part and reverse in part.

FACTUAL BACKGROUND

Sandra Jean Greenwood and Hubert Allen Greenwood were married on July 5, 1986. A daughter and son were born to the couple in 1990 and 1995 respectively. The Hardin Family Court entered a Decree of Dissolution on October 15, 2007. The couple had settled all issues related to personal property through mediation, but required a final hearing to resolve the issues relating to the children, including custody, visitation, child support payments and reimbursement of medical expenses. The family court ordered joint custody of the minor children with each party having physical custody on alternating months. Because physical custody was shared, there was no child support obligation ordered for either party.

Ms. Greenwood brings three issues on appeal. First, she argues the award of joint custody was clearly erroneous and was an abuse of discretion. Second, she contends that the trial court abused its discretion when it failed to award her reimbursement for one-half of the children's medical expenses incurred during the pendency of the dissolution proceedings. Her third contention is that the trial court erred in failing to award child support during the pendency of the dissolution proceedings.

STANDARD OF REVIEW

We will not substitute our own findings of fact unless those of the trial court are “clearly erroneous.” *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). In reviewing the trial court’s decision, we must determine whether it abused its discretion. Abuse of discretion requires that the decision be whether the decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000); *Com. v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

DISCUSSION

Ms. Greenwood’s first argument on appeal is that the family court erred in awarding joint shared custody. She acknowledges, however, that there was sufficient evidence to support the decision of the trial court ordering joint shared custody and that the findings of fact were not clearly erroneous. As set forth above, a custody award “will not be disturbed unless it constitutes an abuse of discretion.” *Sherfey v. Sherfey*, 74 S.W.3d 777, 782-83 (Ky. App. 2002). “Abuse of discretion implies that the family court’s decision is unreasonable or unfair.” *B.C. v. B.T.*, 182 S.W.3d 213, 219 (Ky. App. 2005).

Ms. Greenwood testified that joint custody would be appropriate. The children had requested the opportunity to spend equal time with each parent. Prior to the final hearing, the parties had been alternating custody in a joint arrangement. Based upon this evidence, there is nothing in the family court’s application of its findings of fact to lead us to believe the decision was unreasonable or unfair. As there is ample evidence in the record to support the trial court’s decision regarding

joint shared custody, we find that there was no abuse of discretion regarding this issue.

Ms. Greenwood next contends that the family court erred in failing to award her child support from the date of the initial filing of the divorce petition until the date of the hearing. On November 1, 2006, Ms. Greenwood filed a motion for child support. At the final hearing almost a year later, the family court found Ms. Greenwood had been the primary residential custodial of the children, yet found “that both parties [had] provided for their children and [had] provided well.” Specifically, the court held:

the Court is equally convinced that both parties have provided for their children and have provided well. The Court concludes that [Mr. Greenwood] more than likely, although, lack of sufficient proof at the hearing [sic] did provide for his children since [Mr. Greenwood] agreed to utilize non-marital funds to establish a college trust fund for both Sara and Seth. The Court believes, although there was no testimony brought forth at the hearing on this point, [Ms. Greenwood] may not have sought child support from [Mr. Greenwood] to the fact [Mr. Greenwood] had provided with his non-marital funds college funds for both the children. More than likely [Ms. Greenwood] did not want to press this issue to ensure that [Mr. Greenwood] would be so agreeable.

Ms. Greenwood argues the family court abused its discretion when it failed to award her child support during the pendency of the divorce. We agree.

Child support is ordinarily left to the discretion of the family court. *Van Meter v. Smith*, 14 S.W.3d 569 (Ky. App. 2000). We will not substitute our judgment absent a showing of an abuse of that discretion. *Gibson v. Gibson*, 211

S.W.3d 601 (Ky. App. 2006). The family court has set forth a holding that is based purely on conjecture and speculation rather than on testimony and other evidence. As a result, she abused her discretion and the issues of child support and reimbursement of expenses during the pendency of the divorce should be returned to the court for findings based upon evidence which supports them.

Ms. Greenwood next contends that the family court erred in failing to award her reimbursement of half of the medical expenses she incurred for the children. Medical expenses shall be allocated between the parties in proportion to their combined monthly adjusted parental gross incomes. Kentucky Revised Statutes (KRS) 403.211(8). Again, the decision of the family court judge was based upon conjecture and speculation rather than evidence set forth at the hearing. This issue too, must be remanded to the trial court for a decision based upon the evidence presented.

The judgment of the Hardin Family Court is affirmed as to the issue of child custody and reversed on the issues of child support and reimbursement of medical expenses.

ACREE, JUDGE, CONCURS.

GUIDUGLI, SENIOR JUDGE, CONCURS IN PART,
DISSENTS IN PART, AND FILES SEPARATE OPINION.

GUIDUGLI, SENIOR, JUDGE, CONCURRING IN PART AND
DISSENTING IN PART: I concur in part and dissent in part. I concur with the majority as to the custody issue but dissent as to the issues of retroactive child

support and medical expenses. As the majority points out, child support is ordinarily left to the discretion of the family court. *Van Meter v. Smith*, 14 S.W.3d 569 (Ky. App. 2000). In this case each party filed for custody and child support but there was never a hearing on either motion. The petition for dissolution was filed on September 26, 2006. Mr. Greenwood filed for custody and child support on October 23, 2006. Ms. Greenwood filed for custody and support on November 1, 2006. The parties mediated the property issues on March 14, 2007. And the final hearing was held on October 4, 2007, with the decree being entered on October 15, 2007. Based upon the order of joint custody, no child support was ordered. While the family court could have ordered retroactive child support to either party (mother does earn more than father), it did not. The family court could have addressed the issue better but based upon the facts of this case, I see no benefit to sending it back for additional findings when neither party pushed the issue during the year-long separation. Since the decree was entered, the parties have addressed future medical expenses and miscellaneous expenses.

It is very clear from the family court's discussion that offsets against the child support and medical expenses were taken into consideration and applied against these sums when Mr. Greenwood paid for other expenses incurred on behalf of the children. While it is correct that the family court did not do an analysis down to the last penny, I can find nothing in the record or in Ms. Greenwood's arguments to suggest the family court's determinations were "clearly erroneous." *Dull v. George*, 982 S.W.2d 227, 230 (Ky. App. 1998). Ms.

Greenwood has failed to show that the family court abused its discretion.

Therefore, I would affirm the judgment entered by the Hardin Family Court.

BRIEF FOR APPELLANT:

Lori A. Kinhead
Elizabethtown, Kentucky

BRIEF FOR APPELLEE:

Douglas E. Miller
Radcliff, Kentucky