

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000407-ME

TOMMIE CARY¹

APPELLANT

v. APPEAL FROM OWSLEY CIRCUIT COURT
HONORABLE THOMAS P. JONES, JUDGE
ACTION NO. 07-CI-00063

LARRY TAYLOR

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, DIXON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Tommie Cary brings this appeal from a December 29, 2011, order of the Owsley Circuit Court awarding Tommie and Larry Taylor joint custody of their minor child and designating Larry the primary residential parent. We affirm.

¹ When this action originated in the Owsley Circuit Court, Tommie Cary was Tommie Wilson. Tommie subsequently married and became Tommie Cary.

Tommie Cary and Larry Taylor cohabitated for several years, and on May 27, 2001, Tommie and Larry had a son together. Tommie, Larry, and the child lived together in Booneville, Kentucky, for several years. In March 2007, Tommie moved out of the home and took the child with her. Thereafter, the Commonwealth filed a petition for child support on behalf of Tommie. A paternity action subsequently established that Larry was the child's father, and Larry agreed to pay child support. There was not an order entered addressing custody.

Sometime in 2008, Tommie moved to Tennessee, and the child relocated with her. Tommie began a relationship with Bill Cary; eventually, Tommie and the child moved in with Bill. In March 2010, Tommie and Bill had a domestic dispute. Tommie was arrested, charged with domestic violence, and incarcerated. At Tommie's request, Larry went to Tennessee, retrieved the child, and brought the child back with him to Kentucky.²

Shortly after returning to Kentucky, Larry filed an *ex parte* motion for temporary custody of the child. The circuit court granted Larry's motion and awarded Larry temporary custody by order entered March 18, 2010. Larry also filed a motion for permanent custody and a motion to terminate his child support. On June 28, 2010, Tommie filed a motion to set aside the March 18, 2010, *ex parte* order of temporary custody. Tommie also filed a motion for visitation. Following a hearing before the Domestic Relations Commissioner (DRC), the circuit court

² The domestic violence charge against Tommie was ultimately dismissed. Tommie and Bill Cary subsequently married and had two children together. They continued to live in Tennessee with their two children and an older child of Bill's from a previous relationship.

rendered an order on August 4, 2010, granting Tommie's request to set aside the March 18, 2010, order of temporary custody. Also, the court awarded temporary joint custody to the parties, designated Larry as the "primary residential custodian," and granted Tommie visitation.

On August 16, 2010, Tommie filed a motion to set aside the August 4, 2010, order. Tommie alleged that the recommendations of the DRC were tendered on July 28, 2010, but were never served upon her and that the August 4, 2010, order of the court was entered before the requisite ten-day period for filing exceptions to the DRC's recommendations had expired. Kentucky Rules of Civil Procedure (CR) 53.05. By order entered November 29, 2010, the circuit court set aside the August 4, 2010, order and referred the matter back to the DRC for a hearing on permanent custody.

Another hearing before the DRC was conducted on July 15, 2011. The DRC interviewed the child in chambers and prepared a sealed report regarding the interview. Following the hearing, the DRC rendered a report, and the report was entered on August 4, 2011. Therein, the DRC recommended that the parties be granted joint custody and that Tommie be designated the "primary residential custodian." Larry timely filed exceptions to the DRC's recommendations.

On October 18, 2011, Tommie filed a Motion for Judgment wherein she requested the circuit court adopt the DRC's recommendations. By order entered October 24, 2011, the circuit court granted Tommie's motion for judgment but stated it would "enter an order on the Recommendation of the Domestic

Relations Commissioner in the time allotted by law, and this matter shall remain on the December 2, 2011, docket for any further discussion that may be necessary.”

On December 27, 2011, Tommie filed a second Motion for Judgment. By an Order on the Report of the Domestic Relations Commissioner entered December 29, 2011, the circuit court concluded that the parties should be awarded joint custody but ordered that Larry rather than Tommie should be designated the “primary residential custodian.”³ This appeal follows.

Tommie does not challenge the circuit court’s award of joint custody to the parties. Rather, Tommie contends that the circuit court erred by designating Larry as the “primary residential parent.”

It is well-established that an initial custody determination and a determination of a primary residential custodian are both governed by the best interests standard of Kentucky Revised Statutes (KRS) 403.270. *Frances v. Frances*, 266 S.W.3d 754 (Ky. 2008). Although KRS 403.270 does not include a definition of “best interests,” it does provide a non-exclusive list of relevant factors to be considered in a best interests determination. The relevant factors are as follows:

- (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;
- (b) The wishes of the child as to his custodian;

³ It must be noted that the December 29, 2011, award of joint custody was an initial custody determination as opposed to a modification thereof.

- (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](#)[.]

KRS 403.270(2).

Our standard of review upon an initial custody determination and upon a designation of primary residential custodian is as follows. The circuit court's findings of fact will not be disturbed unless clearly erroneous. *Frances*, 266 S.W.3d 754. Findings of fact are not clearly erroneous if supported by substantial evidence of a probative value. And, the circuit court is in the "best position to resolve the conflicting evidence" and then determine what is the child's best interests. *Id.* at 758-59.

Having reviewed the record, it is clear that the circuit court's decision to designate Larry as the primary residential parent was supported by substantial evidence. While we may have decided the issue differently, as an appellate court our standard of review requires a great deal of deference to the circuit court's findings of fact. The circuit court clearly considered the wishes of both parents and of the child, as well as the child's relationship with both parents and the siblings (including half-siblings and step-siblings) in each home. The court also

discussed the child's adjustment to school in Owsley County and noted that the child was no longer in special education classes. The circuit court clearly considered the domestic violence incident that led Tommie to ask Larry to take the child to Kentucky.

Simply stated, the circuit court considered the factors relevant to the best interests determination as set forth in KRS 403.270(2) and determined that designating Larry as primary residential custodian was in the best interests of the child. We cannot say that the circuit court's findings are clearly erroneous or that it abused its discretion by so concluding. Hence, we conclude the circuit court's award of joint custody and designation of Larry as the primary residential parent must be affirmed.

For the foregoing reasons, the order of the Owsley Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE.

Richard Kenniston
Jackson, Kentucky