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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001116-ME

JERA A. BARRETT — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE CHRISTOPHER J. MEHLING, JUDGE
ACTION NO. 08-CI-00621

JAMES M. PLUNKETT;
A.B., A MINOR CHILD;
R.P., A MINOR CHILD;
K.B., A MINOR CHILD; AND
G.P., A MINOR CHILD, AS REPRESENTED BY
THE GUARDIAN AD LITEM CYNTHIA
ROWELL CLAUSEN — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, KELLER AND THOMPSON, JUDGES.

CAPERTON, JUDGE: Jera A. Barrett appeals from the findings of fact and conclusions of law entered by the Kenton Family Court on May 25, 2011, in this

marriage dissolution action. At issue are child custody and education; child support and medical expenses; and the amount and duration of maintenance.

Jera A. Barrett and James M. Plunkett were married in 1992; Jera filed a petition for dissolution of marriage on February 26, 2008. The parties have four minor children, who at the time of the entry of the findings were aged thirteen, ten, nine and four. Jera holds a medical degree with a specialty in psychiatry, and a juris doctorate degree. She is employed as a psychiatrist at the University of Cincinnati. James is employed as a physician with a specialty in rehabilitation medicine and pain management at the Veteran's Administration in Cincinnati, Ohio. The four children are homeschooled, although the three eldest attended Leaves of Learning, a non-accredited school that can be used by parents who home school to provide supplemental programs. During the course of the litigation, James filed a motion requesting that the children attend public school, as Jera was working and would not have the time to continue homeschooling.

Following a lengthy trial, the court awarded the parties joint custody of the children and appointed Jera as the primary residential custodian. The trial court ordered that the homeschooling of the children was not to continue; that the parents were to select public or private schools for the children to attend; and that one of the children, who had been diagnosed with a learning disability, was to attend a special school recommended by an educational evaluator. James was ordered to pay $1,750 per month in child support. James was also responsible for the children's medical insurance. The expenses for the children's unreimbursed

medical, dental, vision, daycare and extracurricular activities were divided 64 percent to James and 36 percent to Jera. Jera was awarded maintenance in the amount of $2,000 per month for twelve months. This appeal by Jera followed.

CHILD CUSTODY

When determining an award of child custody, Kentucky Revised Statutes (KRS) 403.270(2) directs the circuit court to give equal consideration to both parents and to award custody in accordance with the best interests of the child. The standard of review regarding child custody issues is whether the trial court's decision was clearly erroneous and constituted an abuse of discretion. *Eviston v. Eviston*, 507 S.W.2d 153 (Ky. 1974). The appellate court will only reverse a circuit court's child custody decision if the findings of fact are clearly erroneous or the decision reflects a clear abuse of the considerable discretion granted to trial courts in custody matters. Kentucky Rules of Civil Procedure (CR) 52.01 and *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). "A finding of fact is clearly erroneous if it is not supported by substantial evidence, which is evidence sufficient to induce conviction in the mind of a reasonable person." *B.C. v. B.T.*, 182 S.W.3d 213 (Ky.App. 2005).

Jera argues that the trial court's award of joint custody was contrary to the overwhelming weight of the evidence and was not in the children's best interests. She contends that she was the primary caretaker of the children throughout the marriage, and that there was ample evidence in the record of James's poor parenting skills and abusive conduct. Jera contends that the court gave inadequate

consideration to James's mental health problems as evidenced by the fact that one of their daughters is so terrified of James that she refuses to visit him. She also argues that the court gave insufficient weight to the report of the children's guardian ad litem (GAL) which recommended that Jera be awarded sole custody.

In its findings, the trial court addressed James's aggressive behavior at length. These findings describe a series of disturbing and violent episodes: James fractured one of the children's arms several years ago while trying to discipline him; bit one of the children when he was angered by her behavior; left the children unattended in public places such as amusement parks for extended periods of time; punched holes in the walls of the family home in front of the children; called Jera inappropriate names and struck her in front of the children; and is chronically late in picking up and dropping off the children at various activities.

The trial court also found, however, that Jera was well aware of James's anger management issues and has goaded him or used the children to goad him into losing his temper. The trial court also found that Jera had encouraged the breakdown in communication between James and his daughter. Jera contends, however, that some of the facts relied upon by the court in finding that she manipulated the children in order to anger James are either untrue or were never put into evidence. These involve an incident in which she allegedly encouraged the children to ask their father if they could keep a kitten, even though he lives in a condominium which does not allow pets; that she interfered with the children obtaining academic testing at Beechwood schools; that she told one of the children

to ask her father for a $500 fee to attend a program for gifted children; and that one of the children recorded her father without his permission. She also states that the trial court's finding that the children needed to be tested in order to be eligible to attend public schools is not supported by the record.

The trial court's primary reason for awarding joint custody was to ensure that the parties had an equal say in important decisions affecting the children's lives, particularly those decisions relating to education. The trial court was troubled by Jera's insistence that the children continue to be homeschooled. Dr. Ed Connor, a psychologist who performed a court-ordered confidential custody evaluation, recommended a joint custody arrangement with Jera as the primary residential custodian. Dr. Connor found the children to be socially awkward, and described their disrespectful, defiant and inappropriate behaviors as exceeding anything he and his team had previously observed among numerous child participants. An educational evaluator, Ellen Yass-Reed, conducted testing on the three eldest children and recommended that they attend traditional public schools and in the case of one child, a special school for children with learning disabilities. The trial court was clearly concerned that, without James's input, the various social and educational problems of the children detected by the experts would not be addressed.

The Kentucky Supreme Court has explained that:

> Joint custody as a legal concept has several defining characteristics. Both parents have responsibility for and authority over their children at all times. Equal time

> residing with each parent is not required, but a flexible division of physical custody of the children is necessary. A significant and unique aspect of full joint custody is that both parents possess the rights, privileges, and responsibilities associated with parenting and are expected to consult and participate equally in the child's upbringing.

Pennington v. Marcum, 266 S.W.3d 759, 764 (Ky. 2008). The trial court's decision was fully in keeping with this concept of joint custody. As the trial court explained, "[i]f this matter was left up to the wife as a sole custodian we still would not understand the academic placement of these children nor discovered that R.P. has significant learning disabilities."

As to Jera's argument that the court gave insufficient weight to the GAL's recommendation that she be awarded sole custody, we note that the court did give considerable weight to the GAL's report that Jera was not taking her daughter to a mental health professional who had been designated to help the child improve her relationship with her father. The trial court found this particularly egregious since Jera herself is a psychiatrist and should understand the importance of these counseling sessions.

When viewed as a whole, there was substantial evidence supporting the trial court's findings regarding the custodial arrangements for this family, and therefore its award of joint custody was not an abuse of discretion.

HOMESCHOOLING

Jera argues that the trial court abused its discretion in ordering the discontinuation of homeschooling. She contends that James only began to object

to the homeschooling of the children when she filed for divorce and he was confronted with the prospect of greater financial obligations if she continued to work part-time. Jera argues that the trial court's findings were clearly erroneous when it stated that the children had never been academically tested when in fact the record shows that the children were tested in 2007, before the separation. She further points to her lengthy trial testimony regarding tests such as the Iowa Test of Basic Skills and the standardized test that allowed one of the children to be accepted into Stanford University's Educational Program for Gifted Youth.

There was never any suggestion on the trial court's part that the children were not academically gifted, or that there was anything inherently disadvantageous about homeschooling. As we have already stated, the trial court relied heavily on Dr. Yass-Reed's assessment, and the report of Dr. Connor, to find that the children were so seriously lacking in discipline and social skills as a result of homeschooling that they would be hindered for the rest of their lives. The trial court also clearly stated that it was concerned with the fact that one of the children had a learning disability that was only discovered after the court ordered the educational assessment. The court noted that the children have difficulty completing tasks on time, and that their greatest objection to attending school was the prospect of having to get up in the morning.

Jera contends that the trial court gave undue weight to the report of Dr. Connor and the evaluations of Dr. Ellen Yass-Reed, and completely ignored the testimony of the children's teachers from Leaves of Learning and a friend, Mrs.

Peck. Kentucky Rules of Civil Procedure (CR) 52.01 states that "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." It was well within the trial court's discretion to find the reports of Dr. Yass-Reed and Dr. Connor more convincing. Jera argues that Dr. Connor's report was unduly negative because the children did not want to participate in the evaluation process and this reluctance was reflected in their behavior. Presumably, however, Dr. Connor as an experienced evaluator would recognize and allow for the children's attitude. The trial court's decision to discontinue homeschooling was not manifestly against the weight of the evidence in this case and therefore cannot be reversed on appeal. *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008).

CHILD SUPPORT AND OTHER EXPENSES

"As are most other aspects of domestic relations law, the establishment, modification, and enforcement of child support are prescribed in their general contours by statute and are largely left, within the statutory parameters, to the sound discretion of the trial court." *Van Meter v. Smith*, 14 S.W.3d 569, 572 (Ky.App. 2000). "However, a trial court's discretion is not unlimited. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Downing v. Downing*, 45 S.W.3d 449 (Ky.App. 2001). The pertinent statutory provision provides as follows:

> If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income, except that a determination of potential income shall not be made for a parent who is physically or mentally incapacitated or is caring for a very young child, age three (3) or younger, for whom the parents owe a joint legal responsibility. Potential income shall be determined based upon employment potential and probable earnings level based on the obligor's or obligee's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community. A court may find a parent to be voluntarily unemployed or underemployed without finding that the parent intended to avoid or reduce the child support obligation.

KRS 403.212(2)(d).

Jera argues that the trial court erred in calculating the parties' earning capacities. The trial court found James's earning capacity to be the amount shown on his 2010 income tax return, $231,820.62. Jera presented an expert witness who argued that James could earn far more as a pain management specialist, from $360,000 to $446,000 annually. But James argued that he is not board-certified as an anesthesiologist, which is a key requirement for doctors who wish to practice pain management full time. He has never maintained an independent pain management practice and has only done some pain management work in conjunction with his physical rehabilitation work at the VA hospital.

As to Jera's earning capacity, the trial court relied on the testimony of William Cody, a vocational expert retained by James. Cody estimated her earning capacity to be $164,000. The trial court found that this was reasonable. In addition to Cody's testimony, the trial court referred to a letter of engagement for

Jera's work at the University of Cincinnati's College of Medicine, Department of Psychiatry. According to that document, her salary is divided between the University and an entity called PPSI. Her position is for twenty hours per week and her salary is $92,000. Through 2007, she also worked for her father's company, which performs psychological testing for employers. According to Jera, however, her father no longer had any work for her.

Jera argues that the letter regarding her position at the University of Cincinnati was unauthenticated and that a more accurate reflection of her earning potential is approximately $79,613, as reflected in her 2009 tax return. The trial court noted that Jera's testimony regarding whether her current employment was full or part-time was somewhat contradictory. The trial court also observed that Cody's estimate did not even factor in Jera's unique position of holding both medical and law degrees. The trial court's findings regarding James and Jera's earning capacity are supported by substantial evidence and will not be reversed.

During the pendency of the dissolution action, James had been paying child support in the amount of $2500 per month. Jera argues that the $1,750 per month that James has now been ordered to pay is inadequate, and that there is no worksheet showing how the court arrived at this number. The combined parental income in this case exceeds the uppermost levels of the guideline tables. Pursuant to KRS 403.212(5), "[t]he court may use its judicial discretion in determining child support in circumstances where combined adjusted parental gross income exceeds the uppermost levels of the guideline table." "As long as the trial court's discretion

comports with the guidelines, or any deviation is adequately justified in writing, this Court will not disturb the trial court's ruling in this regard." *Downing*, 45 S.W.3d at 454 (citation omitted).

> Factors which should be considered when setting child support include the financial circumstances of the parties, their station in life, their age and physical condition, and expenses in educating the children. The focus of this inquiry does not concern the lifestyle which the parents could afford to provide the child, but rather it is the standard of living which satisfies the child's reasonable and realistic needs under the circumstances.

Id. at 457.

In setting the amount of child support, the trial court fully explained its reasoning. It found that the children did not have an extravagant lifestyle; the two boys do not participate in any organized activities; the girls participate only in synchronized swimming. The family did not take elaborate trips and their housing was not lavish. The largest expense, for Leaves of Learning, would be eliminated when the children started school in the fall, although the court acknowledged that a new expense would be incurred in sending one of the children to a school that provides specialized instruction. In light of these findings, the trial court's award of child support was reasonable. Furthermore, its division of the unreimbursed medical, dental, vision, daycare and extracurricular expenses on a 64/36 percentage basis was reasonable in light of the parties' incomes and the fact that James is responsible for the childrens' medical insurance.

AMOUNT AND DURATION OF MAINTENANCE

Since February 2009, James had been paying temporary maintenance in the amount of $3,000 per month. In the final order, he was required to pay maintenance in the amount of $2,000 for twelve months. Jera argues that the trial court's award of maintenance for a total three years and three months, after a marriage of almost nineteen years' duration, is an abuse of discretion. The pertinent statute provides that the maintenance shall be in such amount and duration "as the court deems just," and requires the court to consider the following factors, if relevant:

> (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.

KRS 403.200(2).

Jera argues that the trial court failed to consider that she had to put her career on hold to home school the children, and that she was lucky to find full-time employment with a salary of $79,613. As the trial court noted, however, Jera's assertion that she works full-time conflicts with her contention that she has plenty of time to home school the children. She argues that she was responsible for transporting the children to Leaves of Learning and to their extracurricular activities and consequently had no time to improve her employment situation.

> A family court operating as finder of fact has extremely broad discretion with respect to testimony presented, and may choose to believe or disbelieve any part of it. A family court is entitled to make its own decisions regarding the demeanor and truthfulness of witnesses, and a reviewing court is not permitted to substitute its judgment for that of the family court, unless its findings are clearly erroneous.

Bailey v. Bailey, 231 S.W.3d 793, 796 (Ky.App. 2007).

The trial court's finding that Jera's earning capacity is in the range of $164,000 per year is fully supported by evidence in the record. The trial court further found that three years was a sufficient period for Jera to adjust to her situation and utilize the advanced degrees she possesses in medicine and law. This conclusion is supported by evidence of "sufficient probative value to induce conviction in the mind of a reasonable person." *Id.* It may not, therefore, be reversed on appeal.

CONCLUSION

For the foregoing reasons, the findings of fact and conclusions of law of the Kenton Family Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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